

ELEVATING EUROPE

**SMART INITIATIVES AND
ADMINISTRATIVE INNOVATION**

Proceedings of the International Conference EU-PAIR 2023



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EDITURA UNIVERSITĂȚII „ALEXANDRU IOAN CUZA” DIN IAȘI

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Jean Monnet Chair. EU Public Administration Integration and Resilience Studies

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2023

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THE NEW YORK CONVENTION: A REGULATING
AND STANDARDIZING INSTRUMENT FOR ENHANCING
THE INTERNATIONAL EFFECTIVENESS
OF FOREIGN ARBITRAL AWARDS

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Abstract

The 1958 New York Convention was the result of political negotiations and international empirical debates. Its text was finalized during a multinational conference, building upon the project proposed by the International Chamber of Commerce in Paris and the Economic and Social Council of the United Nations. Distinguished scholars in the field of international trade law actively participated in the drafting of the Convention, including Prof. P. Sanders (Netherlands), Dr. O. Glossner (Germany), F. Eisemann (CCI), M. Domke (USA), G. Holleaux (France), M. Matteucci (Italy), among others. Compared to previous treaties and common law in the field of arbitration, the New York Convention introduced significant innovations and improvements. Notably, the treaty expanded its scope, eliminating the requirement for the parties to be nationals of one of the signatory states. The primary objective of this paper is to discuss the series of progressive steps that must be followed after the adoption of the New York Convention. It will provide a detailed analysis of the importance of specialized internal regulations, using comparative and analytical methods. The main goals of this paper include defining the scope of the 1958 New York Convention and identifying standardized solutions for applying the grounds for refusing the enforcement of foreign arbitral award.

Keywords: *foreign arbitral award; efficiency; 1958 New York Convention; international arbitration; alternative dispute resolution.*

JEL Classification: K12, K20

1. INTRODUCTION

The New York Convention possesses the prerogative of establishing a standardized international framework, rightfully regarded as the "most advanced system, replacing arbitrariness with objectivity" (Căpățină, 1997) or as former President of the International Court of Justice, Judge Stephen Schwebel, opined about the New York Convention, "It works." (Born, 2001) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted on June 10, 1958, under the auspices of the United Nations and came into force on June 7, 1959, presently applicable in 156 states. The New York Convention has become the "cornerstone of international commercial arbitration" (Van den Berg, 1981), hailed by scholars as "the most efficient exemplification of international law in the entire history of commercial law" (Mustill, 1989).

The New York Convention was crafted to address the deficiencies of its predecessors: the Geneva Protocol of September 24, 1923, regarding arbitration conventions, and the Geneva Convention of September 26, 1927, on the execution of foreign awards, both adopted under the League of Nations. Pursuant to Article VII(2) of the New York Convention, the Geneva treaties "shall cease to have effect between contracting states on the day and to the extent that they are bound by this Convention." Consequently, the Geneva Convention and Protocol fell into disuse.

Before delving into the analysis of the New York Convention, it is essential to underscore that it is a part of a "network of regulations" contributing to the "international legal circulation of arbitral awards" (Căpățină, 1997). This network of international norms includes international and regional conventions governing the international effects of foreign arbitral awards, such as the European Convention on International Commercial Arbitration of 1961, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, the Inter-American Convention on International Commercial Arbitration of Panama of 1975, the Amman Convention on Commercial Arbitration of 1987, the Organization for the Harmonization of Business Law in Africa Treaty of 1993 (commonly referred to as the "OHADA Treaty"), as well as numerous bilateral treaties on legal assistance and reciprocal recognition of investments. An analysis of these principal international arbitration conventions demonstrates that they supplement the conventional regime governed by the New York Convention, which, nonetheless, remains the primary international standard for the efficacy of foreign arbitral awards.

2. DATA AND METHODOLOGY

The present research is a comparative study that involves the description, analysis, and interpretation of norms pertaining to foreign arbitral awards. Its primary objectives are to ascertain the influence of political institutions, the formulation of policies favoring alternative dispute resolution, and the assessment of the

effectiveness of the 1958 New York Convention as the principal international benchmark for foreign arbitral award enforcement. Through a meticulous examination and interpretation of existing norms, as well as the identification of pertinent tools and legal provisions, this research seeks to inform policy decisions and regulatory frameworks aimed at enhancing business development and consumers protection in Moldova, drawing inspiration from European best practices.

