The United States Joins the Inter-American Arbitration Convention

Houston Putnam LOWRY*

The United States Congress recently enacted the necessary implementing legislation so that the United States can become a party to the 1975 Inter-American Convention on International Commercial Arbitration (Inter-American Convention). The Inter-American Convention requires countries to enforce agreements to arbitrate and arbitration awards on the basis of reciprocity.

I. THE ROLE OF ARBITRATION IN INTERNATIONAL TRANSACTION

As a general rule, judgments rendered by foreign courts are not enforceable in other countries, except based upon the principle of comity. Enforcement based on comity borders on enforcement as a matter of grace instead of enforcement as a matter of right. Businessmen require an effective mechanism to settle their disputes, especially when engaging in international trade. They are concerned about possible bias when suing in foreign court.[1] Foreign procedure puts the United States businessman at a disadvantage[2] because of a different jurisprudential history, a different relationship between counsel and client and a possible language barrier.

The modern answer is international commercial arbitration.[3] Arbitration is always a voluntary decision. The parties agree to give the arbitral tribunal the power to issue a binding decision on a particular dispute.[4] The parties have the power to select the arbitrators, so they can select people with the qualifications they desire.[5] This avoids the problem of "parochial bias."

The parties may specify where the arbitration will be held, the language of the arbitration and its rules of procedure. This is often done by adopting an already existing set of rules or specially designing rules for the specific arbitration. The parties

* Tarlow, Levy, Harding and Droney, P.C. Associate, Chartered Institute of Arbitrators (London, U.K.) and former chairman of the Connecticut Bar Association's Section of International Law and World Peace.

[1] This is the original reason behind diversity jurisdiction in the United States Constitution. A Connecticut citizen had every reason to distrust the reliability and independence of those "foreign courts" in Massachusetts, Virginia and New York.

[2] Even if only psychological and because the businessman cannot use his customary counsel.

[3] This can be an institutional arbitration under the rules of the International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration, the Stockholm Chamber of Commerce, etc., or an *ad hoc* arbitration specially created for the situation.

[4] The dispute may already exist, which means the agreement to arbitrate is called a submission agreement. If the dispute does not exist, it is simply an agreement to arbitrate future disputes. The vast majority of arbitrations result from agreements to arbitrate made before there was a dispute between the parties.

[5] Presumedly impartial experts, knowledgeable in the type of dispute being resolved, or attorneys.

may go so far as to establish the rules of evidence as well. If the parties fail to specify any matter of procedure, the arbitral tribunal may determine its own procedure.

The enforceability of private agreements to arbitrate and arbitration awards took a tremendous step forward when the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was drafted by the United Nations Conference on International Commercial Arbitration. This Convention was prompted by a substantial growth in international trade after World War II and an increasing dissatisfaction with prior Conventions.[6] The United States became a party to this Convention in 1970. Over 80 States presently adhere to the New York Convention.

II. Latin American problems with agreements to arbitrate and enforceability of arbitral awards

Agreements to arbitrate are enforceable in the United States because of state arbitration Statutes and the Federal Arbitration Act.[7] Agreements to arbitrate were not enforceable in early English common law because they ousted the court of jurisdiction and violated public policy.[8] Latin American countries share our ancestors' bias against arbitrations, commonly called the "Calvo doctrine".[9]

Agreements to arbitrate disputes which occur in the future are unenforceable in many Latin American countries. Only agreements to arbitrate existing disputes are enforceable. Since the vast majority of arbitrations occur because of agreements to arbitrate in the future, this effectively eliminates a substantial majority of all arbitrations. Parties often simply will not agree on arbitration after the dispute has arisen.

The grounds for attacking arbitral awards are very broad in many Latin American countries, making it extremely difficult to enforce any arbitral award. When an arbitral award can be easily overturned, this defeats the parties' expectation of a quick and final adjudication of the dispute. This is the reason many parties refused to arbitrate in England before their 1979 Arbitration Act became law.[10]

Another problem is the "competence-competence" doctrine. This doctrine provides that arbitral tribunals are competent to determine their own jurisdiction. This doctrine is common enough in international law[11] but is sometimes not accepted in certain Latin American countries.

[6] 1923 Geneva Protocol on Arbitration Clauses and 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.

[7] 9 U.S.C. Section 1 *et seq*.

[8] Vestiges of this legal orientation remained until recently when the United States Supreme Court decided antitrust and securities fraud questions could be settled by arbitration, *Scherk v. Alberto-Culver Co.* 417 U.S. 506 (1974) and *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985).

