

# The Challenges of the New York Convention and Potential Solutions

Ziming Yang<sup>1,\*</sup>

<sup>1</sup> School of Law, University of San Diego, California, the United States of America

\* Corresponding Author Email: zimingyang@stu.xaau.edu.cn

**Abstract.** This paper analyzes the current challenges of the New York Convention and proposes potential solutions through the actual situation and public reporting. Central to these challenges is the over-dependence on the judicial systems of the target countries, which often results in inconsistent and unreliable enforcement of international arbitration awards. This analysis identifies several key issues impacting the Convention's effectiveness: the conservative attitude of some countries in the enforcement of international arbitration, judicial corruption, the imperfection of the judicial system, and the different enforcement procedures under various judicial systems. To address these impediments, the paper explores innovative solutions inspired by successful practices from other international legal frameworks. Notably, it examines the streamlined processes of the Madrid Agreement Concerning the International Registration of Marks and various bilateral legal assistance agreements. These models provide valuable insights into simplifying procedural complexities and enhancing the uniformity of legal processes. By integrating these practices, the paper proposes actionable strategies to mitigate the current limitations of the New York Convention, aiming to bolster its role as a foundational instrument in the global arbitration landscape.

**Keywords:** New York Convention; international arbitration; enforcement procedures; Madrid Agreement; bilateral legal assistance agreements.

## 1. Introduction

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the “the New York Convention”) is the crucial legal frame of international trading. The New York Convention was adopted in 1958 and had 24 beginners. Up to today, there are more than 170 signatory countries, covering almost all the regions in the world. The New York Convention mainly provides a legal frame and ensures the recognizing and enforcing the international arbitral awards between signatory countries. Each signatory country indeed has some reservations, but this does not really affect the fact that the New York Convention is the basis for the arbitration settlement of international disputes.

There is no doubt that in the last few decades, the New York Convention has definitely enhanced the certainty and predictability of the arbitration settlement of international disputes. The fact that the increasing number of signatory countries is an indication of confidence in the New York Convention itself. Conversely, if a country is resistant to joining the New York Convention, it may make potential international investors equally skeptical of their investment. To put it more bluntly, if an international investor has a legal dispute in a non-contracting country, he has to go to the local court or arbitration institution of that country to resolve the dispute. None of this is familiar to the international investor - the legal system, the lawsuit proceedings, and the need to hire a local lawyer who is well versed in the local law – and he has to rely entirely on a lawyer he has never met.

However, despite its global acceptance and its critical role in international trade and dispute resolution, the practical enforcement of the Convention encounters significant challenges. These include varied judicial interpretations, national resistance, procedural inconsistencies, and issues of corruption and transparency in different legal systems. Such challenges undermine the effectiveness of the Convention and call for a detailed examination of its application in diverse legal environments.

Therefore, this paper aims to dissect these challenges by examining the Convention's enforcement dilemmas through a detailed analysis of its application in various legal systems. The first section reviews the historical development and the current status of the Convention, establishing the context

for further discussion. The second section delves into the specific challenges faced in various jurisdictions, utilizing case studies and comparative analysis to illustrate the main issues. The third section proposes potential solutions inspired by other international legal frameworks and practical reforms in similar treaties. The final section synthesizes the findings and suggests directions for future research and policy development, aiming to strengthen the global practice of arbitration under the New York Convention.

## **2. Historical Development and Current Status of the New York Convention**

### **2.1. Historical Development of the Convention**

The New York Convention, formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was adopted on June 10, 1958, in New York City. It was initiated by the United Nations to provide a common legislative framework facilitating the recognition and enforcement of international arbitral awards. The Convention aimed to address the complexities and disparities in the treatment of foreign arbitral awards by different national courts, which had historically hindered international trade and investment. Over the years, the Convention has been ratified by a majority of the world's nations, reflecting its universal appeal and the global recognition of arbitration as an essential mechanism for resolving international commercial disputes.

### **2.2. The Current Status of the Convention**

As of today, the New York Convention has 170 member countries, making it one of the most important and widely implemented international treaties in the field of arbitration [1]. The widespread adoption underscores its effectiveness in standardizing the procedures for enforcing arbitral awards across different legal systems. However, the application of the Convention is not uniform; variations in domestic legal cultures and interpretations of the Convention's provisions lead to inconsistencies in enforcement practices. These inconsistencies pose challenges to the predictability and reliability of the arbitration process, impacting international business operations and investor confidence.

### **2.3. Impact and Relevance in Contemporary Times**

The New York Convention remains highly relevant in today's globalized economy, where cross-border transactions and international disputes are common. Its role in facilitating smoother, more predictable arbitration outcomes is crucial for maintaining the flow of international trade and investment. The Convention also helps in minimizing the risks associated with cross-jurisdictional legal disputes by providing a framework that reduces the potential for lengthy and costly litigation. Despite its successes, the ongoing challenges and the evolving nature of international trade necessitate continual assessment and adaptation of the Convention to meet the changing needs of the global community.