Therefore, this concise analysis delves into information concerning foreign arbitral awards and the role of political institutions in shaping policies and promoting the efficacy of the 1958 New York Convention. Such an examination entails the evaluation of foreign arbitral award laws, regulations, and EU-level policies to identify optimal approaches for the Republic of Moldova.

By means of this comparative research, it may be possible to pinpoint key factors that contribute to the efficacy of alternative dispute resolution, particularly in the context of arbitration. These factors could include the level of political commitment to foreign arbitral awards and the effectiveness of the 1958 New York Convention.

This article underscores the significance of foreign arbitral awards and subsequently expounds upon the importance of the 1958 New York Convention. Moreover, this research methodology encompasses the analysis and comparison of data from various sources to draw conclusions and provide recommendations. Throughout the research process, an array of methodologies has been employed, including:

a) Analysis: Breaking down the topic into distinct sections, referring to legal doctrine, EU and national regulations.

b) Synthesis: Identifying unique concepts, tracking the evolution of consumer protection legislation, enforcement bodies, and redress systems through the use of digital tools.

c) Deduction: Formulating conclusions based on the research material and presenting a personal perspective on the subject matter.

d) Classification: Categorizing various aspects into distinct groups based on specific criteria to enable in-depth examination.

e) Analogy: Comparing different institutions and legal provisions in various jurisdictions to identify commonalities and distinctions.

f) Observation: Studying statistical data and monitoring the progression of digital tools for effective consumer protection.

g) Comparison: Contrasting the level of legal regulation of consumer protection institutions in the national legal framework of the Republic of Moldova with regulations in foreign jurisdictions.

3. LITERATURE REVIEW ON THE INTERNATIONAL CIRCULATION OF FOREIGN ARBITRAL AWARDS AND THE EFFECTIVENESS OF THE 1958 NEW YORK CONVENTION

A substantial body of study proposals and opinions has already been generated on foreign arbitral awards and the effectiveness of the 1958 New York Convention, as well as on enforcement institutions and redress systems, highlighting the influence of political institutions.

A significant role in the endeavor to standardize regulations concerning international commercial arbitration is played by the UNCITRAL Model Law on International Commercial Arbitration, developed by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. This Model Law has affirmed the recognition and enforcement of foreign arbitral awards, particularly in Articles 35-36, which bear resemblance to Articles IV-V of the 1958 New York Convention. The primary intent of the authors was to ensure that this Model Law did not contradict the 1958 New York Convention but, rather, contributed to its incorporation into national law.

In comparison to previous treaties and common law in the field of arbitration, the New York Convention introduced significant innovations and improvements. The treaty has a broader scope (Van den Berg, 1981), eliminating the requirement for the parties to be nationals of one of the signatory states. The concept of "double exequatur" was abolished, and the burden of proof was shifted: once the applicant presents the arbitral award and the arbitration agreement to the enforcing court under Article IV, the burden of providing evidence shifts to the recalcitrant party invoking the grounds for refusal stipulated in Article V. The grounds for refusing recognition and enforcement of foreign arbitral awards are comprehensively regulated (Fouchard *et al.*, 1996). Article V of the Convention restrictively regulates five grounds that may be invoked by the respondent, and two additional grounds that may be invoked by the respondent or ex officio by the court to refuse the effects of foreign arbitral awards.

The new international instrument establishes an international regime for the efficacy of arbitration agreements through a substantive provision in Article II, which requires a written form and governs the effects of both the arbitration clause and the arbitration agreement (Karabelnikov, 2012). At the suggestion of Professor P. Sanders of the Netherlands, it was decided to avoid the adoption of two separate international treaties, as was the case with the Geneva Conventions. Instead, the New York Convention introduced provisions governing the efficacy of arbitration agreements with the aim of enhancing the international efficacy of arbitral awards (United Nations, 1999). The Convention gives priority to the parties' choice in constituting the arbitral tribunal, the arbitration procedure, and the applicable law, as expressed in the arbitration agreement. In the absence of an agreement on these matters, it stipulates the application of the law of the place where the award was made.

The system of the 1958 New York Convention is represented by several key elements, including its scope in terms of material and territorial coverage, its mode of application encompassing the fundamental principles and rules governing the interaction of conventional norms with national and international law, and the actual provisions of the Convention itself.

