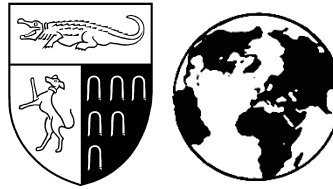


The Yale Journal of International Law Online



The *Yukos* Award and the Debate over the New York Convention

Steven Levy[†]

As the Obama Administration defends the Trans-Pacific Partnership (“TPP”), and several presidential candidates rail against it,¹ international arbitration has increasingly come under public scrutiny. Opponents of TPP from across the political spectrum have seized on its provisions that allow foreign investors to arbitrate disputes against states.² In the midst of this raucous debate, the largest case in the history of international arbitration is unfolding.³ On July 18, 2014, an arbitral tribunal in The Hague decided that Russia owed the majority shareholders of Yukos, a defunct Russian oil company, \$50 billion.⁴ On April 20, 2016, a Dutch court set aside that award,

[†] Yale Law School, J.D. Candidate 2016; Amherst College, B.A. 2013. The author wishes to thank Britta Redwood and Romain Zamour for their comments and suggestions.

1. Adam Behsudi, *Trump Keeps Up Attack on TPP Heading into Iowa*, POLITICO (Feb. 1, 2016), <http://www.politico.com/tipsheets/morning-trade/2016/02/trump-keeps-up-attack-on-tpp-heading-into-iowa-sanders-baits-clinton-from-all-set-to-sign-tpp-212457>; Donald J. Trump, *Donald Trump: Disappearing Middle Class Needs Better Deal on Trade*, USA TODAY, Mar. 14, 2016, <http://www.usatoday.com/story/opinion/2016/03/14/donald-trump-tpp-trade-american-manufacturing-jobs-workers-column/81728584>; Maya Rhodan, *President Obama Urges Swift Passage of TPP Trade Deal*, TIME, Feb. 3, 2016, <http://www.time.com/4207350/barack-obama-tpp-trade-deal>.

2. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST, Feb. 25, 2015, https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html; Daniel J. Ikenson, *Hyperbole Aside, Elizabeth Warren Is Right About the Risk of Investor-State*, CATO (Feb. 26, 2015), <http://www.cato.org/blog/hyperbole-aside-elizabeth-warren-right-about-risk-investor-state>; Elizabeth Warren, *I Agree with Hillary Clinton*, ELIZABETH WARREN FOR SENATE (May 7, 2015), <http://www.elizabethwarren.com/blog/i-agree-with-hillary-clinton>.

3. See Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles’ Heel of the Investor-State Arbitration System?*, 26 AM. REV. INT’L ARB. 47, 47 (2015); Shona Simkin, *The Yukos Settlement: An Insider’s View into the Largest Arbitration Award in History*, HARV. L. TODAY (Mar. 10, 2015), <http://today.law.harvard.edu/the-yukos-settlement-an-insiders-view-into-the-largest-arbitration-award-in-history/> (“To put [the *Yukos*] award in perspective, the second largest arbitral award is \$2.47 billion . . .”).

4. See *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, UNCITRAL PCA Case No. AA 226 (Perm. Ct. Arb. 2014); *Yukos Universal Ltd. (Isle of Man) v. Russian Fed’n*, UNCITRAL PCA Case

finding that the arbitral tribunal lacked jurisdiction to render it.⁵ Yukos shareholders are now appealing that decision.⁶

Regardless of what happens on appeal, this battle is far from over. Because of a longstanding dispute over how to interpret the New York Convention (“Convention”),⁷ the key framework in which international arbitration operates,⁸ the *Yukos* award will continue to haunt Russia long after the Dutch judiciary has rendered its final decision. The text of the Convention and a convincing logic-based argument suggest that the award should live on despite being set aside. But this approach would vastly empower arbitrators and presents the possibility of endless litigation.

