

Fali S. Nariman, *International Arbitration in the Twenty-First Century: Concepts, Instruments and Techniques*

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INTERNATIONAL ARBITRATION IN THE TWENTY-FIRST CENTURY: CONCEPTS, INSTRUMENTS AND TECHNIQUES

FALI S. NARIMAN*

This brief comment discusses my thoughts on the state of international arbitration today. I begin by charting out the evolution of legal mechanisms governing arbitration internationally, including: the New York Convention of 1958, the UNCITRAL Arbitration Rules of 1976, and the UNCITRAL Model Law of 1985. I then move on to discuss the problems affecting the enforcement of arbitral awards today, in particular the mindset of the judges of national courts towards enforcement. Any introduction to international arbitration today would be incomplete without a reference to the system of settlement of investment disputes. Here, I discuss the effect of Bilateral Investment Treaties and the role of the International Centre for Settlement of Investment Disputes. I conclude by commenting on some attributes of a good arbitrator in today's world.

* Senior Advocate, Supreme Court of India, New Delhi; President, Bar Association of India. Address: F-21/22, Hauz Khas Enclave, New Delhi, INDIA.

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I. INTRODUCTION

The theme of the Conference at which an initial draft of this brief comment was presented was “International Commercial Arbitration in the 21st Century” – so named only because the organizers could not find a more appropriate title. International Commercial Arbitration in the first decade of the new millennium is fundamentally no different from what it has been in the last two decades of the twentieth century.

The theme is not so important as the idea, however. The idea of a conference like the one I attended is to familiarize ourselves with transnational conventions and rules of arbitration, since they provide a standard by which a national arbitral system can be judged (that is, judged from the outside).

Looking from the outside then, what are the essential attributes of a good arbitrator? In my view, the answer is that a good arbitrator is one who is aware of happenings, not merely in his own country, but also around the world.

Globalization of international arbitration initially began with the Geneva Protocol of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.¹ These international instruments were, however, largely ineffective.

And so they went the way of the League of Nations, which had sponsored them. In the United Kingdom, the Lord Chancellor and the Attorney General came close to resigning in protest at the British Cabinet’s decision to sign the 1923

¹ Geneva Protocol on Arbitration Clauses, 24 September, 1923, 27 L.N.T.S. 157 (1924) (hereinafter 1923 Geneva Protocol); Convention for the Execution of Foreign Arbitral Awards Geneva, 26 September, 1927, 92 L.N.T.S. 301 (1929) (hereinafter 1927 Geneva Convention). Under the 1927 Geneva Convention, the procedural law of the place of arbitration had to be taken into consideration for the composition of the Arbitral Tribunal and the Arbitration Procedure. However, thanks to the initiative of the ICC this was avoided in the New York Convention; where parties have agreed on the composition of the Arbitral Tribunal and the Arbitration procedure, the procedural law of the place of arbitration is disregarded (Art. V(i)(d)).

Geneva Protocol simply because these high officials could not view with equanimity any multilateral treaty where the United Kingdom could not *control* which other states became privy to its reciprocal rights and obligations. All this, of course, was in the heyday of the British Empire.

By the 1940s, the sun was already setting on the British Empire. I was a student at this time in a catholic missionary college in Bombay, and I recall with some amusement the prescient sense of history with which one of the Jesuit fathers always responded when we greeted him. “How are you, father?” we would solicitously ask him, only to receive from him a chuckled response. “Like the British Empire my son, slowly disintegrating.”

With the disintegration of the British and other colonial empires and the establishment of independent nation-states and the increased growth of trade between them, there arose a fresh need to provide an acceptable and independent legal mechanism that would help people resolve disputes of a commercial nature arising between inhabitants and entities in different states.

Three great developments helped to fulfill this felt need: first, the New York Convention (1958),² second, the UNCITRAL Arbitration Rules (1976),³ and third, the UNCITRAL Model Law (1985)⁴ (on which the Indian Arbitration and Conciliation Act of 1996 is fashioned).

II. EVOLUTION OF LEGAL MECHANISMS WORLDWIDE

First, let us examine the New York Convention. The failure of the 1927 Geneva Convention as an effective treaty for enforcing foreign awards stimulated the search for something more efficient. In 1953, the International Chamber of Commerce (“ICC”) took the initiative for drafting a new instrument concerning foreign arbitration awards and submitted it to the United Nations.