4. ARBITRAL AWARDS ELIGIBLE FOR ENFORCEMENT WITHIN THE FRAMEWORK OF THE NEW YORK CONVENTION

The norms of the 1958 New York Convention on the international effectiveness, as per Article I(1), apply to arbitral awards "made in the territory of a State other than the one where recognition and enforcement are sought and arising out of differences between individuals or legal entities." Additionally, it also applies to arbitral awards not considered as domestic awards in the State where recognition and enforcement are sought. Article I(2) further clarifies that by arbitral awards, it means "not only awards made by arbitrators appointed for a specific case but also those made by permanent arbitral bodies to which the parties have submitted.

1) The Material Scope of Application of the Convention

The delineation of the material scope of application is determined by establishing the following constitutive elements:

a) The award subject to the Convention is an 'arbitral' award -

The Convention does not provide a specific definition of an arbitral award; however, it specifies that these awards can be issued by both institutionalized and ad-hoc arbitrations, both holding equal authority.

The qualification of the term "arbitral award" is determined by the court seized in accordance with the forum's law. In the judicial practice of the Republic of Moldova, in the case of *Horus SA v. the Ministry of Health of the Republic of Moldova* in 2013, the issue of classifying a decision as an arbitral award was addressed. In this case, the Ministry of Health and the Ministry of Justice of the Republic of Moldova requested the refusal of recognition and enforcement of a decision issued by an "adjudicator," arguing that it did not represent an "arbitral award" but rather an act of a pre-contentious procedure, the "adjudication" procedure. According to the Moldovan Law on Arbitration and the Law on International Commercial Arbitration terms like "adjudicator" and "adjudication" are not recognized, and therefore, they are not covered by the definitions related to arbitration. The first-instance court and the Court of Appeal in Chişinău rejected these arguments as unfounded, explaining that, according to the contractual provisions, the parties had stipulated two consecutive arbitration procedures, referred to in English as "adjudication" and "arbitration." The first referred to an ad-hoc arbitration procedure, while the second referred to an institutionalized arbitration, in case

one of the parties disagreed with the decision in the first phase of arbitration. The claimant, Horus SA, demonstrated that the "adjudication" procedure was identical to arbitration, with parties being notified, informed about the arbitration process, presenting their claims and evidence, all of which were examined by a sole arbitrator referred to as an "adjudicator."

Comparative judicial practice demonstrates that common law courts have ruled that the interpretation of the term "arbitral award" should take into account the spirit of the New York Convention, the nature and content of the document submitted for enforcement, regardless of its title, and whether it conclusively decides the dispute, including issues related to jurisdiction. For this, the award must be rendered by arbitrators, conclusively resolve the dispute or certain contentious issues, and be binding on the parties.

b) The Arbitral Award is Final and Binding on the Parties -

The 1958 New York Convention established the binding nature of arbitral awards. This criterion is defined by the ground for refusing recognition and enforcement under Article V(1)(e), which states that recognition and enforcement may be refused if "the award has not yet become binding on the parties or has been set aside or suspended." German and French jurisprudence has explained that an award is binding because it cannot be challenged through an appeal either in another arbitral tribunal or in a common law court. The exercise of certain remedies, even if they may lead to the annulment of the award (such as annulment proceedings, revision, or setting aside), does not affect the finality of the award because the new judgment corresponds to a different legitimacy, namely, the constitutional authority to exercise, under strict scrutiny, judicial control (Matei, 2009). Thus, even if an arbitral award has been challenged in the state of origin through annulment proceedings, it can still be submitted for recognition and enforcement under the 1958 New York Convention. However, the court seized of the matter may refuse to enforce an award that has been suspended or set aside under Article V(1)(e) at the request of the respondent, provided that the necessary evidence has been presented.

Regarding the determination of the binding nature of an award, legal scholars have differing opinions on the method of qualification. According to some authors, the award will be assessed as binding in relation to the law of the state of origin, given the provision of Article V(1)(e) of the Convention (De Boissesson, 1990). According to an alternative opinion, the qualification should be made through autonomous interpretation, with reference to the rules of the 1958 New York Convention, in order to avoid the establishment of a "double exequatur" for the arbitral award if it were to be classified based on the law of the state of origin (Sanders, 1979).

The final character of an arbitral award implies that the adjudicating authority, the arbitral tribunal, has definitively and conclusively decided on contentious

issues or the entire dispute, without the possibility of repeating the judicial act that would lead to the modification or revocation of the award.