[9] This doctrine provided that foreigners must resort to local courts to enforce their rights, like nationals. This feeling was undoubtedly reinforced by the so-called "gunboat diplomacy" of the era.

[10] The 1979 Arbitration Act reduced the authority of English courts to supervise arbitration by abolishing the mandatory so-called "special case" procedure.

[11] The International Court of Justice in The Hague is essentially an arbitral tribunal for States. It has the competence to determine its own jurisdiction pursuant to Article 36(6) of the Statute of the International Court of Justice.

Non-nationals were restricted or prohibited from acting as arbitrators in many Latin American countries. This flies in the face of modern practice, where the claimant tends to appoint an arbitrator of the claimant's own nationality. The respondent similarly appoints an arbitrator of his own nationality. The third arbitrator or umpire is usually not a national from either the claimant's or the respondent's country.[12]

Many Latin American countries require an arbitration agreement be made in a "public writing".[13] If the writing does not meet these formal requirements, the agreement to arbitrate is unenforceable. Needless to say, these formalities are often overlooked in international transactions.[14]

The idea of arbitration to resolve international business disputes came fairly late to the Americas. The United States Chamber of Commerce signed a model agreement on arbitration with the Bolsa De Comercio of Buenos Aires in April 1916. Additional bilateral agreements were signed with counterparts of the United States Chamber of Commerce in Brazil, Colombia, Ecuador, Panama, Paraguay and Venezuela. These private contractual agreements were to provide the first steps for the drafting of the Inter-American Convention.

Another step forward occurred when the Inter-American Commercial Arbitration Commission was established in 1934. The Commission enjoys a special status under Article 3 of the Inter-American Convention which is reflected in the proposed 9 U.S.C. Section 306.

American states preferred a regional solution, which reflected their distrust of arbitration, instead of the New York Convention. This regional solution became the Inter-American Convention. The Inter-American Convention was promulgated in 1975 at the conclusion of the first Specialized Inter-American Conference on Private International Law sponsored by the Organization of American States.[15] The Inter-American Convention is an American counterpart to the 1961 European Convention on International Commercial Arbitration, 1972 Moscow Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Cooperation and the 1952 Arab League Convention on the Execution of Judgments. The New York Convention allows regional agreements to override its terms.

III. International trade is increasing

International trade in the United States, and especially Connecticut,[16] is increasing. As the amount of international trade increases, the potential for disputes

[12] Many arbitral institutional rules require the third arbitrator or umpire to be of a "neutral" nationality.

[13] Such an agreement may need to be executed before a notary, which is a judicial officer in civil law countries. A *notaire* should not be confused with a notary public in common law countries. The only thing they have in common is a similar name. Their duties and training are very different between the two types of legal systems.

[14] These formalities may be impossible to comply with because the documents are executed in the United States, where there is no foreign *notaire* available.

[15] See Annex A to this article for the list of countries which are parties to the Inter-American Convention.

[16] See Annex B to this article.

also increases. Neither party in an international transaction wants to submit their disputes to the courts of the other party.[17] Arbitration allows the parties to select an informed "judge" who is neutral and free from local procedural idiosyncracies and bias.[18]

IV. Ratification of the convention and the history of the implementing legislation

President Reagan transmitted the Inter-American Convention to the United States Senate for advice and consent on 15 June 1981. As with most private international law conventions, it was difficult to obtain swift action. The United States Senate gave its advice and consent to ratification in October 1986.[19] The Senate required implementing legislation to be adopted as a pre-condition for depositing the instrument of ratification with the Organization of American States. Implementing legislation was introduced in the Congress during the 99th and 100th sessions. While the legislation passed the Senate both times, the House of Representatives did not act on the legislation at all.

The primary reason for this inaction appeared to be apathy instead of opposition to the Inter-American Convention. Private international law does not arouse strong interest when it involves commercial interests.

The House Subcommittee on Immigration, Refugees and International Law in the 101st Congress, chaired by Congressman Bruce A. Morrison, held hearings on the necessary implementing legislation[20] on 1 May 1990. H. R. 4314 was transmitted to the full House of Representatives on 22 May 1990 accompanied by House Report 101–501. The House of Representatives passed H.R. 4314 on 5 June 1990.

The Senate passed H.R. 4314 on 4 August 1990. The bill was signed into law by President Bush on 15 August 1990 and is now known as P.L. 101–369. It is codified at 9 U.S.C. Section 301 *et seq*.