This was to later become the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958⁵ – India played a part in its drafting, it was represented at the Conference in New York by its former Attorney General – C. K. Daphtary. Daphtary was the Deputy Chairman at the New York

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June, 1958, 330 U.N.T.S. 3 (hereinafter New York Convention).

³ United Nations Commission on International Trade Law Arbitration Rules, 15 December, 1976, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (1976) (hereinafter UNCITRAL Arbitration Rules).

⁴ UNCITRAL Model Law on International Commercial Arbitration, 11 December, 1985, G.A Res. 40/72, U.N. Doc. A/RES/40/72 (1985) (hereinafter Model Law).

⁵ See New York Convention, *supra* note 2.

meeting. This Convention is now recognized by as many as 144 nation-states⁶ around the world, and by this fact alone it is reckoned as one of the most successful multilateral conventions so far adopted by the United Nations. Under this Convention, almost at one bound, foreign-arbitral awards became directly executable in all New York Convention countries, and hence far more easily enforceable than foreign judgments.

The UNCITRAL Arbitration Rules⁷ were followed by the UNCITRAL Model Law.⁸ They were put together with the assistance of a wide range of experts hailing from different regions of the world, India included. The drafting body for these two instruments was the UNCITRAL (United Nations Commission on International Trade Law), which was itself chosen on a regional basis from amongst members of the United Nations in order to ensure that it was broadly representative of the world's principal legal, social, cultural and economic systems.⁹

The legislative history of the Model Law – so painstakingly framed, discussed and then reviewed and finally adopted by the Commission – is a great success story. It is indicative of how an international body, by consensus, can successfully draft an instrument for adoption by varied and dissimilar political, cultural and economic systems, both in the East and in the West. On 11 December 1985, the General Assembly of the United Nations put its stamp of approval to the Model Law when it adopted a Resolution – a unanimous one – recommending that all states give consideration to the Model Law to achieve uniformity in the law of arbitral procedures and practices in international commercial arbitration.¹⁰

Whilst the action of the UN General Assembly marked the successful conclusion of the drafting phase of the Model Law, it signaled the start of a new phase – the effort to secure enactment by nation-states throughout the world of modern arbitration legislation based on the Model Law. There are now 60

⁶ United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, Ch. XXII Doc. 1, *available at*: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII1&chapter=22&lang=en (last visited 22 December, 2009).

⁷ See UNCITRAL Arbitration Rules 1976, *supra* note 3.

⁸ See Model Law, *supra* note 4.

⁹ Nine members were from Africa, seven from Asia, five from Eastern Europe, six from Latin America, and nine from western Europe and “others”. The “others” included Australia, Canada, New Zealand and the United States. See G.A. Res. 2205 (XXI) (17 December, 1966) and G.A. Res. 3108 (XXVIII) (12 December, 1973).

¹⁰ See Model Law, *supra* note 4.

countries¹¹ in five different continents of the world that have adopted or adapted the Model Law. India is, of course, one of them.

However, going back, it was the New York Convention that really set the ball rolling in synthesizing different cultural systems and helping make transnational awards readily “transportable” from one convention state to another, and enforceable in each of them.

I pay tribute today to the foresight and wisdom of the framers of the New York Convention for having recognized, way back in 1958, the singular importance of the sovereign national courts to whom its main provisions are addressed. Foremost among the framers were two great arbitrators: Pieter Sanders (now in his nineties, he is fortunately still with us) and Dr. Otto Glossner (he too, happily, is still with us): they are the only survivors of that golden age – I call them the “Fathers” of the New York Convention and I am proud and privileged to be counted as their friend.

The framers saw, long before anyone else had, that national courts simply could not be ignored and that without the aid and assistance of local municipal courts, transnational arbitral awards would never be effectively enforced. After nearly 60 years, the scene has not changed much. What is needed to achieve a greater globalization of the New York Convention is not an amendment of its provisions, as some academics have suggested, but the strengthening of the support system through wider dissemination of the UNCITRAL Model Law.