Therefore, the forum seized must examine the documents submitted for recognition and enforcement in light of these two criteria to determine whether they can be granted their proper legal effects. Comparative judicial practice notes that the following types of arbitration awards can fall within the scope of the Convention:

- Single (global) arbitral awards – These are final arbitral awards that fully resolve all issues in dispute and the arbitrated dispute as a whole (Fouchard *et al.*, 1996).

- Partial arbitral awards – These conclusively resolve a part of the dispute, with the remaining issues to be resolved by the arbitral tribunal. The condition is that these contentious issues must be separable from the rest of the dispute (Colombia Corte Suprema de Justicia, 2011);

- Interlocutory (interim or preliminary) awards – These decide a preliminary issue to dispose of the parties' claims, such as the statute of limitations, the applicable law to the case, etc. However, an interlocutory award must contain a mandatory and final decision on specific issues.

- Consent awards – These record the parties' agreement regarding the settlement of the dispute. However, such cases have not been encountered in jurisprudence (UNCITRAL Secretariat, 2016).

- Awards on costs and arbitration expenses.

c) *The award arises from disputes between persons, and/ or businesses* –

The Convention does not provide details regarding the legal status of the parties involved in the arbitral dispute. However, both doctrine and jurisprudence have concluded that the term "legal persons" encompasses state-owned enterprises as well as states, represented by authorities, agencies, subdivisions when acting *de iure gestionis*.

Regarding the effectiveness of arbitral awards invoked for forced execution against a state or a state-owned enterprise, the issue of jurisdictional immunity and enforcement immunity of states continues to generate discussions and interpretations in both doctrine and jurisprudence (Kronke *et al.*, 2010). The principle of international public law *par in parem non habet imperium* underpins the legitimacy of state immunity. However, a distinction must be made between jurisdictional immunity, whether absolute or functional, and enforcement immunity (Cheng, 2011).

The general rule, accepted as the majority opinion in doctrine (Gaillard, 2008) and judicial practice, presumes that states cannot invoke jurisdictional immunity once they have agreed to submit the dispute to arbitration. However, waiving jurisdictional immunity does not necessarily mean waiving enforcement

immunity for the state, as accepting an arbitration clause does not imply a general waiver of jurisdictional immunity.

As a result, some high-profile cases, such as the NoGa v. Russian Federation case, have generated different interpretations, particularly by Russian authors. For example, M.M. Boguslavskii contradicts the rule recognized by the Paris Court of Appeal regarding the loss of the right to jurisdictional and enforcement immunity upon the conclusion of an arbitration agreement (Boguslavskii, 2005).

Efforts to enforce arbitral awards against state assets have encountered various difficulties in practice. Attempts to seize state assets used for *iure imperii* activities have been hindered by states invoking enforcement immunity. Similarly, efforts to seize state assets used for *iure gestionis* activities have been rejected on the grounds of incorrect targeting of the debtor. Jurisprudential practice in Switzerland, Sweden, Austria, Germany, and the USA has supported this approach, allowing forced execution on state assets used for *iure gestionis* activities (Pengelly, 2009). In this context, similar to the NoGa case, in another case, Republic of Cameroon v. Winslow Bank & Trust, the Paris Court of Appeal explained that even if the state agreed to waive its enforcement immunity regarding its assets through a clause in an international trade contract, "this cannot be considered an express waiver of enforcement immunity with respect to assets used by the diplomatic missions of the Republic of Cameroon.

d) The award pertains to disputes deemed commercial in nature

This criterion is relevant in determining the material scope when a member state has invoked the commerciality reservation upon accession to the Convention. The qualification of disputes as commercial in nature for arbitration purposes will be determined according to the law of the forum, as the Convention does not provide a specific definition for this term.

