This House believes that the New York Convention does more harm than good to developing economies
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Introduction

On 13 May 2015, in an event that comprised a series of intellectually stimulating and highly entertaining sessions, the first session, following welcoming remarks to kick off the event, was a debate on the topic of bridging cultures with the motion: This House believes that the New York Convention does more harm than good to developing economies.

The session comprised high profile speakers, introduced below, and a prestigious panel of judges – Mr Karl-Heinz Böckstiegel, Independent Arbitrator, Mr Fernando Mantilla-Serrano of Latham & Watkins and Ms Zia Mody of AZB & Partners. Mr Böckstiegel, who chaired the session, opened the floor to the speakers by setting the scene and inviting the speakers to be “as aggressive as possible”.

Speaking in favour of the motion were Mr Makhdoom Ali Khan of the Supreme Court of Pakistan, and Ms Lucy Reed of Freshfields. Speaking against the motion were Mr Dominique Hascher of the Supreme Judicial Court of France and Ms Adrianna Braghetta from the Governing Board of ICCA.

Arguments in favour of motion

Mr Khan and Ms Reed’s submissions comprised various key messages to demonstrate that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NY Convention”) was unfair to developing countries, including that it was undemocratic, was grossly out-dated, and impeded the allegedly desired improvement of developing countries’ court systems.

Mr Khan’s speech focused on the following two arguments: (i) that the NY Convention set such a low criteria for the enforcement of awards that it impeded capacity building in the developing world; and (ii) that the enforcement process as facilitated by the NY Convention was in itself unfair and harmful to the developing world, in that deep pockets had more room to play with the system until it produced the desired result. In explaining the first argument, Mr Khan paraphrased the words of Justice Robert Jackson of the United States Supreme Court, saying that “arbitrators are not final because they are infallible but they are infallible because they are final”. He then asked whether they should be final, stating that most civilised legal systems recognised at least one appeal as a requirement of the process, and therefore it was questionable as to why this requirement passed the arbitration world by. His latter argument was explained by the example of the case of Dallah v Pakistan, in which Dallah having exhausted all its options in the English courts simply moved on to the French courts to restart the process, ignoring successfully the principles of res judicata, stare decisis and issue estoppel.

Ms Reed continued the affirmative angle of the debate with the following three arguments: (i) that because of the NY Convention, local courts in less developed countries were “languishing in terms of caseload, judicial resources, judicial training, legal infrastructure and even ethics”; (ii) that developing economies were hostage participants to the NY Convention as they had no choice but to join the Convention and were “coerced” to stay in it; and (iii) the NY Convention was a “legal antique” as it was no longer useful for
anyone, and especially not for developing countries. With respect to this last argument, Reed demonstrated her point by reference to Article II(2) of the NY Convention, which defines an agreement in writing as including an “exchange of letters or telegrams”, and made the point that this was desperately archaic against the backdrop of statistics in the Economist that Africa is expected to have more than 930 million mobile phones by 2019, which amounts to almost one phone per African.

Arguments against motion

Mr Hascher and Ms Braghetta’s aim was to demonstrate that the NY Convention enhanced the quality of legal systems and national judiciaries in developing countries, provided legal certainty to its users and placed developing economies in a stronger position to attract foreign investment.

Mr Hascher took the lead in explaining why the motion should fail by making the following arguments: (i) that the multiplicity of legal systems was a source of incoherence and conflict, and some coherence could be achieved through the adoption of uniform standards in the form of the NY Convention; (ii) that the NY Convention enhanced the quality of the national legal systems and judiciaries of the developing countries. In his first argument, Hascher explained that given its role in harmonising the criteria for enforcing arbitral awards, the NY Convention was “certainly the most important step that states can make today towards the generalisation of an efficient pro-arbitration recognition and enforcement scheme which is enforced among more than 154 countries around the world, of which more than half are already developing countries”. As to Mr Hascher’s second argument, he explained that the efficiency of arbitration is directly linked to the quality of the judicial system, and that arbitral proceedings could not develop harmoniously without the assistance and under the control of state courts. He explained his viewpoint that the NY Convention granted a society the effective right of access to arbitral justice and public justice, and did so in a non-discriminatory manner. Ultimately the jurisprudence created in the context of enforcing awards under the NY Convention contributed to the advancement of the legal system of that society, such that courts may find themselves adopting the dynamic approach of the NY Convention. Mr Hascher made the further, and important, point that the NY Convention “organises a dialogue” between the setting aside of awards and enforcement of awards in local courts.

Ms Braghetta continued the arguments against the motion and commenced by explaining that the affirmative arguments were generic complaints about the NY Convention rather than arguments in pursuance of the motion. She also commented in her introduction that the reality is that the developed world is having to listen and pay attention to what the developing world has to say, and the latter has become a “huge force” in international arbitration. She made the following specific points: (i) the NY Convention, far from harmful, serves as a helpful minimal standard for developing countries to observe to become a jurisdiction in which investors may find themselves enforcing arbitral awards; (ii) that it is precisely because they have ratified the NY Convention that developing countries adopt their approach towards and treatment of foreign awards, including in refraining from conducting a review of the merits of such foreign award. In the latter argument, Ms Braghetta elaborated that developing countries readily adopted the NY Convention so as to foster development in their arbitral regime and thus attract foreign investment. She commented that Ms Reed’s suggestion that such economies were hostage participants was therefore untrue. She ended with an example of a developing economy – Brazil, where she comes from – which ratified the NY Convention 13 years ago in 2002. Ms Braghetta made the interesting observation that prior to its accession to the NY Convention, and despite having a good piece of arbitral legislation which largely mirrored the NY Convention, Brazil was not able to secure significant foreign interest or investment. Its accession to the NY Convention however contributed to its subsequent success on that front, to the point where it is now the third largest jurisdiction to use international arbitration (according to ICC data).
Rebuttals and surrebuttals

Given the controversial nature of the topic and the strong arguments presented, the speakers were given the opportunity of presenting rebuttals and surrebuttals including in relation to a procedural objection raised in the debate.

