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CONTENT

THEME 1 INTERNATIONAL ADR

- 1 **THE DEVELOPMENT OF FDI DISPUTE SETTLEMENT IN CHINA AND MALAYSIA** 2
Liu Kai & Luo Hanwei
- 2 **THE BASIC INTERNATIONAL STANDARDS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS** 12
Mahmood Mowlavi
- 3 **PENYELESAIAN PERTIKAIAN KE ATAS LANGKAH PERTUKARAN YANG MENYENTUH PERDAGANGAN: BIDANGKUASA BERTINDIH ANTARA IMF DAN WTO** 18
Rohimi Shapiee
- 4 **TRIBUNAL UNDANG-UNDANG LAUT ANTARABANGSA SEBAGAI MEDIUM PENYELESAIAN PERTIKAIAN KE ATAS BLOK ND6 DAN ND7** 37
Muhamad Sayuti Hassan @ Yahya & Wan Siti Adibah Wan Dahalan

THEME 2 LABOUR & ADR

- 1 **THE EFFECT OF UNIONS ON JOB SECURITY IN LABOR LAW OF IRAN** 50
Mehdi Shabannia Mansour, Mohammad Javad Shabannia Mansour & Mohammad Askarinejad Amiri
- 2 **ANALISIS YURIDIS KOMPETENSI ABSOLUT MAHKAMAH INDUSTRIAL DI INDONESIA** 56
Rumainur
- 3 **WORKERS' RIGHTS AND TRADE UNION IN DISPUTE RESOLUTION; IRANIAN LABOUR PERESPECTIVE** 61
Mostafa Seraji & Kamal Halili Hassan
- 4 **UNDANG-UNDANG BURUH TERHADAP DASAR PENGHANTARAN BURUH MIGRAN INDONESIA KE LUAR NEGARA DAN PERMASALAHANNYA** 71
Umar Siratang & Salawati Mat Basir

THE BASIC INTERNATIONAL STANDARDS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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ABSTRACT

Arbitration is a well recognized mode for resolving disputes arising out of international commercial transactions. An arbitration award is a determination on the merits by an arbitral tribunal in an arbitration, and is analogous to a judgment in a court of law. Once a dispute between parties is settled, the winning party needs to collect the award. Unless the assets of the losing party are located in the country where the award was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition and enforcement of foreign arbitral awards between the country where the award is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect. However, one of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the courts of other countries. This difficulty has been sought to be removed through various international conventions. The New York Convention is one of the key instruments in international arbitration which applies to the recognition and enforcement of foreign arbitral awards. However, the world of international arbitration has changed since the creation of the Convention so it needs a complementary to the Convention which deals with the issues that have arisen in the practice of international arbitration during the last 50 years.

Keywords: Disputes, Arbitration, Enforcement of awards, New York Convention

INTRODUCTION

International arbitration is an increasingly popular means of alternative dispute resolution for international commercial transactions. The primary advantage of international arbitration over court litigation is enforceability: an international arbitration award is enforceable in most countries in the world. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes that arbitration awards are final and not ordinarily subject to appeal, the ability to choose flexible procedures for the arbitration, and confidentiality.

Once a dispute between parties is settled, the winning party needs to collect the award or judgment. Unless the assets of the losing party are located in the country where the court judgment was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition of court judgments between the country where the judgment is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect.

International Conventions without doubt incorporate the necessary combination of rules and procedures that has to be available to commercial operators. Without such a convention, it is indeed difficult to do business in the world. It represents an essential tool for competing in the increasingly liberalized environment of international trade between private individuals.

The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, also known as the "New York Arbitration Convention" or the "New York Convention," is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.¹

BACKGROUND

The first such international convention on commercial arbitration was the Geneva Protocol on Arbitration Clauses of 1923 which was drawn up on the initiative of the ICC under the auspices of the League of Nations. Its main purpose was to secure recognition of the validity of international arbitration agreements² and to ensure that, if a party commenced litigation, the courts would refer the parties to arbitration.³ The Geneva Protocol of 1923 was followed by the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 which applied to the execution of foreign arbitral awards.

The Geneva Protocol had two objectives, first it sought to make arbitration agreements and arbitration clauses in particular, enforceable internationally; and secondly, it sought to ensure that the awards made pursuant to such arbitration agreements would be enforced in the territory of the State in which they were made. The Geneva Protocol of 1923 was followed by the Geneva Convention of 1927 which also drawn under the auspices of the League of Nations. The purpose of the Convention was to widen the scope of the Geneva Protocol of 1923 by providing recognition and enforcement of protocol awards within the territory of contracting States (not merely the State in which the award was made).⁴

The New York Convention was established as a result of dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. The initiative to replace the Geneva treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953. In 1953, the International Chamber of Commerce (ICC) produced the first draft Convention on the Recognition and Enforcement of International Arbitral Awards to the United Nations Economic and Social Council.