National courts remain divided over the fate of an award that is set aside at the seat of the arbitration—that is, annulled in the country where the arbitration took place. In the eyes of most legal systems, such an award is completely void and cannot be enforced.⁹ But France and a number of other countries disagree. Their courts have recognized and enforced awards that have been set aside at the seat.¹⁰

Renowned arbitrators, practitioners, and legal scholars are similarly divided on this question. Professors W. Michael Reisman and Albert Jan van den Berg share the majority view.¹¹ Meanwhile, Professors Jan Paulsson and Emmanuel Gaillard side with France and likeminded states.¹² Considering the palpable influence scholarship has on the field of international arbitration, this division is nearly as important as that of national courts.¹³

No. AA 227 (Perm. Ct. Arb. 2014); *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed’n*, UNCITRAL PCA Case No. AA 228 (Perm. Ct. Arb. 2014).

5. Stanley Reed, *Dutch Court Overturms \$50 Billion Ruling Against Russia in Yukos Case*, N.Y. TIMES, Apr. 20, 2016, <http://www.nytimes.com/2016/04/21/business/international/yukos-russia-50-billion-ruling.html>.

6. *Id.*

7. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 330 U.N.T.S. 38.

8. See W. Michael Reisman & Brian Richardson, *The Present – Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, in ARBITRATION: THE NEXT FIFTY YEARS, ICCA CONGRESS SERIES NO. 16, at 17, 21 (Albert Jan van den Berg ed., 2012).

9. See EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION ¶ 126 (2010); Saad Badah, *Grounds for Refusing Recognition and Enforcement of a Foreign Arbitral Award Which Was Set Aside Abroad*, 41 N.C.J. INT’L L. 59, 72, 82 (2015); Emmanuel Gaillard, *Enforcement of Awards Set Aside in Country of Origin: The French Experience*, 14 ICSID REV. 16, ¶¶ 31-32 (1999).

10. GAILLARD, *supra* note 9, at ¶ 126. Other countries that have recognized and enforced awards that were set aside at the seat include the Netherlands, Belgium, and Austria. *Id.* One court in the United States has also recognized and enforced an award set aside in the country of the seat. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996); see GAILLARD ¶ 127. But “US case law today leaves very little room for the recognition of awards that have been set aside at the seat.” GAILLARD ¶ 128.

11. See Reisman & Richardson, *supra* note 8, at 29, 62-63.

12. GAILLARD ¶¶ 125-32; Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments*, 6 ASIA PAC. L. REV. 1 (1998).

13. See John P. Bowman, *In-House Lawyer’s Role in International Arbitration*, 20 AM. REV. INT’L ARB. 285, 301 (2009) (“[B]ecause of . . . the importance attached to scholarship and other educational contributions to the international arbitration bar, . . . in-house counsel should also take care to select arbitration counsel well-known to and respected by their colleagues.”); Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. DISP. RESOL. 37, 63 (1996) (“International commercial arbitration became the accepted and expected way to resolve international disputes primarily because of the efforts of a small group of Continental academics and, to a lesser

Fundamentally, these two camps disagree over how to interpret the Convention, which provides for the recognition and enforcement of awards that qualify under its terms.¹⁴ Currently, 156 countries are parties to the Convention.¹⁵ The victor in an international arbitral proceeding in these nations may seize the assets of the loser in any of the other states that are parties to the Convention.¹⁶

It is highly disputed whether Article V of the Convention prevents courts from enforcing awards that have been set aside at the seat.¹⁷ The English translation of Article V states that “[r]ecognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, *only* if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:”¹⁸ Article V then proceeds to spell out a series of grounds for refusal to enforce an award. One such ground is that “the award . . . has been set aside or suspended by a competent authority of the country in which . . . that award was made.”¹⁹ The minority camp contends the language “may” in this text, even with the addition of the adverb “only,” leaves courts with room for discretion—i.e., that under Article V courts may decide whether to enforce awards that have been set aside at the seat.²⁰

Some in the majority camp counter that the Convention is an international agreement with equally authentic translations in French and Spanish, and that these translations use more mandatory language—language that means “shall refuse” to recognize and enforce under certain circumstances, rather than “may only” refuse to recognize and enforce under certain circumstances.²¹ According to the Vienna Convention on the Law of Treaties,²² when there is a discrepancy between translations one must analyze the object and purpose of the treaty itself and select the interpretation most consistent with it.²³ This rule opens the door to a somewhat circular but potentially compelling argument: if one accepts the majority’s view of the object and purpose of the Convention, the language “shall refuse” should prevail.

