

Book Review

NEW YORK CONVENTION – ARTICLE-BY-ARTICLE COMMENTARY¹

Reinmar Wolff ed

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1 In a cross-border context, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”) is a cornerstone of international arbitration. It governs not only the recognition of an agreement to arbitrate but also the recognition and enforcement of the work product standing at the end of arbitration proceedings in the form of an arbitral award. As of May 2021, 168 States have acceded to the Convention in order to signal to the globally active entrepreneur and business undertaking that safeguards to protect trade and investment have been codified so that arbitration as a means of dispute resolution is effective and provides an award creditor with a recognised legal framework to enforce the rights determined by the arbitral award against the award debtor.

2 As Reinmar Wolff who is Assistant Professor at the University of Marburg, Germany, and a practising lawyer and experienced international arbitrator has mentioned in his preface to the second edition, no central entity exists which is entrusted with the authoritative interpretation of the Convention. This is the gap which the book skilfully bridges by providing case law and legal materials from around the world. As editor, Wolff has gathered and kept together from the first edition his team of nine learned fellow authors who are all specialists in international arbitration and enforcement and recognition proceedings (Christian Borris, Bernd Ehle, Todd J Fox, Rudolf Hennecke, Angela Kölbl, Christoph Liebscher, David Quinke, Maxi Scherer and Stephan Wilske).

3 The commentary runs through the 16 Articles of the Convention Article by Article in a comprehensive and detailed manner allowing the reader to swiftly find his or her particular issue of interest. In addition, the five annexes include the Convention in its authentic languages, give particulars on the status of accession to the Convention by providing the List of Contracting States, Dates, Reservations and Declarations as well as the 2006 UNCITRAL Recommendation as regards Arts II and VII, the

1 C H Beck/Hart/Nomos, 2nd Ed, 2019.

complete set of the sources with references to documents reflecting the *Travaux Préparatoires* and finally the complementing conventions such as the Geneva Convention and the European Convention. In addition, the book contains an impressive “Table of Cases and Awards” stemming from Albania to Zimbabwe by linking the case materials to pertinent Articles of the Convention. It closes with a detailed and easily applicable index which is a helpful tool to connect an issue in question to the relevant Article of the Convention.

4 After the “Preliminary Remarks” written by Liebscher who gives a general overview including the importance and relevance of the Convention and its history as well as the difficult topic of the lack of uniformity in respect of the rules of its interpretation, the subsequent commentary of each Article of the Convention and its subsections starts with an impressive, specific bibliography of legal and scholarly writings on the subject matter in question followed by a detailed table of contents providing a compass through the analysis that follows, an overview on the issues governed by the Article, its spirit and purpose, the drafting history and then an in-depth analysis of the text of the relevant Article and its practical application.

5 Article I commented by Ehle explains in a comprehensive manner the scope of application of the Convention by thoroughly looking at the term “arbitral award” and the relevant criteria for the foreign character of an award in contrast to domestic awards. In his view, “delocalized” or “a-national” awards do not fall within the ambit of the Convention.² Likewise, decisions that are temporary in nature such as emergency arbitrator decisions are outside the scope of Art I.³

6 Wolff rightly suggests that an autonomous interpretation of the “in writing” requirement under Art II should include the principles articulated in Art 9(2) of the UN Electronic Communications Convention which reflects international consensus and may as such be considered giving due regards to the Convention’s openness towards contemporary communication technology.⁴ As regards the enforcement of arbitration agreements under Art II(3) in the event that the court of a Contracting State is seized of an action governed by an agreement to arbitrate, Wilske/Fox argue that absent clear indications to the contrary, a general express or implied choice of law should be viewed as governing the arbitration

2 Ehle in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art I, para 110.

3 Ehle in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art I, para 71a.

4 Wolff in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art II, para 123i.

agreement also.⁵ Only in a clear default situation, the proper law of the agreement to arbitrate may be determined by the law of the place of arbitration. Both contributors carefully analyse the court's standard of review and suggest that a public policy defence should not be permissible at this stage.⁶

7 Articles III and IV are analysed by Scherer and shape out the essential principles of the Convention, *ie*, the affirmation and enhancement of the Convention's pro-enforcement bias by articulating important limitations regarding the application of the *lex fori* to the recognition and enforcement procedure. The conditions of Art IV are exhaustive and should not be construed as providing for mandatory procedural prerequisites but merely as evidentiary means, which is a more liberal approach in line with the Convention's objective to facilitate recognition and enforcement of foreign arbitral awards.⁷

8 The commentary of Art V covers 230 pages with contributions from Borris, Hennecke, Liebscher, Quinke, Scherer, Wilske, Fox and Wolff. This is not unsurprising as the reasons for refusal of recognition and enforcement form the reality test of the Convention. While the list of grounds for refusal is exhaustive but not exemplary, issues like the "manifest disregard of the law" or "foreign non-convenience" are rejected by Borris/Hennecke as grounds for successfully resisting enforcement. Wilske/Fox address the particular problems not covered by the Convention such as issues of agency and corporate or organic representation.⁸ Scherer deals with the minimum requirements for a fair arbitral procedure guaranteed by Art V(1)(b) by referring to the different standards applied in the Contracting States as regards the conditions that constitute a fair process.⁹ Liebscher analyses the effects of an award which has been set aside in the country of origin and suggests not to enforce such award unless it has been set aside in extraordinary circumstances like egregious violations of due process principles.¹⁰ Quinke carefully explains the concept of arbitrability codified in Art V(2)(a) and distinguishes subjective and objective arbitrability by giving a comprehensive overview on the latter

5 Wilske/Fox in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art II, para 233.

6 Wilske/Fox in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art II, para 307.

7 Scherer in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art IV, para 27.

8 Wilske/Fox in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art V, paras 123 and 124.

9 Scherer in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art V, para 169 ff.

10 Liebscher in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art V, para 391.

issue by analysing acts of state, antitrust, consumer, insolvency law as well as disputes relating to intellectual property rights and intra-corporate disputes. Wolff qualifies the general concept of public policy as a safety-valve mechanism allowing the Contracting State to prevent the intrusion of awards into its legal system which the State considers irreconcilable with it.¹¹

9 The “more favourable right provision” which forms part of Art VII is carefully commented by Quinke by explaining the relationship between the Convention and other sources of law. The commentary is completed by Kölbl’s thorough analysis of the various technical matters dealt with in Arts VIII–XVI. She provides a rich body of references to historical details including country specific statements and sources of the *Travaux Préparatoires*.

10 The standard price of €230 for the book is highly competitive for such an in-depth commentary of this outstanding quality. It is a most useful knowledge base for all practitioners in international arbitration including judges, arbitrators and counsel as well as scholars and students and deserves a prominent place in every reference library.

11 Wolff in *New York Convention – Article-by-Article Commentary* (Reinmar Wolff ed) (C H Beck/Hart/Nomos, 2nd Ed, 2019) Art V, para 490.