2) Territorial Criteria for the Scope of the New York Convention

The New York Convention uses territorial criteria to define foreign arbitral awards. An arbitral award can be classified as a "foreign arbitral award" under Article I(1) of the Convention based on the following two cases: (a) the award was rendered in a state other than the one where recognition and enforcement are sought; and/or (b) the arbitral award is not considered a "domestic award" in the state where recognition and enforcement are requested. According to judicial practice and doctrine (Kronke *et al.*, 2010), an award will not be considered "domestic," even if it was rendered in the state where recognition and enforcement are sought if it was rendered using a foreign arbitral law or if it exhibits elements of internationality connecting it with other legal systems, thereby not being closely affiliated with the "domestic" character. This can also occur when both parties in the dispute are foreign. The inclusion of these two alternative criteria for determining the qualification of an award as "foreign" represents a compromise

reached at the time of signing the Convention between states favoring connections to domestic jurisdictions and states seeking to liberalize the international effectiveness of arbitral awards. Based on the wording of the second criterion in the Convention, some authors (Van den Berg, 1981) consider it discretionary, with states having the freedom to choose whether or not to apply it. Nevertheless, the second criterion is increasingly invoked in practice and is even stipulated in national legislation, as is the case in the Republic of Moldova under Article 475 of the Civil Procedure Code. Such extraneous elements as the nationality of the parties, their domicile or residence, are not relevant for determining the qualification of a "foreign award" under the New York Convention. Additionally, the Convention does not require the state where the arbitration is based to be a party to the New York Convention but offers states the opportunity to invoke a reciprocity reservation, a reservation that has been raised by a large number of Convention member states.

a) An arbitral award rendered within the territory of another state

Even though the criterion of territoriality is based on objective location circumstances, the interpretation of the conventional norm "*where the award was made*" presumes some difficulties, debated in doctrine and jurisprudence. Advocates of territorial and transnational concepts have debated the role and importance of the seat of arbitration. Consequently, determining the seat of arbitration for cases in which the parties designated Bucharest as the place of arbitration, but the hearings and debates took place in Chişinău, and the sole arbitrator wrote and signed the arbitral award in Berlin, may lead to different solutions regarding the "*place where the award was made*" within the meaning of the New York Convention. The vast majority of scholars and contracting states consider that the choice of the parties will prevail, and alternatively, the indications of the location of the arbitral tribunal. Therefore, the concept of the "seat of arbitration" needs to be defined as a legal concept, and not just from a physical or geographical point of view. In countries such as Germany, Luxembourg, the Netherlands, England, Spain, a foreign award is considered solely if it was rendered within the territory of another state, thus disregarding the second criterion established by the Convention.

b) Awards that are not considered national according to the law of the forum

According to this additional criterion, arbitral awards that are not considered "domestic" in the enforcing state will fall within the scope of the New York Convention. In this regard, the court will apply its national law to define domestic or national awards, in contrast to foreign awards. From positive law and judicial practice, the following categories of "non-domestic" awards have been identified:

(i) Awards rendered according to procedural law (*lex arbitri*) of another state: This may lead to the application of the Convention to an arbitral award issued within the territory of the forum state but applying a foreign procedural law. This criterion was applied in Germany until the amendments to the Civil Code in 198, and in judicial precedents in the United States. Also, the civil procedural legislation of the Republic of Moldova has incorporated this criterion in Article 475(2)(b) of the Civil Procedure Code, which states that an arbitral award will be considered foreign if "it is issued within the territory of the Republic of Moldova, but the procedural law applied is that of a foreign state."

(ii) Awards issued within the territory of the requested state but containing sufficient elements of internationality to render it irrelevant to its respective legal order. The U.S. Federal Arbitration Act lists some elements of foreignness: the nationality (citizenship) of the parties, the location of properties in dispute, the place of performance of services, works, and other reasonable connections with other states. Judicial practice interprets these elements individually or cumulatively, depending on the specifics of the case at hand.

(iii) International or "a-national" awards – represent another disputed category in terms of their qualification. These awards, by the will of the parties, are detached from any national legal system and are issued applying arbitration rules identified by the parties. Some authors have opposed the qualification of such arbitral awards as eligible for recognition and enforcement under the New York Convention (Van den Berg, 1981). However, recent developments demonstrate that courts tend to admit them for recognition and enforcement, even though such cases are rarely encountered.

In the jurisprudence of the Netherlands and the United States, it has been recognized that the purpose and intention of the New York Convention are to recognize these "a-national" arbitral awards as foreign awards (*Société Européenne d'Etudes et d'Enterprises*, annexe 3).