The majority’s understanding of the Convention is based on the notion that finality is central to the system of international arbitration.²⁴ As two of its proponents have explained

extent, jurists. They worked together to make international arbitration effective—in terms of both enforceability and acceptable procedures—and prestigious, mainly through scholarship.” (footnotes omitted)).

14. Reisman & Richardson, *supra* note 8, at 22.

15. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNITED NATIONS COMMISSION INT’L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 21, 2016).

16. *See* New York Convention, *supra* note 7, art. III; Reisman & Richardson, *supra* note 8, at 21-22.

17. *See* Gaillard, *supra* note 9, ¶¶ 31-32.

18. New York Convention, *supra* note 7, art. V (emphasis added).

19. New York Convention, *supra* note 7, art. V(1)(e).

20. *See* Gaillard, *supra* note 9, ¶¶ 32-33; Reisman & Richardson, *supra* note 8, at 26-27.

21. *See* Reisman & Richardson, *supra* note 8, at 27.

22. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

23. *See id.* art. 31; Reisman & Richardson, *supra* note 8, at 27-28.

24. *See* Reisman & Richardson, *supra* note 8, at 32.

If no forum enjoyed the nullificatory power with universal effect accorded to [the court of the seat] under the Convention, the winner of a defective award could fail in enforcement in any forum and still continue to go to others in an effort at enforcement, harassing the other party and forcing it to either settle for a nuisance value factored by the number of jurisdictions in which it could be pursued, or to expend great amounts of time and effort to block and block again enforcement efforts without ever securing a terminal annulment.²⁵

These scholars reason that on balance a world with finality is superior to one of endless litigation; that it is better to quash some valid awards than to let every defective one run wild.²⁶

Relatedly, some in the majority camp believe the Convention prizes a certain degree of control over arbitrators and seeks to avoid the moral hazard that comes with granting them excessive power. If the seat lacks the ability to annul awards worldwide, control over arbitrators is greatly diminished and the corresponding power of arbitrators is vastly enhanced.²⁷

By contrast, many in the minority camp dispute the majority's reading of the Convention's non-English translations. They instead claim that both the English and non-English translations leave courts with the option to recognize awards that have been set aside at the seat.²⁸

The minority camp also accuses the majority of ignoring, discounting, or misinterpreting Article VII of the Convention, which states

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.²⁹

According to defenders of the minority position, Article VII demonstrates that the Convention is a ceiling, not a floor—that is, that the Convention limits the amount of control courts may have over arbitrators and arbitration, as opposed to requiring courts to invalidate specific types of arbitral awards. They believe Article VII proves that countries, if they so desire, may enforce awards more liberally than their neighbors. Thus, if a nation wishes to enforce awards that have been annulled at the seat, it is free to do so.³⁰

In addition, the minority camp argues Article VII sheds light on the underlying purpose of the Convention, which is fundamentally to enforce arbitral awards.³¹ In order to support their understanding of the Convention's

25. *Id.* at 29; see Gaillard, *supra* note 9, ¶¶ 40-41.

