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Should the Miami Draft be given a second chance? The New York Convention 2.0

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Hace una década, el 'Miami Draft' fue aplaudido por su "completo y estimulante análisis de los problemas de la Convención [de Nueva York]". Sin embargo, desde la presentación del "Miami Draft" ha habido nuevos desarrollos -tanto legales como tecnológicos- que posiblemente podrían aumentar la competencia en el mercado de resolución de disputas internacionales e incentivar cambios en el régimen actual de ejecución arbitral (ver, e.g. La Convención de La Haya sobre Acuerdos de Elección de Foro, el "incremento" en el número de cortes comerciales internacionales y los esfuerzos de la CNUDMI por introducir un mecanismo de ejecución de acuerdos de transacción). A pesar de que dicha competencia aún no ha alcanzado un punto culminante, quizás sea sensato empezar a discutir cuáles cambios a la Convención podrían ser bienvenidos.

1 Introduction

This year the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") will celebrate its sixtieth birthdays. It is considered as one of the most successful international conventions with 159 ratifying countries acceded to date. (2) A decade ago, on its fiftieth birthdays, van den Berg proposed that it is time to modernize the Convention in order to overcome its deficiencies that became evident after a half century of its application. (3) The van den Berg's efforts to improve the enforcement system by creating the "new" New York Convention ("the Draft Convention" or "the Miami Draft") have been welcomed with a moderate enthusiasm. While it was lauded by some as being a *"thought-provoking and thorough analysis of the problems with the New York Convention"*, (4) others, like Gaillard, argued that *"the issues raised by a potential revision of the New York Convention are much more intricate and likely to be highly controversial than one would expect at first sight. Against that background, the inescapable conclusion is that it is absolutely urgent to do nothing."* (5) In a similar vein, Veeder observed that *"even if the New York Convention were broke, which it isn't, the likely "cure" would be far worse than any imagined malady. It would turn a healthy workhorse into a lame old nag, if not actual cat-food."* (6)

Since the Miami Draft has reached its first decennary, one should reflect whether the idea of a revision of the Convention has not be rejected prematurely. This paper will address the viability of the van den Berg's propositions in light of recent developments as well as potential risks regarding application of the Convention in the future. To this end, it is necessary to discuss the impact of the increased competition on the market of international dispute resolution (section 2) and the technological developments (section 3) may have on the Convention. Similarly, it is necessary to review whether the
P 78 Convention, in its current shape (and with its shortcomings) ● can survive in this new age (section 4). The conclusion is that arbitration owes its esteem as a dispute resolution mechanism to the tremendous success of the New York Convention. The Convention has been a cornerstone, the first evolutionary step of this dispute resolution mechanism. (7) Since it has been already achieved, perhaps the time has come for the next one (section 5).

2 (Increasingly) Crowded Market of International Dispute Resolution

In the era of globalization, the efficient international dispute resolution mechanism is a key. Arbitration, being one of the most popular tool to resolve international commercial disputes owes its position to the success of the New York Convention. The enforceability of arbitration agreements and arbitration awards inspired different international institutions to introduce new legal instruments that will ensure a similar enforceability effect for the choice-of-courts agreements (and consequently courts' decisions) (section 2.1) and the settlement agreements (section 2.3). In case these instruments become fully operational, international arbitration will arguably lose its competitive edge against other mechanisms of international dispute resolution. Consequently, these emerging mechanisms could easily take a market share from international arbitration. Additionally, the rise of specialized (commercial) courts might effectuate in competition with international arbitration (section 2.2). All in all, even if the Convention works well, perhaps it is time to improve the arbitration enforcement system, before the competition is in a full swing.

2.1 The Hague Convention on Choice of Court Agreements

Not all cross-border commercial disputes are being resolved in arbitration and not always international commercial arbitration becomes parties' first choice. Instead, they

may also contract for litigation in the (national) court of their choice. In order to do so, parties may include "jurisdiction clauses" in their contract. In the international context, however, lack of universal rules on recognition and enforcement of these contractual provisions is a major drawback.

The Hague Convention on Choice of Court Agreements ("the Hague Convention") is aimed to fill this *lacuna*. According to its preamble, it has been designed to "*promote international trade and investment through enhanced judicial co-operation*". The "enhanced judicial co-operation" can be observed on two levels: (i) enforcement of parties' *exclusive* choice of forum (8) and (ii) recognition and enforcement of the judgement rendered by the court designated in accordance with exclusive choice of court agreement. (9) In other words, the design of the Hague Convention is to cover "front-end" (enforceability of the jurisdiction clauses) and the "back-end" issues (enforceability of the judgements) which mirrors the structure of the New York Convention. (10)

P 79

It should be noted, however that, for example, with respect to the "front-end" issues, the requirement as to the form of the exclusive jurisdiction agreement prescribed by the Hague Convention (11) corresponds much closer to the current expectations of the user than the one prescribed by the New York Convention. (12) Since on a textual level, the Hague Convention form requirement is much less strict, it can be considered as an advantage over the New York Convention system.

