(/)

Uncertainty Regarding the Existence and Future of the Reciprocity Reservation Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

Newsletter - TerraLex Connections

Uncertainty Regarding the Existence and Future of the Reciprocity Reservation Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

By Courtney Furner*

(file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_edn1)

A. Introduction

The basic tenet of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**NYC**) [1] is that Contracting States have the reciprocal obligation to enforce foreign arbitral awards unless the awards violate certain procedural norms. [2] The most well-known reciprocity obligation under the NYC is the reciprocity reservation in art I(3). The works of the United Nations Commission on International Trade Law (**UNCITRAL**) and academic literature indicate that reservations have less of, if not no longer, a role to play in the future of the NYC, but at the same time, indicate that reciprocity will not entirely disappear from national courts and thus continue to pose difficulties for them and impact potential enforcement under the NYC.

B. The reciprocity reservation under the NYC

The legal effect of certain provisions of the NYC is restricted by Contracting States' implementation of two possible reservations when signing, ratifying, accepting, approving or acceding to the NYC: the reciprocity reservation and the commercial reservation. [3] The latter has, for the most part, been uncontroversial in the interpretation and application of the NYC. [4] Accordingly, this article focuses on the reciprocity reservation in art I(3).

As at November 2017, 103 [5] of the 157 [6] Contracting States have made the reciprocity reservation, thereby enforcing awards made only in the territory of another Contracting State. [7] Consequently, in about one-half of the Contracting States, the NYC will not apply unless the country in which the award was made also agrees to be bound by the terms of the NYC. [8]

C. State practice since 1958

Reservations was one of the central issues arising out of the 2008 UNCTIRAL survey monitoring the implementation in national laws of the NYC and considering the procedural mechanisms that various states have put in place to make the NYC operative (**2008 UNCITRAL Survey**) [9] . The results 'revealed a degree of uncertainty as to the existence of reservations', [10] and disclosed

that some states had made use of either one or both reservations without having made a declaration to that effect at the time of ratifying, or acceding to, the NYC.[11] As to the reciprocity reservation, the 2008 UNCITRAL Survey concluded that notifications of reservations or declarations of reciprocity did not reflect Contracting States' practice in this area.[12] Specifically, state practice revealed that the courts of one Contracting State which had not made the reciprocity reservation could refuse enforcement if it was proven that the state where the award was made did not enforce foreign awards in similar cases; the reservation has been formulated by Contracting States on terms different to those set out in art I(3),[13] and applied inconsistently by national courts; and there was uncertainty as to whether a lack of reciprocity between the state where the award was made and the state where enforcement was requested would be a barrier to the enforcement of an award under the NYC.[14] Accordingly, legal uncertainty, non-enforcement (either actual or the mere risk thereof) and increased legal costs in international arbitration have, for some parties, been attributable to the reciprocity reservation. These effects, even if infrequent under the NYC regime, run counter to the NYC's spirit and intent to contribute to increasing the effectiveness of arbitration in the settlement of private disputes.[15] In light of this status quo, what is the future utility of the reciprocity reservation under the NYC?

D. The future of the reciprocity reservation

Since joining the NYC, eight[16] Contracting States have notified their withdrawal of their reciprocity reservation. Further, as most states have now joined the NYC as Contracting States,[17] and the majority of arbitrations are seated in jurisdictions of Contracting States,[18] awards rendered in non-Contracting States are a rarity. Thus, the reciprocity reservations currently in force are becoming increasingly irrelevant.[19] This view is supported by Professor Albert Jan van den Berg's proposed redraft of the NYC, which entirely omits reservations for the reason that the proposed redraft is 'premised on the more modern principle of universal applicability of treaties'.[20] However, even if [21] the proposed NYC redraft comes into force, and for as long as awards are rendered in non-Contracting States, the current reciprocity reservations will continue to have effect unless they are withdrawn.[22] Although some commentators argue that the reciprocity reservation has 'posed few problems for national courts and has done little to impede the success of the NYC', and is 'unlikely to arise in the future',[23] difficulties relating to the reservation have caused some national courts to construe the reservation in a manner inconsistent with the uniform application of the NYC.[24] Moreover, courts have not yet had the opportunity to consider the meaning and effect of reciprocity reservations formulated on terms different than those prescribed by art I(3).[25]