Mr Khan in rebuttal summarised that the arguments against the motion were only to the effect that if a country has not joined the NY Convention it will not be considered safe for arbitration or as a business or as a venue. But, he submitted, the question was whether the club was a good one to begin with: “One is at times reminded, in spite of the popularity of the club, of what Groucho Marx famously said, ‘I would not like to be the member of a club which will have a person like me as a member’.”

Ms Reed added that the NY Convention was tyrannical, and without it justice systems would be more equal. She also made the point that the name ‘NY Convention’ was not liked for being Western, given New York already had the United Nations and the best bagels in Broadway!

Mr Hascher in response argued that the NY Convention put developing countries on an equal footing with developed countries; that it was the common constitution for world trade, world commerce and arbitration. He concluded by saying that developing countries do participate in the interpretation and application of the NY Convention as equal participants alongside developed countries, and that for developing countries to walk out of the NY Convention would “not be going back to yesterday but the day before yesterday”.

Ms Braghetta added to Mr Hascher’s arguments by insisting – in response to Mr Khan – that developing countries do want to participate in the club because it is a reasonable one. She ended with an interesting comparison of the NY Convention to the Panama Convention, which is a convention founded by and for the benefit of Latin American countries and largely mirrors the NY Convention. She concluded that this demonstrated that the developing countries from this region had decided to use the same system as created in 1958 by “the founding fathers of the NY Convention”.

Deliberations by the panel

The speakers were then asked questions by the panel of judges. Mr Fernando Mantilla-Serra posed the question (to Ms Reed) whether the motion actually intended to say that parties would be better off without the recognition of the validity of arbitration agreements such that the NY Convention was not invoked and matters were taken to state courts instead?

Ms Mody asked (Mr Khan and Ms Reed) whether it was true that the motion wrongly assumed that the only beneficiaries of the NY Convention were developing countries because it attracted foreign investment, whereas the reality was that it was not a one-way street anymore and investors from developing countries also benefitted from the developed countries adopting the NY Convention when they made investments in these regions?

Mr Böckstiegel, added two questions: (i) when discussing benefits and difficulties of the NY Convention, was it not important to consider whether there were any alternatives available?; and (ii) did the speakers see a realistic chance of the NY Convention being renegotiated if it has room for improvement?

Ms Reed started by responding that most of the panel’s questions went to the underlying point that but for the NY Convention coming into play so early, there would have been much more pressure for the development of a convention to enforce court judgments, and that would have put pressure on development and improvement in all court systems including, in answer to Ms Mody’s question, pressure against problems in the US court system but more so achieving improvement in the developing country’s court systems. She concluded by stating that the NY Convention could not be amended because of the fear of opening it up, and thus the “status quo of unequal members of a club…will stay in effect”.

Deliberations by the panel
Mr Hascher’s response commenced with the point that the NY Convention was more international than an instrument of court judgments would be because of the input of developing countries rather than it just being a treaty of the developed countries. He added that whilst a renegotiation of the NY Convention was possible, it would likely render it a complicated code. He said the NY Convention should just be left the way it is with its five articles, as they did work and worked in the benefit of all. Ms Braghetta pointed out in addition that no suggestion had been made by those in favour of the motion for there to be improvements to the NY Convention that were dedicated only to developing countries, which in itself reinforced that the treaty was there and was good for all.

Following an observation from the audience, the panel of judges held a unique open ‘in-camera’ session in front of the entire audience – which in itself was an interesting moment to observe – and shared their thoughts and observations of the motion. Mr Böckstiegel questioned which party bore the burden of proof, and highlighted the limitation on the motion which was not against getting rid of the entire NY Convention, but only that it did more harm than good to developing countries. He also posed the question to his panel as to whether their choice was only between dismissing the motion or admitting it, or whether they had the option of coming out somewhere in between.

Ms Mody kicked off the deliberation by stating that the NY Convention was what we had and there were no real alternatives, and that the undeniable merits of uniformity and greater autonomy did not outweigh the benefits of the NY Convention. She therefore concluded that there was not much harm to developing countries. Mr Mantilla-Serra commented that that it must not be forgotten that the beneficiaries of the NY Convention were mostly users of international trade, and that for developing economies it has been very positive to have this confirmation of the validity of the arbitration agreement which leads to the possibility to develop arbitration in these countries. He then made the point - against the NY Convention - that it may give the impression to developing economies that the NY Convention was enough and they need not do anything further. He concluded by saying his vote would be cast against the motion.

Mr Böckstiegel, having heard his panel’s comments, stated that he was also inclined to dismiss the motion as the NY Convention did less harm than the benefits it provided to developing countries. He added, *obiter dicta*, that there was room for improvement in the NY Convention, and questioned whether it could feasibly be expected to be changed.

**Conclusion**

Finally, the panel, having unanimously decided that the motion should be dismissed, also invited the audience to comment and vote in respect of the motion; of a room full of participants, only 1 hand was for the motion and the rest were against. In case there was any doubt as to the level of confidence in the NY Convention, this outcome speaks for itself.