As to the "back-end" issues the comparison with the New York Convention is a bit more difficult because different grounds for refusal recognition and enforcement will apply to the arbitral awards and different to the court judgements. The list of the grounds available in the Hague Convention is therefore closer to the limited list of grounds available under Brussels I Recast (13) rather than the grounds for refusal under the New York Convention. (14) Importantly, one should observe that, amongst other things, the "catch-all" public policy provision is much more constrained in scope in the Hague Convention (15) in comparison to the New York Convention. This again, should be considered as a welcomed improvement. (16)

Although well-structured, the Hague Convention did not reach its full potential yet. So far there are thirty-two contracting states. (17) Importantly, only a few of them are being non-European Union members signatories. It means that for the time being the relevance of this convention remains rather limited. It might change, however, when (signatory) countries such as China and the USA will ratify it (the Hague Convention). (18)

Limited territorial scope is not the only concern regarding the Hague Convention. As observed by Briggs, including only exclusive choice of courts agreements in the scope of the Hague Convention might narrow its success. (19) Indeed, this might affect the success of the Hague Convention. It is so, because of a number of dispute resolution designs might not easily fit within the scope of the Hague Convention. It includes, for example, (i) the clauses that give an alternative choice of jurisdictions (where parties agree that courts of country A and B will have exclusive jurisdiction to hear the case), (ii) the clauses that give non-exclusive jurisdiction (where parties agree that courts of country A will have non-exclusive jurisdiction) or (iii) the clauses that give asymmetrical choice for the parties (where parties agree that the exclusive jurisdiction of courts of country A is for the benefit of one contractual party, whereas the other may submit the dispute to another court.

P 80

All in all, it seems that although modelled on the New York Convention and offering improvements, the Hague Convention will not endanger position of international arbitration as a leading dispute resolution mechanism in the upcoming years. (20)

2.2 The Rise of International Commercial Courts

International Commercial Courts are becoming increasingly popular phenomenon. They aim at attracting litigants active in international trade that are in search of neutral *fora*. The most known examples include the Dubai International Financial Centre Courts ("DIFCC") and Singapore International Commercial Court ("SICC"). On the horizon there are other (European) initiatives. One should mention the Netherlands Commercial Court ("NCC"), (21) Brussels International Business Court ("BIBC") (22) or international Commercial Court in Paris ("PICC"). (23) The common denominator of the last three is that they will allow for pleading in English and that are being established in the post-Brexit era. The question at hand, however, relates only to the issue whether the rise of these new institutions in any way would affect international arbitration and the (attractiveness) New York Convention enforcement regime.

At this point in time, no unequivocal answer can be given. There are certain factors that should be taken into account when assessing the issue. Perhaps the most crucial one is whether users of international arbitration and potential users of the newly formed international courts are the same individuals. In other words, the question is whether international courts system is in direct competition with international arbitration (and its enforcement regime).

When analyzing the issue in context of the DIFCC and the SICC two prominent scholars independently concluded that it might not necessarily be the case. (24) Both authors took London as a clear example evidencing that it is possible for (international) arbitration and litigation to co-exist and flourish simultaneously. (25) Indeed, international arbitration is not a universal panacea. This is because not all parties wish to submit their disputes to arbitration, nor not all disputes are fit to be resolved in arbitration. In some instances, traditional judicial structure is exactly what the parties are seeking. Consequently, the targeted clientele for two methods for dispute resolution (*i.e.* international arbitration and international litigation) might actually not be the same.

P 81 Menon observes, for example, that: "*certain cases are better suited for a process that is relatively open and transparent, equipped with appellate mechanisms, the options of consolidation and joinder, and the assurance of a court judgment.*" (26) *At the same author observed that certain (push) factors such as a lack of universally applicable ethical standards or a lack of consistency in the arbitral decision-making process (due to absence of appellate corrective mechanism) may discourage parties in using arbitration.* (27)

Similarly, in a case of the European international commercial courts, it is argued that the targeted group of users is different thus their creation would not directly affect development of international arbitration. Once again London should be brought to equation, albeit in a slightly different context. Since introduction of the idea of international commercial courts on the Continent coincides with the United Kingdom decision to leave the European Union, arguably these newly created initiatives will aim at attracting international litigants that are currently resolving their disputes in Commercial Court in London. Therefore, the higher likelihood of competition exists between Commercial Court in London and continental international commercial courts rather than the competition between these courts and international arbitration.

Arguably, however, one should note that the structure of the international arbitration is changing as well (*e.g.* increased judicialization of the process, increased level of transparency etc.) turning it ever-closer to a courtroom experience. In turn, it may conceivably attract (court) litigants and create a homogenous group of users interested in both international commercial court system as well as international commercial arbitration.