Even if the reciprocity reservation becomes redundant altogether, the general reciprocity clause in Art. XIV remains a risk to enforcement in non-UNCITRAL Model Law jurisdictions, which have included such a clause as a potential defence to enforcement.[26] The author is not aware of any published case, to date, in which a national court refused to enforce an award under the NYC based on Art. XIV.[27] One national court has held that Art. XIV could be relied upon by Contracting States to justify departing from the NYC in cases where citizens of states with recalcitrant courts have been refused prompt enforcement of their arbitration agreements,[28] although another national court has considered that reciprocity considerations do not apply to the commercial reservation.[29] Consequently, national courts will remain the custodians of the existence, effect, and scope of application of current reciprocity reservations. Accordingly, the risk (be it high or low) of non-enforcement on the basis of reciprocity will subsist in certain jurisdictions irrespective of the future status of the reciprocity reservation because each jurisdiction will continue to adjudicate upon the matters before it without preference for or in defiance of decisions made in other national courts carrying out the same or similar function.[30]

(file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftn30)

E. Conclusion

Enforcement of awards outside of the NYC regime is 'a more complex, time consuming and uncertain process, and one that parties seek to avoid'.[31] Therefore, it is in Contracting States' interests to have a NYC-enforceable award, the chances of which are increased if reciprocity obligations do not create a barrier thereto. The omission of reservations clauses in the proposed NYC redraft is indicative of the potential irrelevance of the reciprocity reservation. Notwithstanding this, national courts will continue to be guided by reciprocity considerations when enforcing foreign awards, the effect of which may be to put enforcement at risk in certain jurisdictions. Apparently, reciprocity is here to stay. However, reciprocity can also be turned on its head. Parties can, when drafting their arbitration agreements, avoid seating their arbitrations in countries in which reciprocity has historically hindered enforcement.[32] Furthermore, it has been argued that Art. XIV is an underused, pro-arbitrable mechanism which can be used to encourage Contracting States to not limit their implementation of the NYC for fear that awards made in their jurisdiction will receive similarly narrow treatment in other jurisdictions, thereby resulting in decreased individualisation in the NYC's implementation.[33] Accordingly, Contracting States and parties thereto can manage, and ultimately benefit from, reciprocity obligations, irrespective of the existence and future status of the reciprocity reservation in the NYC.

[1] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref1) Adopted 10 June 1958; entered into force 7 June 1959, 330 UNTS 38 (**NYC**).

[2] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref2) Jeffrey H. Dasteel, 'Is it time to awaken the New York Convention's dormant general reciprocity clause?' (2015) 26 *American Review of International Arbitration* 539.

[3] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref3) NYC art I(3); Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (**VCLT**) art 1(d).

[4] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref4) This is primarily because countries have adopted a definition of 'commercial' that is consistent with the objective of achieving a wide, uniform application of the NYC. See Michael Pryles, 'Reservations Available to Member States: The Reciprocal and Commercial Reservations' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May Ltd 2008) 178.

[5] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref5) This is including extensions. See 'List of Contracting States (as of 1 November 2017) for the New York Convention', in (2017) XLII *Yearbook Commercial Arbitration* 310. Chile has not adopted the reciprocity reservation, but its courts have applied the reservation in practice: see *Stubrin v Sociedad Invesiones Morice SA*, Chilean Supreme Court, 11 January 2007, Rol 6600-2005; *Sociedad Quote Food Products B.V. v Sociedad Agroindustrial Sacramento Ltda.*, Chilean Supreme Court, 5 July 1999, 96 RDJ (1999), 2-1 82, RDJ 261, Rol 3832-1998.

[6] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref6) United Nations Treaty Collection, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Status' (as of 15 February 2018)', <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en> accessed 15 February 2018.

[7] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref7) *J.M. Ltd v Firm S.*, Oberlandesgericht Hamburg, 15 April 1964, cited in (1977) II *Yearbook of Commercial Arbitration* 233 (***J.M. Ltd***); *Norsolor S.A. v Pabalk Ticaret Limited Sirketi*, Court of Appeal of Paris, 19 November 1982, I I0I92; *Weizmann Institute of Science v Neschis*, United States District Court for the Southern District of New York, 3 October 2002, 229 F Supp 2d 234, cited in (2003) XXVIII *Yearbook of Commercial Arbitration* 1038 (***Weizmann***); *Yukos Oil Co. v Dardana Ltd*., Court of Appeal of England and Wales, 18 April 2002, [2002] EWCA Civ 543; *Global Security Seals Group Ltd v National Port Authority*, District Court of the District of Columbia, 25 May 2012, 680 F 3d 805.