Until then we will just have to be content with the present regime of national courts in different states operating under different legal systems, giving recognition to and enforcing foreign arbitral awards and on some (hopefully fewer and fewer) occasions surprising us by not doing so.¹²

¹¹ On the *Asian Continent*: Australia, Bahrain, Bangladesh, Cambodia, China, Hong Kong, India, Iran, Japan, Macao, New Zealand, Philippines, South Korea, Singapore, Sri Lanka, Thailand, On the *African Continent*: Cyprus, Egypt, Jordan, Kenya, Madagascar, Malta, Nigeria, Oman, Uganda, Zambia, Zimbabwe; On the *European Continent*: Austria, Belarus, Bulgaria, Croatia, Denmark, Estonia Germany, Greece, Hungary, Ireland, Lithuania, Norway, Poland, Russian Federation, Scotland, Serbia, Slovenia, Spain, Turkey, Tunisia, Ukraine; On the *American Continent*: Bermuda, Canada, United States of America, Guatemala, Mexico and Peru.

¹² In a masterly review of National Court decisions that have refused enforcement under the New York Convention 1958, Albert Jan van den Berg concludes as follows:

This review of Court decisions in which enforcement of an arbitral award was refused under the Convention shows that the number of such cases is surprisingly small, given that the Convention is now being applied by judges in a large number of Contracting States with diverse legal and cultural

III. PROBLEMS AFFECTING THE ENFORCEMENT OF ARBITRAL AWARDS

The essence of the New York Convention is the specification of limited grounds on which recognition and enforcement of an award may be refused. That the arbitrator has misinterpreted facts or law is not a defense to its enforcement. It is very important to remember this.

In commenting on a 2005 decision of the House of Lords in the *Lesotho Highlands* case,¹³ my good friend William Park (Rusty Park) of Boston, renowned in the arbitral world, commented that the House of Lords had confirmed what he described as “a healthy appreciation that arbitrators do not exceed their powers simply by making a mistake”.¹⁴ This is a useful lesson for us all, especially for lawyers and judges in India: a crucial awareness that arbitrators do not render their award vulnerable simply because they make a mistake, unless that mistake is so egregious as to shock the conscience.

That article by Rusty Park has been published in the journal of the London Court of International Arbitration (LCIA) titled *Arbitration International*,¹⁵ and it quotes a passage from a judgment of the Supreme Court of the United States delivered, not recently, but way back in 1855. That decision concerned two businessmen who agreed to arbitrate their differences before arbitrators who ultimately awarded damages. One of the parties, however, was a litigious New York merchant who went to court and succeeded in having the award set aside. Fortunately for the other party, the Supreme Court of the United States reversed the decision with reasoning that went as follows:

perspectives. Most of the cases of refusal are the result of mistakes of one kind or another: parties drafting inadequate arbitration clauses, arbitral tribunals not paying sufficient attention to the conduct of the proceedings, or courts misunderstanding the meaning of the Convention.

As a result, the cases of refusal do not provide any argument for modifying the Convention. Rather, the “unfortunate few” simply constitute a collection of lessons to be learned by parties, arbitrators, arbitral institutions and national courts in order to ensure the efficacy and enforceability of awards.

These “exceptions” prove the general rule of enforcement, and therefore underscore how successful the New York Convention has been.

See Albert Jan van den Berg, *Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few*, 10 ICC INT'L CT. ARB. BULL. 75 (1999) (Special Supplement).

¹³ *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43.

¹⁴ William W. Park, *The Nature of Arbitral Authority: A Comment on Lesotho Highlands*, 21 ARB. INT'L 483, 484 (2005) (hereinafter Park).

¹⁵ See Park, *supra* note 14, at p. 491.

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the judiciary in place of the judges chosen by the parties [the arbitrators], and would make an award the commencement, not the end, of litigation.¹⁶

Very neatly put, even though this was written more than 150 years ago. The Supreme Court reaffirmed that a court's scrutiny under the New York Convention is strictly limited to ascertaining whether the award gives rise to a possible refusal of enforcement on one of the narrow grounds mentioned in Article V, and the process of scrutiny does *not* involve an evaluation of the arbitrator's findings.

But here again, varied attitudes have prevailed, mainly due to traditional and cultural differences. Not all judges in Contracting States are mentally adjusted to the limited role of the court before which a foreign award is brought for recognition and enforcement. Some judges simply will not accept that an award that is believed to have produced an unjust result must be enforced, and accordingly when perusing foreign awards and the limited grounds available under the New York Convention for their enforcement they have been known to import their own individual beliefs about the justice of the case to try and fit their predilections into the public policy ground – an exercise wholly contrary to the avowed intent and purpose of Article V(2)(b) of the New York Convention.

The consensual nature of international arbitration is one of the key elements required to be at the forefront of every judge's mind, whether that judge sits in a court in the East or in the West. The judge must have the mental discipline to realize the true role of a court of enforcement, which is *not* as a court of original decision-making.