Currently, however, it is likely that different group of (non-arbitration) users will be attracted by a newly created international commercial courts and for this reason the rise of these institutions will not directly result in competition between different (international) dispute resolution mechanisms. Arbitration community should closely observe the developments of international commercial courts. Although, they are not immediate competitors, their potential appeal is tied with the success of the Hague Convention. (28) Even more, it will be greatly enhanced, when the Judgement Convention becomes the reality. (29)

2.3 The (draft) Convention on International Settlement Agreements

The third mechanism (but for litigation and arbitration) that can be used in resolving the international disputes is mediation. Similarly to litigation, this way of resolving disputes has not been (so far) provided with the enforcement mechanism in the international setting. In recent years the UNCITRAL has been busy in preparing such a legal tool.

Following the United States delegation proposal, the UNCITRAL has undertaken the work to introduce the convention that would facilitate the enforcement of the parties' bargain to mediate. Prior to the drafting process, the empirical studies have been conducted to

P 82 determine if the mediation enforcement convention is indeed anticipated. The empirical study confirmed the need of such an instrument and the fact that it should address the enforcement of the agreement to mediate as well as the enforcement of the settlement agreement. (30) This way, the prospective convention would have similar shape as the New York Convention as well as the Hague Convention (31) since both conventions cover the front-end and back-end issues.

It should be noted, however, the UNCITRAL's final creation addresses only the back-end issues. Pursuant to the Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Convention"): "*[e]ach Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.*" (32) It means that the Singapore Convention is limited to the enforceability of the mediation's outcome (settlement agreement). Such a solution fills the enforcement gap only in part and does not fully satisfy expectations to mirror the design of other enforcement mechanisms. In the context of potential competition between different methods of dispute resolution, this solution might limit the impact the Singapore Convention might have as a push factor for a modernization of the New York Convention.

At the same time and importantly, one should note that the UNCITRAL is careful in aligning the newly drafted instrument with other (existing and future) elements of architecture of international dispute resolution. (33) This would entail the New York Convention, the Hague Convention (34) and the 2018 Preliminary Draft Convention on Judgments. (35) It shows that all international dispute resolution enforcement mechanisms might also be prone to co-exist in symbiosis.

3 Opportunities and Challenges Created by Online Arbitration and Technological Developments

The online dispute resolution (ODR) platforms create an excellent alternative for the "traditional" dispute resolution mechanisms, particularly in cases where the amounts at stake are not high. ODR as its older brother –ADR– can take different forms, including negotiation, mediation and arbitration. For the research at hand, only the last, *i.e.* online arbitration, (36) is of relevance. The outstanding issue that continues to attract attention of the legal community is the enforceability of online arbitration agreements (section 3.1) and online (cross-border) arbitral awards (section 3.2) under the New York Convention.

P 83

By and large, the current structure of the Convention was not designed to entertain the notion of truly online arbitration agreements and awards (including those rendered by artificial intelligence). Amongst other things, the formal requirements imposed on agreements and awards may present an obstacle to fully digitalized arbitral process.

3.1 The enforceability of the online arbitration agreements

The notion of online arbitration has been present in the legal literature for a few decades now. (37) It has been suggested that it might be a good fit (at least) for the disputes of lower stakes (for example B2C disputes) but it never reached a phase of becoming a true competitor for the "traditional" arbitration model. Currently, the most prominent presence online arbitration is within the internet domain names disputes. One of the features of online (domain) arbitration that generally might affect the celerity of the proceedings is a "document only" character. Importantly, blockchain technology is a development that has a potential of changing perception of online (or e-) arbitration and of increasing its appeal. (38) In the context of online arbitration agreement, the main legal issue that arises is the formal requirement prescribed by Article II(2) of the Convention, whereas the enforcement of blockchain arbitration agreement might raise concern as to interpretation regarding formation of the contract and vices of consent. (39)

Pursuant to Article II(2) of the Convention "*[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*" This provision imposes rather stringent formal requirements on the parties (signature or exchange of letters) which is not in line with the modern arbitration laws that "*gradually abandoning the requirement of the written form, treating the arbitration clause on the same footing as other clauses in a contract.*" (40)

It is, of course, generally mitigated by the pro-arbitration bias of the enforcement courts and remedied by the UNCITRAL's generous recommendation regarding the interpretation of Article II of the Convention. (41) Such an understanding of Article II(2) of the Convention does not directly emanate from its text and might be more difficult to reconcile with emerging forms of expressing consent. Consequently, van den Berg's proposal to eliminate the form requirement from the Convention should be welcomed. (42)

P 84

In the online arbitration context, it is necessary to mention the "browse wrap" and "click wrap" arbitration agreements. Arguably, these types of agreement fall far from the historical (outdated) language of the Convention. (43) Importantly, in the recent contribution (that presupposes the impossibility of any change to the Convention) Wolff advocates that even "browse wrap" and "click wrap" agreements would eventually be covered by the Convention. He suggests that the "browse wrap" and "click wrap" arbitration agreements may be considered as exchange of declarations to conclude an agreement and as such be subsumed under second tier of Article II(2) of the Convention ("exchange of letters"). (44) As highlighted above, potential blockchain arbitration agreements might also create problems – although perhaps not with the form of the agreement. (45)