[8] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref8) Pryles (n 4) 163, referring to *Weizmann* (n 7) 1042 and *J.M. Ltd* (n 7).

[9] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref9) Specifically, the 2008 UNCITRAL Survey considered whether reservations according to art I (3), if taken in implementation, added or broadened the reservations permitted under the NYC. See UNCITRAL, 'Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' (5 June 2008) A/CN.9/656 and (6 June 2008) A/CN.9/656/Add.1 (**2008 UNCITRAL Survey**) [2], [26] - [33], Annex I [1.2].

[10] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref10) ibid [27].

[11] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref11) ibid.

[12] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref12) ibid [26] - [33].

[13] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref13) ibid. Bulgaria agreed to apply the NYC to awards made in non-Contracting States only if reciprocal treatment is given, and Cuba only where there is reciprocal treatment established by mutual agreement between the parties. See 330 UNTS 3; Pryles (n 4) 163.

[14] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref14) 2008 UNCITRAL Survey [2], [26] - [33], Annex I [1.2].

[15] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref15) United Nations Conference on International Commercial Arbitration, 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (20 May - 10 June 1958) E/CONF.26/8/Rev.1, 3, 5.

[16] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref16) Canada (1987), Austria (1988), Germany (1988), France (1989), Switzerland (1993), Slovenia (2008), The Former Yugoslav Republic of Macedonia (2009), Mauritius (2013).

[17] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref17) See above (n 6), compared to 193 United Nations member states: United Nations, 'Member States' <http://www.un.org/en/member-states/index.html> accessed 15 February 2018.

[18] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref18) According to statistics published by the International Chamber of Commerce (**ICC**) in 2015, the top 10 seats of arbitration are Paris, London, Geneva, Singapore, New York, Zurich, Bucharest, Vienna, Madrid, Mexico City and São Paulo. See ICC, '2015 ICC Dispute Resolution Statistics', *ICC Dispute Resolution Bulletin 2016* (No. 1), 9.

[19] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref19) Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 32.

[20] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref20) Albert Jan van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (29 May 2008, Rev 6); Albert Jan van den Berg, 'Explanatory Note, Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (29 May 2008, Rev 6).

[21] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref21) See Teresa Cheng, 'Celebrating the Fiftieth Anniversary of the New York Convention' (at 684), Emmanuel Gaillard 'The Urgency of Not Revising the New York Convention' (at 689 - 696), Carolyn B. Lamm, 'Comments on the Proposal to Amend the New York Convention' (at 697) and Rory Brady, 'Comments on a New York Convention for the Next Fifty Years' (at 708 - 711), all in: International Council for Commercial Arbitration, *50 Years of the New York Convention*, general editor Albert Jan van den Berg, with the assistance of the Permanent Court of Arbitration, Peace Palace, The Hague (ICCA Congress Series No. 14, International Arbitration Conference, Dublin, 8 - 10 June 2008).

[22] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref22) VCLT (n 3) arts 21(1), 22(3).

[23] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref23) Pryles (n 4) 184.

[24] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref24) Such difficulties have been caused by confusion as to whether the nationality of the parties is relevant to the meaning of 'reciprocity' in art I(3) and whether the reciprocal reservation excuses the application of the NYC to awards that are 'a-national'. Furthermore, national courts have taken inconsistent approaches to determining the following: whether a country in which an award is made is a NYC country; where an award is made; and, the retroactivity of the NYC for the purpose of such the reciprocity reservation. See UNCITRAL, *Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (2016 ed) 29 - 33, 328 - 329; Pryles (n 4); Young-Joon Mok, 'The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958' (1989) 21 *Case Western Reserve Journal of International Law* 123; Björn Gehle & Saloni Kantaria, 'The enforcement of arbitral awards in India – the elephant in the room' (Clayton Utz publication 25 February 2011) <https://www.claytonutz.com/knowledge/2011/february/the-enforcement-of-arbitral-awards-in-india-the-elephant-in-the-room> accessed 15 February 2018.