The real problem with enforcing foreign awards around the globe is the need for a greater awareness amongst judges of the mutual benefits of international arbitration, and above all of its consensual nature. They need to know, for instance, that so great is the sanctity attached to a foreign award under the New York Convention that Article V provides that even if one of the seven circumstances mentioned therein is satisfied, it is not obligatory for the court to refuse recognition and enforcement – a view which has received support from judgments of courts in the United States and France. In separate decisions, courts in each of these countries enforced an International Chamber of Commerce (ICC)

¹⁶ Burchell v. Marsh, 58 U.S. 344 (1855).

award rendered in Cairo under the governing law of Egypt even after the final appellate court in Egypt set it aside.¹⁷

We must realize that globalization does not always result in harmonization. Since how national courts *actually* function depends a great deal on the knowledge, quality and equipment of its judges (and of the lawyers appearing before them and assisting them), the need for a widening of the awareness base of the New York Convention becomes apparent, both amongst judges and lawyers.¹⁸

IV. ARBITRATION IN THE MODERN WORLD

At a one day celebration in New York in 1998 on the occasion of the 40th anniversary of the New York Convention (to which I was invited), in response to a

¹⁷ Chromalloy Aeroservices Inc. (US) v. The Arab Republic of Egypt 939 F. Supp. 907 (D.D.C 1996); The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc (US), Cour d'appel [CA] [Regional Court of Appeal] Paris, 14 Jan., 1997, 12 INT'L ARB. REP. B1 (1997). At a function in New York commemorating the 40th Anniversary of the New York Convention (10 June, 1998), the question as to under what circumstances an Enforcement Judge in a National Court operating under the New York Convention could disregard the annulment of an award by a foreign Court and enforce the award notwithstanding that annulment – was answered by Jan Paulsson as follows:

The enforcement judge should determine whether the basis of the annulment by the judge in the place of arbitration was consonant with international standards. If so, it is an International Standard Annulment, and the award should *not* be enforced. If the basis of the annulment was one not recognised in international practice, or if it was based on an intolerable criterion, the judge is faced with a Local Standard Annulment. He should disregard it and enforce the award.

One may expect that such an approach would lessen the temptation to issue Local Standard Annulments. It is also to be noted that this solution is entirely consistent with the 1961 Geneva Convention . . . and so contributes to harmonization in the right direction.

See Jan Paulsson, *Awards set aside at the place of arbitration*, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION – EXPERIENCE AND PROSPECTS 24-26, Colloquium to celebrate the 40th anniversary of the New York Convention (*supra* note 2), New York, U.S., 10 June, 1998 (U.N. Publication, Sales No. E.99.V.2) (1999) *available at*: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf> (hereinafter Paulsson). Jan Paulsson said that this suggestion “could (and should) become part of any supplement or protocol to the Convention, but one of its attractions, was that it did not require such a protocol – the solution was already available to individual national systems by virtue of the discretion built into article V.” (*See* Paulsson, *supra* at 26)

¹⁸ For instance, in the Middle-East (Dubai) if an award is made on oral evidence after examining witnesses, the award must be set aside if the witnesses have not given their statements on oath! People who would arbitrate in Dubai must be aware of the local procedural law.

kite-flying question from the floor as to whether it would be appropriate to speak publicly about the need for “training” judges, a distinguished former Chief Justice of a Court of Appeals of the United States said positively and frankly: “Having been a judge for 26 years, I have no hesitation in saying that judges do need training and education”. Another judge (from Canada) opined a bit more guardedly: “In an adversarial system of justice I would say that you must educate the bar so as to help the judges”. Arguably, a more diplomatic way of expressing the same thought! It is the judges of national courts who drive the New York Convention-train in each contracting state and it is the responsibility of those long-experienced in international arbitration to help them drive it in the right direction.

But the arbitral world is a truly global world, and since 1958 it has gone way beyond the New York Convention. We live in an age of accelerated economic convergence not matched, however, by a convergence of national legal systems – and the need for development in the third world has called for new solutions. It is now more than 35 years since another international convention – the Convention on the Settlement of Investment Disputes between States and Nationals of Other States¹⁹ – has come into force. It is commonly known as the Washington Convention of 1965. The Washington Convention is now ratified by as many as 156 nation states (as of 26 November, 2009) around the world, both from the East and from the West (in fact, more from the East than from the West).²⁰

It provides for a system of settlement by conciliation and arbitration of investment disputes between a State party to the convention and nationals of another State. The International Centre for Settlement of Investment Disputes at Washington, D.C. (or “ICSID”, as it is better known) is the institution administering the Convention. It has put in place a general system of *compulsory* arbitration against contracting states for all matters relating to international investment at the instance of private actors in international economic relations.