Arguably, the blockchain arbitration agreement will not be immune to the classic legal interpretation issues regarding the consent, for example misrepresentation, fraud, mistake. This might in turn trigger questions as to the validity of the agreement. Self-executing character of the smart-contract would likely trigger arbitration to resolve the issues (including validity of the arbitration clause itself). At the same time, however, the matter of enforceability of the arbitration agreement might be brought in parallel to the national court. Or it might be considered in the context of proceedings under Article II(3) of the Convention, which reads that: "*[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*" In either case, automation of the blockchain technology might create a hardship to the administration of justice.

Additionally, on the one hand, one may argue that the self-executing character of the blockchain arbitration agreement would in principle make an enforcement mechanism (such as the Convention) rather obsolete. On the other hand, however, submitting the

arbitral award for enforcement under the Convention (be it as it may as "e-award" or "traditional" award) based on blockchain arbitration agreement might create some difficulties. (46) In particular, Article IV(1)(b) of the Convention requires submission of the original arbitration agreement (as referred to in Article II of the Convention) upon application of enforcement and –importantly– such an agreement needs to be in the language of the country of enforcement (47) (whereas a blockchain would be written in code).

The legal developments have always been behind the technological advancements. Yet, the Convention thanks to the universal endorsement of pro-arbitration philosophy survived many of them. The question remains if the new wave, however, is not too tall.

P 85

3.2 The enforceability of online arbitral awards

The enforceability of online arbitral award has also been a subject of discussion for a while, analyzed hand-in-hand with the online arbitration agreements. (48) Usually the studies concentrate on the requirements prescribed under Article IV and Article V of the Convention and whether online award fulfills them. (49) At the same time, it is also sensible to reflect on the applicability of the Convention regime to blockchain arbitral awards as well as the awards rendered by Artificial Intelligence ("AI"). All three issues will be discussed in turn.

Although scholars do not necessarily exclude that the online arbitral award may be enforced under the Convention, it is generally not advised to render a digital arbitral award and expose it for risk of refusal of enforcement. (50) The challenges to online awards are two-fold. On the one hand the award needs to comply with Article IV of the Convention, on the other the award must be resistant to Article V challenges.

Article IV of the Convention prescribes requirements to be fulfilled by a party who applies for enforcement of the arbitral award. In essence, the party should supply the enforcement court with the (i) "*the duly authenticated original award or a duly certified copy thereof*" (51) and (ii) "*[t]he original agreement referred to in article II or a duly certified copy thereof*". (52) In case of an online arbitration award, these requirements might create some difficulties.

Wahab explains that in order to satisfy Article IV(1)(a) requirements "*an e-award must be 'in writing' and duly 'signed'.*" (53) These will be fulfilled in case when the "*e-award is accessible so as to be usable for subsequent reference*" (54) and when it is either printed on paper or digitally signed for authentication purposes. (55) Wolff suggests that challenges
P 86 related to Article IV(1)(a) of the Convention will only happen if parties cannot "*rely on a more recognition-friendly national law such as Article 35(2)(1) of the [2006 Model Law].*" (56) Importantly, these difficulties have already been tackled in the Miami Draft. (57)

The second requirement of Article IV (*i.e.* including the original agreement to arbitrate) has already been discussed above. (58) Notably, however, it is also covered by the Miami Draft. As explained by van den Berg: "*[u]nlike Art. IV(1)(b) of the New York Convention, Art. 4 of the Draft Convention does not oblige the party seeking enforcement of the award to supply (a copy of) the arbitration agreement. The abandonment of this requirement follows the liberalization of the formal requirements regarding the arbitration agreement in the Draft Convention*" (59) Such a modification of the provision should be welcomed also in context of the translation prerequisite under Article IV(2) of the Convention. (60)

Apart from the Article IV requirements, the online arbitral award should withstand the challenges it may face pursuant to Article V of the Convention. Apart from the usual Article V analysis, Wolff observes that the online arbitration award might be refused recognition and enforcement pursuant to Article V(1)(e) of the Convention if it does not satisfy (i) the form requirements or (ii) the delivery requirements of *lex arbitrii*. (61) Should the (new) Enforcement Convention be applicable to the online arbitration it would be sensible to address these issues within.

The next issue of relevance is the one of the blockchain awards. Similar to the blockchain arbitration agreements, (62) these would be, in principle, self-executing thus will not require the enforcement mechanism. At the same time, however, automatic effect of such an award allows them to escape any court supervision and in turn might trigger doubts as to its acceptability in the international legal framework, (63) including right to fair trial in particular. These issues, however, have not been addressed neither by the Convention nor by the Miami Draft.