26. See, e.g., Reisman & Richardson, *supra* note 8, at 28, 32, 62.

27. See *id.* at 17-18, 24-25.

28. See, e.g., Gaillard, *supra* note 9, ¶¶ 32-33.

29. New York Convention, *supra* note 7, art. VII.

30. See Gaillard, *supra* note 9, ¶¶ 20-22, 32-33, 35-36.

31. See *id.* ¶¶ 32-33; Emmanuel Gaillard, *The Present – Commercial Arbitration as a Transnational System of Justice: Arbitration as a Transnational System of Justice*, in *ARBITRATION: THE NEXT FIFTY YEARS*, ICCA CONGRESS SERIES NO. 16, at 66, 71 (Albert Jan van den Berg ed., 2012) (“[T]he objective of the New York Convention is much more straightforward. It is to facilitate the recognition and enforcement of arbitral awards, not to dispatch relative competence to national legal systems.”).

object and purpose, this camp analyzes the Convention in light of the Geneva Protocols it replaced.³² These Protocols required *double exequatur*, meaning that an award would not circulate until it was rubberstamped by a court of the seat, at which point third countries would enforce the judgment approving of the award. The elimination of this system was a move towards limiting courts' control of arbitrators and arbitration, and favoring the circulation of awards.³³

Some proponents of the minority view also note that awards often have stronger ties to the enforcing jurisdiction than to the seat. The seat may simply provide hotel and conference rooms for the arbitrators and parties. Meanwhile, the enforcing jurisdiction might use its police force to seize assets and give them to the victor. Therefore, because the seat often has a comparatively small interest in the award, its courts should not have the ability to annul the award worldwide.³⁴

Supporters of the minority position also deploy a logic-based argument to criticize the majority view. If a court at the seat refuses to annul an award, courts in other countries will still review the award when it is challenged. They will review it even if it is challenged on the same grounds that it was at the seat. This reveals an internal inconsistency in the majority view. How can it accept that a local judgment annulling an award will have a global effect, but a local judgment that refuses to annul an award will not? In the majority position, two parallel judgments—rendered by the same court, exercising the same jurisdiction, and using the same procedures—will have markedly different effects depending on whether the court says “yes” or “no” to annulling an award. This seems out of keeping with other kinds of judicial decisions, given that their scope of influence does not typically turn on whether the court answers “yes” or “no” to the question presented.³⁵ Moreover, if one accepts the minority's position that the Convention's fundamental purpose is to enhance the recognition and enforcement of awards, this asymmetry seems paradoxical because it systematically disfavors the recognition and enforcement of awards.³⁶

Both the majority and minority camps have strong arguments to support their interpretations of the Convention. The text of the Convention and a persuasive logic-based argument support the minority view. Yet this position would aggrandize arbitrators at the expense of courts and create the possibility

32. New York Convention, *supra* note 7, art. VII(2) (“The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.”).

33. See GAILLARD, *supra* note 9, ¶¶ 33, 36, 128, 131-32; Gaillard, *supra* note 9, ¶¶ 33-34.

34. Gaillard, *supra* note 9, ¶¶ 44-45.

35. See GAILLARD, *supra* note 9, ¶ 130 (“[G]enerally speaking, the aptitude of a norm to provide a basis for the solution to a legal issue is not dependent on the *outcome* of the proposition it enunciates, but rather on its *object*.” (quoting SYLVAIN BOLLÉE, *LES MÉTHODES DU DROIT INTERNATIONAL PRIVÉ À L'ÉPREUVE DES SENTENCES ARBITRALES* § 402 (2004)); Gaillard, *supra* note 9, ¶ 34. Troubled by this asymmetry, some scholars, including Professor Sylvain Bollée, “have indeed accepted that a decision upholding an award at the seat of the arbitration should, as long as the decision meets the requirements for the recognition of foreign judgments, lead to the automatic enforcement of the award.” GAILLARD, *supra* note 9, ¶ 130 (citing BOLLÉE, *supra*, § 402).

36. See GAILLARD, *supra* note 9, ¶ 130; Gaillard, *supra* note 9, ¶ 34.

for endless litigation. So long as this debate continues, and France and other countries continue to recognize and enforce awards that have been set aside at the seat, the *Yukos* award will live on no matter what courts in the Netherlands decide. Thus, no matter the result on appeal, Russia may ultimately be forced to pay Yukos shareholders billions of dollars.