Today, bilateral trade relations are based on the law – not statutory law, but law in the international sense – of treaty making. This law is in the form of BITs (Bilateral Investment Treaties). There are more than 2700 such bilateral investment treaties in existence today. Many of these have been signed in the last ten years in numerous areas of emerging markets. They have given a stimulus to the globalization of world economy by providing increasing investment opportunities

¹⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March, 1965, 575 U.N.T.S. 159 (1965).

²⁰ In the Asian continent including the Middle-East 35 countries have ratified the Washington Convention and in Africa 49 countries have ratified it. 39 countries in Europe and 30 countries in and around the Americas have also ratified the Washington Convention. India is not one of the countries that have ratified the Convention.

to the developed world, with, arguably, corresponding advantages and benefits to the developing countries.

Such treaties are negotiated and signed between states, but they confer on present and future foreign investors in contracting states the right to arbitrate a wide range of grievances arising from the action of a large number of public authorities within the states, whether or not any specific arbitration agreement has been concluded by the latter with the particular complainant. BITs have heralded a new form of international commercial arbitration: “arbitration without privity.”

We now have (thanks to the ingenuity of the legal fraternity) a rule of law regime in which investors in foreign countries can, through the instrumentality of bilateral treaties, exercise direct rights of action against the state entity in which the investment is made even without contractual relations with that state entity.²¹ Unsurprisingly, the caseload of ICSID has grown vastly in recent times.

Users of commercial arbitration are neither organised nor vocal – as are, for example, NGOs in the field of human rights – and therefore they do not intrude upon that growing sense of complacency that appears to have overtaken arbitrators with respect to their own work and performance. The situation is reminiscent of a statement made at a Lord Mayor’s banquet way back in 1936 by the then Chief Justice of England. Somewhat pompously, Lord Hewart informed his audience that: “His Majesty Judges are supremely satisfied with the almost universal admiration in which they are held.” Substitute “international arbitrators” for “His Majesty Judges” and you will get international arbitrators’ current perspective on themselves.

David Pannick has written a controversial but entertaining book on “Judges”.²² After quoting Lord Hewart, he says that it is difficult to believe that the “universal admiration” at *all* reflected the true feelings of many of the customers of Lord Hewart’s own courts! I suggest that if a study was undertaken of the “true feelings” of the customers of arbitral tribunals around the world the results may not be quite as flattering.

²¹ *E.g.*, the Energy Charter Treaty (Lisbon, 17 December, 1994) signed by 49 States including major countries producing and purchasing power in the Energy field – like France, Germany, Italy, Japan, Netherlands, Russia, Spain and the United Kingdom. Art. 26 of the Energy Charter Treaty is different from existing provisions made in BITs – it is better drafted and should be a forerunner of what to expect in treaty-making in the future: If the investor wishes to avail itself of arbitration under the Treaty, it has the further option of choosing among three sets of rules; either those of ICSID (*i.e.* the Washington Convention 1965) or the Model Law or arbitration under the Rules of the Stockholm Chamber of Commerce;

²² DAVID PANNICK, *JUDGES* (Oxford University Press, 1987).

V. CONCLUSION

I began by posing a question. What are the attributes of a good arbitrator? Let me end by defining one. A good arbitrator is a person who keeps asking himself (or herself) in *every* single arbitral proceeding what justice the case demands in the fact-situation presented, and *then* finds out whether there is anything in the applicable law which would militate against the tribunal arriving at a *just* conclusion. You could be wrong, of course, if you do this – but you will always remain popular with the users.

I leave you with a story recounted by William Rees-Mogg, contributor to the Millennium Issue of the *London Times* in 2000, when he wrote of his memories of the century that had just passed. He described a visit to Hong Kong and dinner with the Pattens at Government House. He took a taxi back to his hotel. The taxi driver, who was Chinese, had a comment about the last Governor, Chris Patten. “He was a *good* Governor”, the taxi driver said, “even when he was wrong”. I do not know about you, but I would be delighted and proud to be remembered as a *good* arbitrator – even when I was wrong.