V. Contents of the implementing legislation

The implementing legislation for the Inter-American Convention is virtually identical to the implementing legislation for the New York Convention. For example:

New Section 301 differs from existing Section 201 only by the name of the Convention.

---

[17] Especially if one of the parties is a State. Sovereign States often require disputes be submitted to their courts out of national pride. Foreign businessmen frequently question the independence of such courts and seek to avoid them.

[18] Whether real or imagined. Arbitrators appear more likely to follow the parties' choice of law than domestic courts (especially if it is a hybrid law instead of a clear reference to a particular municipal legal system). Needless to say, a trial by jury is not normally available in an arbitration.

[19] Senate Executive Report 99–24.

[20] A Bill to implement the obligations of the United States under the Inter-American Convention on International Commercial Arbitration, was introduced on 20 March 1990 as H.R. 4314 by Representative Jack Brooks of Texas at the request of the Bush administration. An identical bill was introduced by Senator Claiborne Pell on 20 November 1989 as S. 1941.

New Section 302 specifically incorporates existing Sections 202, 203, 204, 205 and 207. This means all the case law which has built up under the New York Convention interpreting these Sections shall be applicable to interpreting the Inter-American Convention's implementing legislation.

Existing Section 206 is virtually identical to new Section 303(a). The difference appears in new Section 303(b), which provides that the court shall require arbitration to be held in accordance with the agreement even if the parties fail to specify the place of arbitration. Twenty years of experience since the enabling legislation for the New York Convention was enacted shows this provision is necessary because the parties sometimes fail to specify where the arbitration shall be held. This omission should not be such a major defect that the agreement to arbitrate is invalid.

New Section 303(b) also provides that the arbitrators may be appointed in accordance with Article 3 of the Inter-American Convention if the agreement fails to specify how all the arbitrators will be appointed. While the parties usually provide a method for appointing arbitrators, the agreement to arbitrate should still be enforceable even if they do not. In this case, the "fall back" rules of procedure are specified by the Inter-American Commercial Arbitration Commission (Inter-American Commission). New Section 306 makes it clear the applicable rules are the rules promulgated by the Inter-American Commission on 1 July 1988. These rules are virtually identical to the Uncitral (United Nations Commission on International Trade Law) arbitration rules.[21] No changes of these rules by the Inter-American Commission will be effective against United States citizens until the Secretary of State accepts the changes pursuant to 5 U.S.C. 553.

New Section 305 makes it clear that the regional solution, namely the Inter-American Convention, shall prevail over the New York Convention if a majority of the parties to the arbitration are citizens of a State or States that are parties to the Inter-American Convention *and* are Member States of the Organization of American States. It is not at all clear, however, why the requirement of membership in the Organization of American States was imposed.

Contrary to the implementing legislation for the New York Convention, new Section 304 limits the application of the Inter-American Convention to cases where an arbitral award is made in a territory of a contracting State. This means arbitral awards will be enforced only on the basis of reciprocity.

Existing Section 208 is identical to new Section 307.

[21] The Inter-American Commission recommends the following clause for the arbitration of future disputes: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereto, shall be settled by arbitration in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission in effect on the date of this agreement. [The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono*.]" Note: The parties may wish to consider adding the following: 1. The number of arbitrators shall be [1 or 3]. 2. The place of arbitration shall be [location]. 3. The language(s) to be used in the arbitral proceedings shall be [one or more languages].

The Inter-American Commission recommends that the parties consult the Commission for assistance when they are preparing an agreement to submit existing disputes to arbitration.

It is doubtful whether the power of arbitral tribunals in the United States can render awards as *amiable compositeur* or *ex aequo et bono* without specific enabling legislation (such as Connecticut Public Act 89–179, Section 28(3)).

VI. The text of the Inter-American Convention on International Commercial Arbitration

The actual language of the Inter-American Convention is substantially similar to the New York Convention. Article 1 of the Inter-American Convention provides that arbitration agreements are valid, whether the dispute arises in the future or is an existing dispute. This is similar to New York Convention Article II(1). The agreement must be set forth in "an instrument signed by the parties" under the Inter-American Convention, while the New York Convention requires an "agreement in writing".[22]

Inter-American Convention Article 2 corrects the problem concerning the nationality of the arbitrators. Arbitrators may be nationals or foreigners and shall be appointed in the manner the parties agree. The power of appointment may be delegated to a third party, which can be either a natural or juridical person. This means "institutional arbitrations" are possible under the rules of the Inter-American Commission, International Chamber of Commerce, American Arbitration Association, London Court of International Arbitration, to name a few.