The system of the 1958 New York Convention comprises 156 member states, which, through the ratification of the treaty, commit to respecting and applying the convention's rules regarding foreign arbitral awards. However, under Article I(3) of the international treaty, states are given the option to make certain reservations, which entail additional limitations on the scope of application of the 1958 New York Convention:

a) Reciprocity reservation: It allows the application of the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. This reservation is irrelevant to the nationality of the parties, who may come from states that are not parties to the Convention. Courts in England, Austria, Germany, and other countries have considered the situation at the time of recognition and enforcement proceedings and deem the reservation met when a state acceded to the Convention during that period, even if it was not a signatory to the treaty at the time of the award's issuance (*Kronke et al.*, 2010).

This reservation has been made by over two-thirds of the contracting states, including the Republic of Moldova.

b) Commerciality reservation: Allows a state to apply the Convention only to disputes arising from contractual or non-contractual legal relationships that are considered commercial under its national law. Although Article I(3) refers to national law for the qualification of the term "commercial," in practice, courts often interpret this term quite broadly, sometimes with reference to the definition contained in the UNCITRAL Model Law on International Commercial Arbitration.

The scope of the 1958 New York Convention can also be limited by signaling its non-retroactivity. Although the Convention does not contain an express provision in this regard, some states, including Bosnia and Herzegovina, Malta, Croatia, and the Republic of Moldova, have indicated in their implementing legislation provisions regarding the non-retroactivity of the Convention.

5. PRINCIPLES AND RULES FOR THE INTERPRETATION AND APPLICATION OF THE 1958 NEW YORK CONVENTION

The New York Convention system is being consolidated through the use of uniform principles and rules for the interpretation and application of its provisions, which directly determine the success of this international instrument and contribute to achieving its primary goal. Interpretation shall be carried out in accordance with the provisions of Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties. In this regard, recognition and enforcement courts must apply these rules of interpretation, and in case of drafting ambiguities, they shall be resolved by considering the context, intent, purpose, and preparatory work of the Convention. This approach aims to ensure the uniform application of the Convention's provisions in all signatory states, directly contributing to the primary goal of the Convention, namely the promotion of international trade and the resolution of international disputes through arbitration. The Convention seeks to facilitate the recognition and enforcement of arbitral awards and arbitration agreements. Therefore, the courts seized of the matter cannot interpret the Convention by referring to their national law unless their national law expressly provides for such a reference.

The application of the Convention for five decades, along with the efforts of UNCITRAL, ICCA, CCI to standardize and generalize judicial practice in this field, has led to the crystallization of trends in application and interpretation. These trends have allowed the establishment of widely accepted principles of application and interpretation. These principles include the *pro-enforcement bias* principle (ICCA, 2011), the principle of maximum effectiveness (Gélinas, 2013), the presumption of the effectiveness of the arbitral award and arbitration agreement (Van den Berg, 1981), the prohibition of reviewing the merits of the arbitral award, and the principle of the most favorable law for the international

effectiveness of arbitral awards, as stipulated in Article VII of the 1958 New York Convention.

6. STANDARDIZATION OF THE INTERNATIONAL FRAMEWORK FOR THE INTERNATIONAL EFFECTIVENESS OF FOREIGN ARBITRAL AWARDS AND PROSPECTS FOR THE EVOLUTION OF THE CONVENTIONAL FRAMEWORK

The 1958 New York Convention was crafted to serve the interests of international trade and, by extension, international arbitration (Briner, 1999). In pursuit of these objectives during the drafting phase, the participating states set goals such as standardizing domestic legislations through the adoption of internationally uniform rules, providing contracting states with predictable and secure knowledge of how other contracting states would operate concerning the effects of foreign arbitral awards, and establishing objective criteria that would limit divergent interpretations of the international treaty (ICCA, 2009).

Over the course of the 58 years since the adoption of the New York Convention, it has become the international reference system for the international effectiveness of foreign arbitral awards, successfully establishing a global network for the circulation of arbitral awards within a unified normative context.

Comparative analysis of jurisprudence regarding the application of the New York Convention has been carried out since 1976 in the renowned international Yearbook Commercial Arbitration. Over 38 annual editions, more than 1,300 court decisions have been analyzed, selected based on the specifics of the Convention's application (Van den Berg, 1981)

According to estimates, only 10% of the cases reported have seen refusals to recognize and enforce arbitral awards (Van den Berg, 1981). The 1958 New York Convention stands out as one of the few treaties where judges take into account the uniform judicial practice of other member states. However, in recent years, there have been several court decisions with unsatisfactory interpretations of the Convention. Therefore, some authors have advocated for the promotion of uniform judicial interpretation, while others have proposed a comprehensive revision of the international treaty. The common goal of both currents of thought is to ensure an international regulatory framework favorable to the international effectiveness of foreign arbitral awards, as well as the harmonization and unification of international trade law, a goal reaffirmed by UNCITRAL's resolutions and recommendations.

