

RETHINKING THE NEW YORK CONVENTION

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RETHINKING THE NEW YORK CONVENTION

A Law and Economics Approach

SHEN Wei



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To my parents

FOREWORD

There has been a very large literature devoted to the law of arbitration, a considerable portion of which focuses upon the New York Convention. Much of this writing is practical in nature, directly contributing through exposition and commentary to the law and practice of international commercial arbitration.

Dr Shen argues in this book that contemporary scholarship can reasonably aspire to go beyond that, invoking appropriate strands of legal and socio-political theory. He is surely right, in that the present surge of pluralist scholarship offers us fresh opportunities to re-examine the legal regimes of international commerce in a broader light. The New York Convention is an important – and arguably a largely successful – feature of the contemporary global governance regime, so fifty-five years after the birth of the Convention, it is appropriate to re-examine the evolving operation of this instrument, self-consciously invoking a range of theoretical resources, including but going beyond jurisprudence, in doing so.

Any new attempt to analyse the New York Convention is a formidable challenge given the vast array of topics and issues touching international commercial arbitration in general and the New York Convention in particular – not to mention the diversity of judicial opinions in more than 145 Convention States.

Dr Shen meets this challenge by reducing the issues surrounding the application of the New York Convention into four key topics: the evolution of the treaty; the competition among various jurisdictions in the context of enforcing an annulled award; *lex mercatoria* and governing law in arbitration; and the doctrine of public policy. Dr Shen approaches this challenge in an extremely innovative way. From a perspective broadly informed by economics, he draws specifically upon both Darwinian evolutionary theory and game theory. This is a brave initiative, clearly marking off his analysis from existing research in the field.

Dr Shen is to be warmly congratulated on making a fresh and important contribution to this field; his book deserves every success and will surely become an essential work of reference.

Simon Roberts
Professor of Law
London School of Economics
August 2012

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I am particularly grateful to Professor Simon Roberts for his guidance, support and encouragement, which made my PhD thesis, and now this book, an updated version, possible. I am indebted to Professor Michael Palmers and Professor Anthony Bradley who commented on an earlier draft of the manuscript. Special thanks also go to Trevor Goh and Yvonne Xu who read through the whole manuscript with great care and patience, and Dr Iris H.Y. Chiu for her insightful comments on Chapter 4. Certainly, responsibility for any error, defect or omission rests with me.

My interest in international commercial arbitration dates back to twenty years ago when I took a commercial arbitration course with Professor Chen Zhidong, who has become my mentor in many respects since then. I truly thank Professor Chen for his endless support, guidance and encouragement.

This book is a product of collective efforts. I want to thank two anonymous referees' endorsement for the publication of this book in this series. My gratitude further extends to Rebecca Pound for her patient proofreading and editorial input, and to Ann-Christin Maak for publication support. They have done their job with great efforts and tolerance for my failings; without them, this book would be a mission impossible.

As always, my greatest debt and most heartfelt thanks are owed to my parents even though our cultural tradition may restrain me from expressing that in a refined manner. As a merely tiny token of appreciation, this book is dedicated to them.

CONTENTS

<i>Foreword</i>	vii
<i>Acknowledgments</i>	ix
<i>List of Tables and Diagrams</i>	xiii

Chapter 1.

Rethinking the New York Convention: From a Jurisprudence-Oriented Perspective	1
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Chapter 2.

The New York Convention and Darwinian Legal Theory	9
2.1. Darwinian Evolutionary Theory	9
2.2. Legal Evolutionary Theory	12
2.3. The Application of Darwinian Theory in the Legal Sphere	20
2.4. The New York Convention and Darwinian Evolutionary Theory	27
2.4.1. The Origin of Arbitration and Core Memetic Code	28
2.4.2. The Hostility towards Arbitration by Courts in Common Law Jurisdictions	32
2.4.3. The Long Journey to the New York Convention	36
2.4.4. Mutation and the New York Convention	46
2.5. Environmental Changes and the New York Convention	53
2.5.1. Globalisation and its Impact on Arbitration Law	53
2.5.1.1. <i>Lex Mercatoria</i>	57
2.5.1.2. Sovereignty and De-nationalisation	60
2.5.1.3. Harmonisation of Arbitration Law	64
2.5.2. New York Convention and New Technology	68
2.5.2.1. New Technology, Commerce and Law	68
2.5.2.2. New Technology and E-based Arbitration	69
2.5.2.3. Impact of New Technologies on the New York Convention	70
2.6. New Direction of the New York Convention	79

Chapter 3.**Enforcement of Annulled Awards, Delocalisation and Game Theory 81**

3.1. From <i>Hilmarton</i> to <i>Chromalloy</i> : Case Law Study	82
3.1.1. <i>Hilmarton</i> Saga in France	82
3.1.2. <i>Chromalloy</i> Case: a Dilemma	84
3.1.3. Why are <i>Hilmarton</i> and <i>Chromalloy</i> Special?	88
3.2. Articles V and VII of the New York Convention	90
3.3. Legal Nature of an Annulled Award	98
3.4. Game Theory and Its Application	102
3.4.1. Prisoner's Dilemma and Strategic Behaviour	102
3.4.2. Race to the Bottom in Regulatory Contexts – Some Examples Involving States	104
3.5. Game Theory, Enforcement of Annulled Awards and the New York Convention	110
3.5.1. Legitimate Expectations of Private Parties in Arbitration	117
3.5.2. Public Interests of Nations in Enforcing Annulled Awards	122
3.5.3. Dual Control Mechanism, Delocalisation and Judicial Competition	128
3.5.4. Tensions between Rendition and Enforcement Forums and Gaming Settings	137
3.6. "Second Look" at the New York Convention	150
3.6.1. Goals of the New York Convention	150
3.6.2. Limits for Discounting Annulment under the New York Convention	151
3.7. Upgrading the New York Convention: Preliminary Thoughts	154