## **3. Specific Challenges Faced in Various Jurisdictions**

### **3.1. Preservative Attitude of the Target Country**

The recognition and execution of enforcement in the cross-border arbitration awards relies on the courts or enforcement agencies of the destination country. Some internal courts or enforcement agencies have maintained a conservative attitude to the enforcement of foreign arbitral awards, which may affect the practical effect of the New York Convention. These conservative attitudes are usually implicit – they may demand that tens or even hundreds of pages of arbitral awards be translated into their own local language, and that they require notarized sworn translations. Such requirements, though seemingly procedural, can lead to substantial delays.

This is particularly evident in countries with less developed legal systems or in countries that prioritize domestic interests over international obligations. These courts do not openly resist the

enforcement of these cross-border arbitral awards, but the conservative attitude may lead to excessive delays in the enforcement period, failure to take timely measures of conservatory measures, and the loss of the applicant's rights.

The consequences of such judicial conservatism are particularly dire for small and medium-sized enterprises, which typically lack the resources to navigate complex international legal landscapes. These businesses, often less familiar with the intricacies of international law, may rely on superficial understandings of the New York Convention gleaned from internet searches or non-specialist media. Misled by a perceived robustness of the Convention's provisions, they find themselves unprepared for the procedural hurdles and the associated costs. This not only hampers their ability to effectively assert their rights but also potentially leads to significant financial and operational setbacks.

### **3.2. Corruption and Inadequate Legal System**

The enforcement of arbitral awards is further compromised by systemic issues within the judicial systems, such as corruption, inadequate infrastructure, or backlogs. According to public information released by the World Bank in 2020, El Salvador, a country in the Americas, takes 816 days on average to enforce a contract. This extended period, nearing three years, places El Salvador in the middle tier, ranked 91st out of 190 countries in the World Bank's Doing Business Report "Ease of Doing Business" [2]. It can be said that this is a sample that is in the middle of the world, and it takes 816 days for this sample to execute the contract. The 91st ranking was also cited by the U.S. government's Bureau of Economic and Business Affairs and recorded in its 2021 Investment Climate Statements [3]. Suppose a cross-border investor reads the report and thinks that El Salvador can rank about half of the easiest places in the world to do business, which will boost their investment confidence. However, in the future, when it is necessary to apply for enforcement in the event of a dispute, it will take nearly 3 years to enforce the contract. This is not only a major blow to the capital turnover of investors themselves, but also a weakening of the New York Convention itself.

Another sample is Vietnam. Due to its human and economic advantages, Vietnam is widely regarded as the hottest investment focus in the world. In recent years, a large number of multinational companies have invested in their subsidiaries or branches in Vietnam. According to the World Bank's Doing Business Report, which comes from the same source, Vietnam ranks 70th out of 190 countries or regions [4]. Considering that most of the top countries are developed countries (close to 30), and these developed countries are not investment hot spots, the 70th is actually higher than expected. However, it still takes 400 days [5] on average to execute a contract in Vietnam, which is more than a year. Although this will be much less than in the previous example, a one-year enforcement period is still unacceptable for most international businesses.

These examples are indicative of broader trends seen in various parts of the world, where judicial inefficiencies and corruption erode the trust and reliability of the arbitration process stipulated by the New York Convention. When judicial systems are bogged down by corruption, it not only delays the enforcement but can also lead to biased or unfair rulings, further deterring international investments. Moreover, the lack of modern infrastructure and procedural clarity can exacerbate these issues, leading to a labyrinthine legal process fraught with uncertainties.

### **3.3. Legal Barriers in Arbitral Award Enforcement**

In practice, the execution process is not always smooth. Most respondents will use a variety of means to hide their property or transfer their property in advance. Often, these respondents are domestic enterprises well-versed in their country's legal nuances and equipped with the necessary social networks to manipulate outcomes affordably. They may preemptively hide or transfer assets, complicating the enforcement of awards. In contrast, foreign applicants typically face significant obstacles due to their unfamiliarity with the local legal system. Without the aid of highly experienced legal counsel, these applicants frequently miss critical opportunities for asset preservation or securing injunctions, which are essential for enforcing their rights effectively. The engagement of skilled lawyers, who are crucial for navigating these complex legal waters, comes at a high cost. Many such

lawyers work on a contingency basis, adding to the financial burden faced by foreign businesses seeking justice.

To sum up, the New York Convention has undoubtedly revolutionized the recognition and enforcement of foreign arbitral awards, but to this day, it has faced a variety of challenges due to its own shortcomings, which have affected its actual effectiveness. Therefore, how to solve the above-mentioned problems such as reliance on the enforcement mechanism of the destination country, the challenges within the judicial system of the destination country, and the high enforcement costs will become an urgent issue to be addressed by the New York Convention.