The last challenge that could not have been foreseen when the Convention was introduced is the arbitral award being rendered by AI. (64) One obstacle may relate to
P 87 the procedural rules at the country of enforcement. It is simply because, until now, national arbitration regimes may refer to arbitrator as a natural person, (65) which may give a rise to a successful setting-aside application against AI-rendered award. Another one is created by Article IV(1)(a) of the Convention, which has been discussed above, namely (signature) authentication of the award rendered by the AI. Arguably, the Miami Draft would be more open to accommodate the AI awards. (66)

It is unlikely that under the current enforcement system, arbitrators will put their award

at risk by rendering it only in digital form. It is also yet to be seen if (now futuristic) notion of the AI international arbitral award would fit under the Convention regime. Arguably, however, the new enforcement formula might be useful in the context of online arbitration.

4 Adaptability of the New York Convention to Changed Circumstances

The aim of the analysis above, was to outline what are potential challenges to international arbitration and to the Convention itself. (67) The outstanding question is whether –and if so how– these challenges can be overcome within the current framework of the Convention. An outdated language and strict requirements of the Convention might limit the adaptability of the Convention (section 4.1) and create a situation where applicants are reliant on liberal interpretation of the Convention by the courts. The UNCITRAL soft (persuasive) tools might also be insufficient, considering how many elements they should cover (for example in case of online arbitration) (section 4.2).

4.1 Archaic requirements and (outdated and) unclear language of the New York Convention

In sixty years of application of the Convention certain interpretative difficulties became evident. These have been flagged by van den Berg already ten years ago. (68) Van den Berg categorized his observations in five points, which dealt with provisions that: (i) are missing in the current text of the Convention, (ii) should be modernized, (iii) use unclear text, (iv) use outdated text or (v) should be aligned with "prevailing" judicial interpretation. Arguably these deficiencies continue to limit the adaptability of the Convention to new developments.

For example, one of the likely-to-be-welcomed modification to the text of the Convention would be a change to an archaic and strict "writing" requirement applicable to the parties' agreement to arbitrate in Article II(2) of the Convention. Although, the UNCITRAL released its recommendation as to the interpretation of said provision, by which it relaxed the standard of the form requirement, (69) this would be one of the most pressing
P 88 front-end issues to be changed in the text of the Convention ● itself. (70) This is so, especially taking into account that a potential competition (such as the Hague Convention) makes use of modern design with regard to the front-end issues. (71)

The need for a change can also be observed if one looks at an unclear and/or outdated text of the New York Convention. One of the illustrations of unresolved dilemma deals with the use of the word "may" in the text of Article V(1) of the New York Convention. (72) The use of discretionary language in the English text of this provision have triggered considerable amount of debate among authorities who could not agree whether the enforcement court has a duty or discretion to accept the challenge if all the conditions are fulfilled. (73) Another illustration is the text of Article V(1)(c) of the New York Convention and the difficulty with distinction between the "terms of submission to arbitration" and the "scope of submission to arbitration" (amongst other things). In fact, this wording has already been included in the text of the Geneva Convention, the predecessor of the New York Convention. (74) This means that the text remained unchanged for nearly a hundred years now.

Although some of the deficiencies are of limited importance and many others can be often remedied by the judicial interpretation aligned with the pro-enforcement spirit of the New York Convention, the fact remains that the application of the Convention might require stretching its linguistic constrains potentially to the higher degree than application of its modern counterparties in the realm of international litigation and international mediation. (75)

4.2 Limited efficiency of the UNCITRAL soft tools

The UNCTIRAL efforts to ensure consistent application of its instruments is praiseworthy.
P 89 (76) At times, however, they might not be sufficient or even create a ● confusion. The most recent examples of the UNCITRAL work relevant in the context at hand are the following tools: (i) the UNCITRAL Recommendation of 2006, (77) (ii) the UNCITRAL Digest on the Model Law (78) and (iii) the UNCITRAL Secretariat Guide to the New York Convention. (79) As mentioned above, these instruments are tailored to safeguard uniform interpretation of the UNCITRAL texts. (80)

When ten years ago van den Berg advocated for the new enforcement convention he was critical in using interpretative guidelines as a remedy against the New York Convention defects. He observed that *"the New York Convention's shortcomings [cannot] be remedied adequately and comprehensively by a "Recommendation regarding the interpretation" issued by international bodies such as UNCITRAL in 2006 regarding Arts. II(2) and VII(1). The mechanism of guidance notes in interpreting an international convention is useful for texts that can be subject to various interpretations, but its value is limited if a text is lacking or if the guidance contradicts an existing text."* (81) Indeed, considering the amount of changes made in the Miami Draft, one could observe that the recommendations might not suffice. (82)