[25] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref25) Pryles (n 4) 163. To the author's knowledge, there is no reported case on this point as at the date of submission of this article.

[26] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref26) For example it has been argued that a broad reading of the United States of America's Federal Arbitration Act 1925,s 207 probably includes the right of a respondent to raise Art. XIV general reciprocity as a defence to enforcement and recognition. Furthermore, *Fertilizer Corporation of India v IDI Management Inc.,* United States District Court for the Southern District of Ohio, Western Division, 9 June 1981, 517 F Supp 948, cited in (1982) VII *Yearbook of Commercial Arbitration* 382 (***Fertilizer Corporation***) indicates that the general reciprocity defence has not been rejected out of hand in the United States. See Dasteel (n 2) 544 - 545; UNCITRAL, *Secretariat Guide* (n 24) 328 - 329. General reciprocity is 'to be considered plus possibly included' in the NYC redraft: van den Berg, Explanatory Note (n 20).

[27] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref27) UNCITRAL, *Secretariat Guide* (n 24) 328 - 329 (in particular, n 1393). One reason for this is that UNCITRAL Model Law jurisdictions have not made Art. XIV general reciprocity available to private litigants as a defence to recognition and enforcement of foreign arbitral awards. See Dasteel (n 2) 539 - 540, 546 – 547.

[28] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref28) *McDermott International Inc. v Lloyd's Underwriters of London*, Fifth Circuit, 3 October 1991, 944 F 2d 199, cited in (1993) XVIII *Yearbook of Commercial Arbitration* 472. According to Pryles, this suggests a broad operation of Art. XIV – for example on the basis of other countries' definitions of public policy and arbitrability - and may also extend beyond strictly legal bases of non-enforcement to political considerations dependent upon the nationality of the parties concerned. See Pryles (n 4) 184.

[29] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref29) That is, national courts should not refuse to enforce an award on the basis that the courts of the place at which the award was made, using the commercial reservation, would not have enforced the award. See *Fertilizer Corporation* (n 26) 953.

[30] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref30) Pryles (n 4); Cheng (n 21) 683; K.W. Patchett, *The New York Convention on the Recognition and Enforcement of Arbitral Awards*, Explanatory Documentation prepared for Commonwealth Jurisdictions (in association with the Commonwealth Secretariat 1981) [1.18].

[31] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref31) Pryles (n 4) 164.

[32] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref32) Björn Gehle & Saloni Kantaria (n 24) 3.

[33] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ftnref33) Dasteel (n 2) 540, 547 – 548.

---

[*] (file:///C:/Users/aarteaga/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/JDEN5053/Lalive%20-%20New%20York%20Convention.doc#_ednref1) Courtney Furner is an Associate in the International Arbitration Group in the Zurich office of LALIVE. This article was submitted to Albert Jan van den Berg in 2017 as part of Ms. Furner's assessments undertaken at the Geneva LL.M. in International Dispute Settlement (MIDS). Ms. Furner can be contacted at cfurner@lalive.ch.

C. Furner
Zurich, CH
PROFILE (/directory/profile/d697b5e607fb)

Posted: Tuesday, April 24, 2018

Topics: Litigation (Civil, Business and Commercial), Alternative Dispute Resolution

Our Mission

Our Mission is to help member firms serve their clients' legal needs and business interests through a worldwide network of quality law firms that meet high professional standards.

Firms & Professionals (/directory/search)

Practice Groups (/groups)

News & Events (/calendar/view)

Publications (/publications)

About Terralex (/Content/aboutus)

Resources & Tools (/publications)

Contact Us (/customerservice/needhelp)

Login (/login)

Register (/register)

- (http://fb.me/TerraLexGlobal)
- (https://twitter.com/terralex)
- (https://www.linkedin.com/company/terralex)
- (https://plus.google.com/105746934858083491063/about)

Copyright 2018 TerraLex, Inc. - All rights reserved. TerraLex "The worldwide Network of independent Law Firms," and the globe logo are registered trademarks of TerraLex, Inc.

Powered by **konnect'd**