#### **4. Potential Solutions to Address the Challenges in Various Jurisdictions**

Recognizing the value of the flexibility within the New York Convention, which allows member states to adapt its principles to their legal systems, it is imperative to maintain this non-mandatory provision as a cornerstone. This flexibility can be seen as an asset that encourages broader acceptance and adaptation by different legal cultures. However, to enhance the effectiveness of the Convention and address the inherent challenges, several improvements, inspired by other successful international frameworks and existing bilateral agreements, are proposed.

##### **4.1. Adoption of Best Practices from the Madrid System**

The Madrid System [6], encompassing the Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as the “the Madrid Agreement”) [7] and Protocol Relating to Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as the “the Madrid Protocol”) [8], represents two multilateral treaties administered by the World Intellectual Property Organization (WIPO). These treaties aim to simplify and standardize the procedures for international trademark registration. Under this system, trademark holders can file an application with the International Bureau of their national trademark office through a single application and one language (usually English or French) and apply it in the target country (which can be one or more).

This streamlined approach offers valuable lessons for the New York Convention, particularly in handling the complexities associated with cross-border enforcement of arbitral awards. Currently, under the New York Convention, enforcing an arbitral award in foreign jurisdictions can be cumbersome and costly. In most countries, the power of attorney and the signature of the application for enforcement need to be notarized and apostilled – if both countries are the member countries of Convention Abolishing the Requirement of Legalization for Foreign Public Documents (hereinafter referred to as the “the Hague Convention”); or consular verification – for one of the countries that is not a member country to the Hague Convention. The process may seem simple, but even if the application is lucky enough to be between the member countries of the Hague Convention, the process can cost hundreds of US dollars in processing fees and two weeks of time. In unfortunate circumstances, if one of the countries is not a member country of the Hague Convention, or if one of the countries excludes the application of the Hague Convention, the process can take thousands of dollars and several months.

The Madrid System's centralized filing procedure could be adapted for the enforcement of arbitral awards. Establishing a similar international bureau under the New York Convention could facilitate the submission and processing of enforcement applications through a unified, standardized process. This bureau could handle verifications and coordinate directly with local enforcement authorities, significantly reducing the need for multiple legalizations and translations.

Additionally, the Madrid System's use of a single application language reduces barriers and costs related to language translations. Under the New York Convention, the enforcement authorities of most countries require the applicant to translate the arbitration result and the application for enforcement into the local language. This undoubtedly increases the cost of enforcement for the applicant again – if the arbitral award is tens or even hundreds of pages long, the additional translation

costs and time will be unimaginably high. Adopting a similar approach in the New York Convention could minimize the need for extensive translations of arbitral awards, especially when these documents are voluminous.

The reduction in direct interactions with local enforcement authorities by centralizing the application process can also decrease the opportunity for judicial corruption, as it limits the personal contact necessary between applicants and local officials. While this would not eliminate the existence of corruption 100 percent, it would significantly improve the existing situation. This centralized process under the New York Convention could ensure a more transparent and consistent enforcement procedure across jurisdictions.

Lastly, the establishment of a comprehensive legal resource base, similar to the one under WIPO for trademark laws [9], would be beneficial for the New York Convention. A dedicated online repository where legal professionals and businesses could access relevant arbitration laws and regulations, enforcement procedures, and case law in multiple languages would enhance transparency and accessibility. This resource could be instrumental in bridging the information gap and ensuring that smaller companies, in particular, can navigate the complexities of international arbitration more effectively.

#### **4.2. Leveraging Existing Bilateral Agreements**

Many bilateral and multilateral agreements on mutual legal assistance in civil and commercial matters offer valuable insights that can enhance the effectiveness of the New York Convention. Take Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial Matters (hereinafter referred to as the "Brussels Regulations") [10] as an example. Articles 39 and 40 of Section 2 "Enforcement" make it clear that a judgment may be enforced in the target country without a declaration of enforceability between member states, and that corresponding protective measures may be taken in accordance with the law of the target country.

This mechanism under the Brussels Regulations can serve as a model for reducing procedural complexities within the New York Convention. By adopting similar provisions, the Convention could allow for the direct enforcement of arbitral awards across member states, reducing the bureaucratic hurdles that currently complicate the process. This would not only speed up enforcement actions but also enhance the predictability and reliability of legal outcomes for international businesses and litigants.

Moreover, the Brussels Regulations allow for the implementation of protective measures according to the laws of the target country. This flexibility ensures that while enforcement is streamlined, it does not compromise the legal systems and sovereignty of the countries involved. Adopting a similar approach in the New York Convention could help in accommodating the diverse legal systems of its member states while maintaining a high standard of protection for the rights of parties involved in arbitration.