Additionally, some of the provisions of the New York Convention creates interpretative

difficulties. (83) One of the examples is the meaning and distinction between the "terms of submission to arbitration" and the "scope of submission to arbitration" in the context of Article V(1)(c) of the New York Convention. (84) The UNCITRAL Secretariat Guide clarifies that *"[t]hough some authors have argued that article V (1)(c) provides a second, separate ground for refusal to enforce an award rendered ultra petita, courts have rejected challenges to recognition or enforcement under article V (1)(c) based on the fact that the arbitrators had exceeded their authority by deciding on issues or granting forms of relief beyond those pleaded by the parties."* (85) The judicial interpretation on which the Secretariat supports its argumentation is based on two U.S. decisions which is of a rather limited authority to provide for uniform reading of the Convention. (86) This is especially so, when compared with the judicial interpretation of the corresponding grounds of the Model Law, (87) as discussed in other interpretative guide endorsed by the UNCITRAL, namely the Digest of the Model Law judgements. (88)

P 90

For example, when discussing Article 34 (which mirrors the text of Article V of the Convention and can be used in the setting aside stage), the UNCITRAL Digest concluded that : *"[s]everal courts have stated that, in determining the "terms of the submission" to arbitration and "scope of the submission" in paragraph (2)(a)(iii) [of Article 34 of the Model Law], the arbitration agreement and other relevant contractual provisions, the notice of request for arbitration, and the pleadings exchanged between the parties are to be taken into account."* (89) The similar findings related to Article 36(1)(a)(iii) of the Model Law (which, again, is almost identical as Article V(1)(c) of the Convention). (90) The authors of the UNCITRAL Digest observed that: *"[...] allegations that an arbitral tribunal awarded more than requested by the claimant are often treated as falling within the ambit of paragraph 1(a)(iii) [of the Article 36 of the Model Law]. However, in determining what has been claimed by a party, a court considered that the arbitral tribunal may go beyond the mere wording of the request and interpret the request in light of the other documents submitted to it."* (91) The approach expressed in the UNCITRAL Digest shows resemblance to approach of the ICCA Guide to the New York Convention where it is explained that *"[i]n determining what the parties have submitted to the arbitral tribunal, regard must be had to the arbitration agreement and the claims for relief submitted to the arbitral tribunal by the parties."* (92)

Considering that the UNCITRAL instruments are designed to ensure harmonized application of the Convention and the Model Law, the discrepancies between the texts discussed above might hinder their coordinated application.

5 Dormant Potential of the Miami Draft

As already observed in the introduction, the Miami Draft has been introduced to eliminate evident shortcomings of the Convention. At the same time, however, new challenges emerged that should be carefully considered in the modified draft. The major criticism, evocatively portrayed by Veeder, (93) focuses on the fact that the New York Convention operates well and thus should not be changed. Arguably, however, international arbitration community should join van den Berg's (impossible) (94) dream in times when international arbitration is a subject of increased criticism and when competition on the international dispute resolution market (slowly but steadily) becomes a reality. While designing the new enforcement framework, one should be open to accommodate technological advancements and perhaps emancipate (online) arbitration from the legal boundaries of the seat. But this is probably a completely new dream to be had.

P 90

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3) A similar exercise has been undertaken a decade earlier as well. See, *i.a.*, papers presented at the Ninth ICCA Congress (Paris, 1998). Available at www.kluwerarbitration.com (last accessed 31 November 2017).
4) (Brady 2009) p.711.
5) (Gaillard 2009) p.696.
6) (Veeder 2010) p.194.
7) Or the second, considering the Geneva Convention.
8) See Art. 5 of the Hague Convention pursuant to which (in principle) the selected court has jurisdiction and shall not decline to exercise it. Also, Art. 6 of the Hague Convention according to which, courts not chosen (again, in principle) have an obligation to suspend or dismiss proceedings to which the exclusive choice of court agreement applies.
9) See Art. 8 of the Hague Convention.