This remarkable success, however, does not fully meet the goals of the convention's authors, as the current situation presents several difficulties in improving this standardized international system.

On the one hand, the brevity of the New York Convention's provisions leads enforcing courts and legal scholars to engage in legal and theoretical interpretations. However, once subjected to interpretation, the Convention's provisions end

up being categorized in different, sometimes divergent ways. This creates difficulties in harnessing the effects of arbitral awards, reduces predictability, and increases the risks of international trade. In such circumstances, the unique system of the New York Convention risks transforming into 156 national implementation sub-systems, ultimately jeopardizing the primary goal of the international treaty, which is "to promote international trade and international arbitration by facilitating the recognition and enforcement of foreign arbitral awards." (ICCA, 2011)

Professor Em. Gaillard considers that the most serious problems in applying the Convention are related to two complex situations: disputes involving states or state-owned enterprises and the manipulation of the public policy ground, which is invoked *ex officio* by the enforcing court (ICCA, 2009). It is noted that the interpretation of the Convention by the judicial authorities is the most pressing issue, as the success of any international treaty in this field depends on the meaning attributed to it in case law. Despite the successes achieved, there are still inconsistent and incoherent applications of the Convention in comparative jurisprudence (Cheng, 2011), including in states that have implemented the UNCITRAL model law or have national regulations in line with the New York Convention.

Among the deficiencies (United Nations, 1999) of the 1958 New York Convention, the following have been highlighted:

a) The absence of a comprehensive scope of application of the Convention, in the sense that it does not generally apply to the enforcement of arbitral awards considered domestic. The definition of an award as "foreign" is outdated and inadequate (ICCA, 2009).

b) The written form regulated by the treaty for the arbitration agreement is too strict in the context of modern international trade and information technology developments.

c) The possibility of enforcing interim arbitral awards under the Convention is confusing.

d) The discretionary power of the judge to allow the enforcement of an arbitral award, even if a ground for ineffectiveness stipulated in Article V(1) has been found, is not applied as a rule but as an exception.

e) The annulment of the arbitral award by the state of origin is a ground for refusing the effectiveness of the foreign arbitral award in accordance with the New York Convention.

f) The enforcement procedure regulated by the Convention is not sufficiently clear and leaves ample room for national law.

g) The issue of applicable law is resolved by constant reference to conflict of laws rules. There is a need for substantive regulation of minimum standards for arbitration agreements and awards through a treaty.

h) Too much significance is given to the law of the seat of arbitration. Determining the validity of the arbitration agreement according to the law of the seat of arbitration does not reflect the parties' intent.

7. CONCLUSIONS AND RECOMMENDATIONS

To achieve the objectives of consolidating and improving the efficiency system of the New York Convention, the following actions can be proposed:

- Continuous assessment of the judicial practice of signatory states regarding the effectiveness of arbitral awards under the 1958 New York Convention.
- Strengthening uniform solutions to problematic issues related to the application and interpretation of the Convention.
- Dissemination of uniform standards and information to national courts.
- Facilitating an ongoing dialogue among the signatory states of the Convention regarding judicial practices in the field.
- Providing signatory states with guidance and recommendations for improving the local situation.
- Organizing international forums for the dissemination and coordination of measures to enhance the conventional efficiency system.

In conclusion, the 1958 New York Convention has succeeded in establishing a homogeneous, coherent, and widely applicable conventional system. The New York Convention system is characterized by the specificity of its rules, legal institutions, subjects, and scope of application. It also has the capacity to generate uniform principles and practices of application, all contributing to ensuring an international circulation of the effects of arbitral awards.

The main current deficiencies of the treaty include problems arising from the inconsistent interpretation and application of the Convention by judicial authorities. These deficiencies can be addressed primarily through actions aimed at enhancing and perpetuating the Convention, rather than by promoting a new international treaty. Therefore, promoting a new treaty in this area is not the most opportune solution at the moment. It is necessary, first and foremost, to strengthen the existing framework of international arbitral award effectiveness, and the promotion of a new convention could be initiated once the majority of signatory states to the 1958 New York Convention are willing to modify the existing normative framework.

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