However, it is essential to acknowledge that the effectiveness of such integrations depends heavily on the level of mutual trust and cooperation among the member states. Most existing treaties that facilitate such legal assistance are predicated on a foundational mutual trust, which might not be as robust in all jurisdictions covered by the New York Convention. To address this, any adoption of measures inspired by the Brussels Regulations into the New York Convention should include clear guidelines on their limits, establish a transition period for implementation, and allow member countries the flexibility to opt in or reserve the right to not participate in certain provisions.

### **5. Conclusion**

This paper has provided an in-depth analysis of the challenges facing the New York Convention in the current international environment and explore possible solutions. Through practical cases and public reports, it has been determined that a primary challenge lies in the dependency on the

enforcement authorities of the target country to execute international arbitral awards. This reliance often results in inconsistencies due to varying legal and procedural standards across jurisdictions.

Although the New York Convention has successfully provided a unified international framework for the enforcement of international arbitral awards, some additional requirements in practice in different countries, such as legalization requirements and translation requirements in its local language, will greatly increase the time and money cost of enforcement. In some countries with inadequate judicial systems, corruption and lack of transparency make it more difficult to enforce international arbitral awards in their own countries. This corruption issue will lead to possible undue interference in the arbitration process and will eventually lead to the imperfect enforcement of the arbitral award. At the same time, due to the imperfection of the judicial system and the lack of operational guidelines, some countries may lack clear legal provisions or effective operational guidelines to deal with international arbitral awards, resulting in legal uncertainty and obstacles to enforcement. The enforcement of the New York Convention is also complicated by different judicial systems and enforcement procedures. In the absence of uniform enforcement standards, the legal and procedural requirements of different countries may have a changing impact on the enforcement of arbitral awards. In some countries, the applicants may have to go through complex and extremely long legal procedures for recognition and enforcement and it would obviously add time and money cost pressures to the execution of international arbitration.

To overcome these obstacles, this paper suggests adopting strategies from other successful international legal frameworks. Based on the practice of the Madrid System, it is highly recommended that the enforcement agencies of various countries have subordinate international bureaus. Applicants may file their applications through the International Bureau, the judicial enforcement body in their home country, and submit them to the International Bureau of the corresponding country through official channels. This process will greatly simplify the process of filing an enforcement application and eliminate the potential time and money required for the legalization process, while also reducing the impact of judicial corruption to some extent by isolating contact with the enforcement agencies of the target country. In addition, the use of one or more international languages for filing as an application will further reduce the cost of translation into minority languages. Despite some limitations, it is also a good idea to learn from the successful experiences of bilateral or multilateral treaties. Whether it is the clauses related to enforcement of the Brussels Regulations mentioned above, or the creation of a public legal resource on the UNCITRAL website, it will further remove barriers to enforcement between different jurisdictions.

## References

- [1] "Contracting States," New York Convention, [Online]. Available: <https://www.newyorkconvention.org/contracting-states>. [Accessed: 30 May 2024].
- [2] "El Salvador Overview," The World Bank, 14 Apr. 2023. [Online]. Available: <https://www.worldbank.org/en/country/elsalvador/overview>. [Accessed: 30 May 2024]
- [3] "2021 Investment Climate Statements: El Salvador," U.S. Department of State, 2021. [Online]. Available: <https://www.state.gov/reports/2021-investment-climate-statements/el-salvador/>. [Accessed: 30 May 2024].
- [4] "2021 Investment Climate Statements: Vietnam," U.S. Department of State, 2021. [Online]. Available: <https://www.state.gov/reports/2021-investment-climate-statements/vietnam>. [Accessed: 30 May 2024].
- [5] "Economy Profile Vietnam," Doing Business 2020, The World Bank, 2020. [Online]. Available: <https://www.doingbusiness.org/content/dam/doingBusiness/country/v/vietnam/VNM.pdf>. [Accessed: 30 May 2024].
- [6] "Madrid System – The International Trademark System," WIPO. [Online]. Available: <https://www.wipo.int/en/web/madrid-system>. [Accessed: 30 May 2024].

- [7] "Madrid Agreement Concerning the International Registration of Marks (as amended on September 28, 1979)," WIPO. [Online]. Available: <https://www.wipo.int/wipolex/en/text/283530>. [Accessed: 30 May 2024].
- [8] "Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (as amended on November 12, 2007)," WIPO. [Online]. Available: <https://www.wipo.int/wipolex/en/text/283484>. [Accessed: 30 May 2024].
- [9] "WIPO Lex Database Search," WIPO. [Online]. Available: <https://www.wipo.int/wipolex/en/main/legislation>. [Accessed: 30 May 2024].
- [10] "Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters," EUR-Lex, 2012. [Online]. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1215>. [Accessed: 30 May 2024].