10) See also (Ahmed and Beaumont 2016) p.4 ("*[t]he Hague Convention operates in parallel with the very successful 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*").
11) See Art. 3(c) of the Hague Convention.
12) See Art. II(2) of the New York Convention. See also section 4.1.
13) Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast").
14) Compare Art. 9 of the Hague Convention, Art.45(1) of the Brussels I Recast, and Art. V of the New York Convention.
15) See Art. 9(e) of the Hague Convention ("*recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State*").
16) At the same time, both conventions (at least in its language versions) use a permissive language.
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18) China have become a signatory on 12 September 2017 whereas the USA on 19 January 2009. For further reading see https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (last accessed 28 August 2018).
19) (Briggs 2008) pp.528-532.
20) The paradigm may shift when the most ambitious project commenced by the Hague Conference on Private International Law is introduced. This is namely, the Convention on Recognition and Enforcement of the Foreign Judgements. See further https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf (last accessed 28 August 2018).
21) https://www.rechtspraak.nl/English/NCC (last accessed 30 June 2018).
22) https://www.lexgo.be/en/papers/judicial-law/international-private-law/creation-of-an-english-speakin... (last accessed 30 June 2018). http://arbitrationblog.kluwerarbitration.com.eur.idm.oclc.org/2018/06/25/the-belgian-government-unve... (last accessed 30 June 2018).
23) https://www.transnational-dispute-management.com/news/20170530pr.pdf (last accessed 30 June 2018).
24) See (Hwang 2015) and (Menon 2015).
25) See (Menon 2015) p.9, (Hwang 2015) p.195.
26) (Menon 2015) p.9.
27) (Menon 2015) pp.9-10.
28) See section 2.1.
29) This is one of the most ambitious project commenced by the Hague Conference on Private International Law. See further https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf (last accessed 30 June 2018).
30) For further reading see *i.a.* (Strong, Realizing Rationality: An Empirical Assessment of International Commerical Mediation 2016) p.45. See also (Strong, Beyond International Commercial Arbitration? The Promise of International Commercial Mediation 2014) pp.32-38.
31) See section 2.1.
32) Art. 3(1) of the Singapore Convention. See, *A/73/17*.
33) The important goal for the UNCITRAL was to avoid potential gaps or overlaps between selected mechanisms. Therefore, the application of the Singapore Convention has been limited to settlement agreements that are product of mediation process. What follows is the exclusion of enforcement of the settlement agreements that are enforceable as judgements or arbitral awards. See, Art. 1(3)(a) and Art. 1(3)(b) of the Singapore Convention. See, *A/73/17*.
34) See section 2.1.
35) See further https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf (last accessed 16 September 2018).
36) For the purpose of this paper online arbitration is considered to be a truly electronic process, the whole arbitration throughout its lifeline is made online. It means that arbitration agreement is concluded online, proceedings are online and the arbitral award is also rendered online.
37) See *i.a.* contribution of (Arsić 1997). See also (Barnett and Treleaven 2018) mapping existing online dispute resolution mechanisms.
38) http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative... (last accessed 24 June 2018). See also *i.a.*https://datarella.com/codelegit-conducts-first-blockchain-based-smart-contract-arbitration-proceedin... (last accessed 24 June 2018).
39) Although, currently the discussion regards usually utility of the blockchain in arbitration or application of arbitration as a dispute resolution mechanism in blockchain context (with the agreement possibly concluded in the traditional way, see fn.37), one may not exclude the possibility of arbitration agreements embedded in the smart contract.
40) (van den Berg 2009) p.654. See for example, Art. 7(4) (option 1) and Art. 7 (option 2) of the 2006 UNCITRAL Model Law on International Commercial Arbitration.

41) *The UNCITRAL Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006).* See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html (last accessed 20 March 2018) ("the UNCITRAL Recommendation"). See also section 4.2 below.
42) See van den Berg's explanation in (van den Berg 2009) p.654. See also section 4.1.
43) This deficiency of an archaic form requirement of the Convention has already been identified by van den Berg a decade ago and is further explained below. See section 4.1.
44) (Wolff 2018) p.12.
45) The recording function of the blockchain will provide strong evidence that the agreement has been concluded.
46) Of course, if the "arbitral award" is also embedded in the blockchain there will be no need for enforcing it under the Convention. Arguably, however, not all decisions might be issued through the blockchain itself. If the award deals with legal concepts (*e.g. force majeure*), a "traditional" award might need to be issued.
47) See Art. IV(2) of the Convention.
48) See section 3.1. For further reading see *i.a.* (Haloush 2008), (Wahab 2012), (Wolff 2018).
49) For example, contrary to the prevalent perception of arbitration, the mechanism of "online [domain] arbitration" is of a non-binding nature which entails that it will not be enforceable under the Convention. See, for example, Art.4(k) of Uniform Domain Name Dispute Resolution Policy ("*The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded*"). Available at https://www.icann.org/resources/pages/policy-2012-02-25-en (last accessed 30 June 2018). See also (Wahab 2012) p.428.
50) See (Wolff 2018) p.17 ("*If the arbitral tribunal makes every effort to make sure that the award is enforceable at law (as prominently required by Article 42 ICC Rules 2017), it will often refrain from rendering a digital arbitral award.*"). Other suggests distributing a paper version of the electronic award, see (Haloush 2008) p.364. See also (Wahab 2012) p.425 ("*Whilst such electronic record of the e-award would qualify as 'writing', it merits authentication and formalization in order to qualify as an original document. In the context of e-awards, this is possible through one of two options: (i) printing the e-award on paper and signing it manually for authentication, which transforms its nature to a paper-based award; [...].*").
51) Art. IV(1)(a) of the Convention.
52) Art. IV(1)(b) of the Convention.
53) (Wahab 2012) p.424.
54) (Wahab 2012) p.424. The author makes also a reference to Article 9(2) of the UN Convention on the Use of Electronic Communications in International Contracts (2005).
55) (Wahab 2012) p.425.
56) (Wolff 2018) p.17. Article 35(2)(1) of the Model Law abandoned authentication and certification requirement.
57) See further (van den Berg 2009) pp.658-660 and http://www.newyorkconvention.org/11165/web/files/document/1/6/16014.pdf (last accessed 30 June 2018).
58) See section 3.1.
59) (van den Berg 2009) p.659.
60) See also section 3.1.
61) (Wolff 2018) p.16. Wolff also highlight the controversies related to the notion of the arbitral award under Article 1(1) of the Convention. For further reading, see (Wolff 2018) p.16. These, however, have been also identified by van den Berg in the Miami Draft. See (van den Berg 2009) pp.451-453.
62) See section 3.1.
63) Including its *res iudicata* effect.
64) See also on the international arbitration and artificial intelligence: http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelli... (last accessed 30 June 2018), http://arbitrationblog.kluwerarbitration.com/2017/05/04/machine-arbitrator-are-we-ready/ (last accessed 30 June 2018), http://arbitrationblog.practicallaw.com/machine-arbitration-will-we-be-out-of-our-jobs-in-20-years/ (last accessed 30 June 2018), http://www.youngicca-blog.com/machine-arbitration-and-machine-arbitrators/ (last accessed 30 June 2018).