Chapter 4.***Lex Mercatoria* and the New York Convention 159**

4.1. Conceptualisation of <i>Lex Mercatoria</i>	159
4.2. Evolution of <i>Lex Mercatoria</i> : A Historical Perspective	161
4.2.1. Medieval Law Merchant and Self-Regulation of Commerce	162
4.2.2. Nationalisation of Law Merchant and Decline of <i>Lex Mercatoria</i>	166
4.3. The Nature of <i>Lex Mercatoria</i> in the Legal Realm	171
4.3.1. Relationship between <i>Lex Mercatoria</i> and National Laws	171
4.3.2. <i>Lex Mercatoria</i> : Effective Tool to Fill Gaps in Commercial Contracts?	174
4.3.3. <i>Lex Mercatoria</i> and Principles of Good Faith and Fairness	178
4.3.4. <i>Lex Mercatoria</i> and Legal Process	179
4.3.4.1. Uniformity and Predictability of the Proceedings	179
4.3.4.2. Judicial Review by the Court	181

4.4. <i>Lex Mercatoria</i> and International Commercial Arbitration	182
4.4.1. Inherent Features of Arbitration and <i>Lex Mercatoria</i>	182
4.4.2. Necessity of Arbitrators’ Discretion	184
4.4.3. Recognition of <i>Lex Mercatoria</i> in Major Jurisdictions.	185
4.4.3.1. England and Other Common Law Jurisdictions.	186
4.4.3.2. France and Other Continental European Countries . . .	189
4.4.3.3. The United States	193
4.5. Revival of <i>Lex Mercatoria</i> and International Commercial Arbitration . .	195
4.5.1. <i>Lex Mercatoria</i> and Globalisation: An Evolutionary Perspective.	195
4.5.2. Unification of Commercial Law and Rise of “Soft Law”	204
4.5.3. Infrastructure of <i>Lex Mercatoria</i> and Arbitration	210
4.5.4. Commercial Justification of <i>Lex Mercatoria</i> in the Commercial World	214
4.5.5. Positivist Rhetoric and Jurisprudential Justification of <i>Lex Mercatoria</i> in a Globalised Period	217
4.6. New <i>Lex Mercatoria</i> and Neo-New York Convention.	222
Chapter 5.	
Public Policy and the New York Convention.	225
5.1. Concept and Practice of Public Policy.	226
5.1.1. Arbitrability and Public Policy.	226
5.1.2. Public Policy in Article V(2)(b) of the New York Convention. . .	232
5.2. Judicial Approaches to Public Policy	234
5.2.1. Substantive Public Policy versus Procedural Public Policy	235
5.2.2. Domestic Public Policy versus International Public Policy	239
5.2.3. Prescriptive Public Policy versus Normative Public Policy	250
5.3. Normative Public Policy in the Gaming Context	257
5.3.1. Normative Public Policy – Efficiency-centred Approach to Public Policy	258
5.3.1.1. Legislatures	261
5.3.1.2. Courts.	263
5.3.1.3. Arbitration Institutions, Arbitral Tribunals and Arbitrators	267
5.3.2. Voice or Exit as a Potential Solution to Inefficient Public Policy .	270
5.3.3. Jurisdictional Competition as an Alternative to Formulate Efficient Public Policy	273
5.3.4. Cooperation among States to Formulate Efficient Public Policy	276
5.4. Construction of Normative Public Policy in International Arbitration .	278
5.4.1. Impediments to Adoption of a “Federalism” Court	279
5.4.2. Global Legislation.	282

5.5. Public Policy, Rule of Law and Globalisation 286

5.5.1. Legal Rationality, Rights Hypothesis and Predictability 286

5.5.1.1. The Idea of Rights 287

5.5.1.2. The Notion of Predictability 289

5.5.2. Legal Order and Transplant 291

5.6. Harmonisation of Public Policy Rules and International Law-making
Process 295

5.7. Summary 300

Chapter 6.

Neo-New York Convention: A Preliminary Conclusion. 303

6.1. Four Dilemmas of the New York Convention 303

6.1.1. Dilemma of the Past, Present and Future of the New York
Convention 303

6.1.2. Dilemma of Tensions between Rendition and Enforcing
Forums 304

6.1.3. Dilemma of Hard Law, Soft Law and *Lex Mercatoria*. 305

6.1.4. Dilemma of Public Policy and Party Autonomy 307

6.2. Two “New” Theories 308

6.2.1. Game Theory and Judicial Competition. 308

6.2.2. Darwinian Theory and Evolution of Law 309

6.3. One Core Question: Improving the New York Convention in the
Globalised World in the 21st Century 310

6.4. How to Reform the New York Convention? 313

Bibliography 319

Index. 353

LIST OF TABLES AND DIAGRAMS

Units in Biological, Social and Legal Evolutions.	16
Factors and Algorithm in Biological and Legal Evolutions	17
Comparison of Characteristics and Variations in Biological and Legal Evolutions	18
Prisoner's Dilemma	102
Public-Private Spheres in Various Periods 197	197
Major Social, Economic and Legal Features in Various Periods	201