Inter-American Convention Article 3 corrects a problem which the New York Convention did not address. Under United States law, if the parties do not provide a set of arbitral rules, they often must go to the courts to enforce the arbitration agreement. Under the Inter-American Convention, there is a "fall back" set of rules; namely the arbitrational rules promulgated by the Inter-American Commission on 1 July 1988. United States nationals are protected from unexpected changes in these fall back rules by new Section 306.

Inter-American Convention Article 4 bears a strong relationship to New York Convention Article III. Each of these Articles provide that an arbitration award is generally enforceable. Under the Inter-American Convention, it is clear that an arbitral award cannot be appealed and has the force of a final judicial judgment in that country. This language is clearer and stronger than the language in New York Convention Article III.

Inter-American Convention Article 5 provides the sole grounds for refusing to enforce an arbitral decision. Once again, this Article is similar to its counterpart in New York Convention Article V.

Inter-American Convention Article 6 is substantially similar to New York Convention Article VI. A "competent authority" may refuse to enforce an arbitral award if the decision is not yet binding on the parties. The party claiming enforcement of the award may request the "competent authority" to instruct the other parties to provide appropriate guarantees that the arbitral award will be enforced, such as a bond or other method of security.

New York Convention Article VIII(1) makes it clear that entering into another multi-lateral or bilateral agreement concerning the recognition and enforcement of

[22] Oral agreements to arbitrate are not enforceable under either Convention.

arbitral awards does not conflict with the New York Convention.

VII Conclusion

It has taken fifteen years from the drafting of this Convention until the United States became a party. Now the United States is a party, arbitration agreements and awards from the United States will be enforceable in more Latin American countries. Likewise, more arbitration agreements and awards from Latin American countries wil be enforceable in the United States. This Convention helps to provide predictability and enforceability to businessmen's expectations about resolving disputes in Latin American countries which are not parties to the New York Convention. The only question is why did it take so long for the United States to ratify this Convention?

ANNEX A

Countries party to the Inter-American Convention:

Country	*Signature*	*Ratification*
Bolivia	2 August 1983	
Brazil	30 January 1975	
*Chile	30 January 1975	17 May 1976
*Colombia	30 January 1975	29 December 1986
*Costa Rica	30 January 1975	20 January 1978
*Dominican Republic	18 April 1977	
*Ecuador	30 January 1975	
El Salvador	30 January 1975	11 August 1980
*Guatemala	30 January 1975	20 August 1986
Honduras	30 January 1975	22 March 1979
*Mexico	27 October 1977	27 March 1978
Nicaragua	30 January 1975	
*Panama	30 January 1975	17 December 1975
Paraguay	26 August 1975	15 December 1976
*Peru	21 April 1988	22 May 1989
*Uruguay	30 January 1975	25 April 1977
Venezuela	30 January 1975	16 May 1985
*United States	9 June 1978	

* also party to the New York Convention.

ANNEX B

The United States Department of Commerce reports Connecticut's nine major export products performed as follows over the past three years. These nine categories account for 90 per cent of Connecticut's foreign exports. Sales are in millions of dollars.

Product	1987 $m	1988 $m	1989 $m	*Percentage change* 1987–1989
Transportation equipment	917.3	1,041.0	1,191.0	29.0
Non-electrical machinery	511.9	577.5	732.3	34.0
Professional and scientific instruments	250.7	405.2	430.3	71.0
Chemicals and allied products	164.3	270.9	379.9	131.0
Electric and electronic machines, supplies	246.0	273.3	351.4	42.0
Fabricated metal products	112.6	112.3	139.8	24.0
Primary metal products	72.7	103.1	123.1	69.0
Waste and scrap	26.9	52.1	86.8	221.0
Used or rebuilt merchandise	75.9	44.5	0.2	−100.0
Connecticut Total*	2,651.0	3,230.0	3,806.0	43.5

* Includes product categories not detailed above.

Connecticut's top foreign customers have increased purchases of Connecticut-made goods as follows over the past three years. Purchases are in millions of dollars.

Country/Region	1987 $m	1988 $m	1989 $m	*Percentage change* 1987–1989
European Economic Community	916.2	1,199.0	1,315.0	43.5
Canada	507.9	576.7	621.3	22.0
Pacific Rim	383.7	387.2	578.9	50.8
Japan	288.0	377.0	503.0	74.0
Mexico	99.5	153.9	175.6	76.0
China	36.4	71.2	91.0	149.0
Eastern Europe*	16.9	16.8	22.0	30.1

* Includes USSR and Yugoslavia.