65) See e.g. Art. 1450 of the French Code of Civil Procedure ("*Only a natural person having full capacity to exercise his or her rights may act as an arbitrator*"). See, however, http://www.youngicca-blog.com/machine-arbitration-and-machine-arbitrators/ (last accessed 30 June 2018) and reference to Hong Kong.
66) See Art. 4(2) of the Miami Draft ("*The party seeking enforcement shall supply to the court the original of the arbitral award.*").

67) See section 2 and section 3.
68) For further reading see, (van den Berg 2009) pp.649-650.
69) See fn.40.
70) Which was addressed in the Miami Draft by excluding the form requirement. See van den Berg's explanation in (van den Berg 2009) p.654 ("*It is submitted that requirements for the form of the arbitration agreement are no longer needed. Actually, modern arbitration laws are gradually abandoning the requirement of the written form, treating the arbitration clause on the same footing as other clauses in a contract [...] The Draft Convention follows this trend by no longer imposing an internationally required written form. Rather, as is the case under the New York Convention in other respects regarding the arbitration agreement, the Draft Convention refers to the applicable law for questions concerning the validity of the arbitration agreement.*"
71) See section 2.1. In short, the requirement as to the form
72) See Art. V(1) of the New York Convention ("*Recognition and enforcement of the award may be refused, [...]*"). For a discussion of the issue see *e.g.* [...].
73) It is observed that the Hague Convention operates with the discretionary "may" as well when discussing the courts power to refuse recognition and enforcement (See Art. 9 of the Hague Convention). This can be considered as a conscious policy choice considering the debate over "may" in the context of the New York Convention but also the use of "shall" in the Brussels I Recast (see Art. 45(1) of the Brussels I Recast). The Miami Draft also uses peremptory "shall" (see Art. 5(3) of the Miami Draft).
74) Compare Art.2(c) of the Geneva Convention ("*That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.*") and Art. V(1)(c) of the New York Convention ("*The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration,[...]*").
75) See section 2.1 and section 2.3.
76) Although the New York Convention was introduced before the creation of the UNCTIRAL, "*promotion of the Convention is an integral part of the work programme of UNCITRAL*". See (UNCITRAL Secretariat 2016) p. ix.
77) See fn.40.
78) *The UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*. See http://www.uncitral.org/uncitral/en/case_law/digests.html (last accessed 30 June 2018).
79) *The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. See http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf (last accessed 30 June 2018).
80) See (UNCITRAL Secretariat 2016) p. ix ("*[The General Assembly] emphasized the necessity for further national efforts to achieve universal adherence to the [New York] Convention, together with its uniform interpretation and effective implementation.*"), (UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 2012).
81) See also (van den Berg 2009) p.650.
82) See http://www.newyorkconvention.org/11165/web/files/document/1/6/16014.pdf (last accessed 30 June 2018).
83) See section 4.1.
84) As well as its relation to Article V(1)(a) of the Convention.
85) See (UNCITRAL Secretariat 2016) p.175.
86) See (UNCITRAL Secretariat 2016) p.175.
87) See Art. 34(2)(a)(iii) and Art. 36(1)(a)(iii) of the Model Law.
88) See fn.77.
89) See (UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 2012) p.151 (with the reference to two Canadian courts decisions).
90) Minor differences do not change the general meaning of this Article.
91) (UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 2012) p.180.
92) (International Council for Commercial Arbitration 2011) p.93.
93) (Veeder 2010) p.194 ("*[...] even if the New York Convention were broke, which it isn't, the likely "cure" would be far worse than any imagined malady. It would turn a healthy workhorse into a lame old nag, if not actual cat-food.*").
94) See http://arbitrationblog.kluwerarbitration.com.eur.idm.oclc.org/2018/06/21/eve-new-york-conventions-60... (last accessed 30 June 2018).

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