¹ <http://www.newyorkconvention.org/>

² Geneva Protocol 1923, Art. 1. This was at a time when many states did not recognize agreements to refer future disputes to arbitration. However, recognition was limited to international arbitration agreements, where the parties were subject to the jurisdiction of different states. Additionally, recognition could be (and frequently was) limited to commercial disputes.

³ Geneva Protocol 1923, Art. 4.

⁴ Rashmi Perumal, *International Conventions Related to Enforcement of Foreign Arbitral Awards*, 2011, <http://jurisonline.in/2011/06/international-conventions-related-to-enforcement-of-foreign-arbitral-awards>

The ICC's initiative was taken over by the United Nations Economic and Social Council, which produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the New York Convention.⁵ With slight modifications, the Council submitted the convention to the International Conference in the spring of 1958.⁶

However, the New York Convention was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states.

The Convention's stating point is the recognition and enforcement of arbitration agreement.⁷ It also provides for the international enforcement of foreign arbitral awards. Closely modeled⁸ on the New York Convention, the 1975 Panama Convention⁹ was signed by a significant number of Latin American states¹⁰ and marked another step forward in the recognition of arbitration as an established method of resolving disputes in a regional context.¹¹

The New York Convention is one of the few examples where a transnational commercial law instrument elaborated by one of the specialized intergovernmental agencies or the United Nations became a true success story.¹² Countries which have adopted the New York Convention have agreed to recognize and enforce international arbitration awards. As of October 1, 2009, there are 144 signatories which have adopted the New York Convention: 142 of the 192 United Nations Member States. Only 50 U.N. Member States and Taiwan have not yet adopted the New York Convention.¹³

⁵ Van den Berg, <http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html>

⁶ <http://en.wikipedia.org>

⁷ The New York Convention, Arts. II.1 and II.3.

⁸ It too recognizes the validity of an agreement that submits existing and future disputes to arbitration: Panama Convention, Art.1.

⁹ Its formal title is "The Convention on the Settlement of Civil Law Disputeing from Economic, Scientific and Technological Co-operation". The text of the convention appears in (1978) III *Yearbook Commercial Arbitration* 15.

¹⁰ Including Brazil, Chile, Columbia, El Salvador, Panama and Uruguay.

¹¹ Alan Redfern; Martin Hunter; Nigel Blackaby; Constantine Partasides, *Law and Practice of International Commercial Arbitration*, 4th Edition, Sweet & Maxwell, 2004, pp.132-133.

¹² Herbert Kronke, *The New York Convention Fifty Years on: Overview and Assessment*, pp.1-2.

¹³ The following countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia & Herzegovina, Botswana, Britain and Northern Ireland, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic Italy, Chile, China, Colombia, Costa Rica, Cte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Grenadines, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, India, Indonesia, Ireland, Islamic Republic of Iran, Israel, Japan, Jordan, Kazakhstan, Kenya, Korea, Republic of Kuwait, Kyrgyzstan, Lao People's Democratic, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, ,Moldova, Republic of Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic Romania, Russian Federation, Saint Vincent and the San Marino, Senegal, Serbia and Montenegro, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tanzania, United Republic of Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom of Great

Adopted by UNCITRAL on 7 July 2006, the Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards.

OBJECTIVES

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.¹⁴

THE PRINCIPLES OF THE CONVENTION

The Convention is structured around two fundamental principles: 1. Deference to arbitral agreements, and 2. A review of the award by the judge of the country where enforcement is sought that excludes any review anew and that is limited to specified grounds. We deal with them to discuss as follows:

1. Deference to Arbitral Agreements

Deference to arbitral agreements is ensured by Article II(3) of the Convention which provides that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

In accordance with this provision, a Court before which a dispute is raised notwithstanding the existence of an arbitral agreement is not required to rule that it has no jurisdiction on its own motion. However, the definition of the arbitral agreement comes with a condition. It must be an "agreement in writing", as Article II(2) of the Convention provides that the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Zimbabwe (source: *ibid*).

¹⁴ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

2. The Terms of Review

The New York Convention rigorously organizes the recognition and enforcement of foreign arbitral awards. On the one hand, it limits the grounds which may be raised to object to recognition and enforcement and, on the other hand, it ensures a certain efficiency of the process during which they are considered.

a. Grounds for Objections to Recognition or Enforcement

Article V of the Convention states the grounds on which admissible objections to the award may be based, thus it excludes any review anew of the award. There are two separate types of such grounds with different procedural status.

(i) Grounds to be raised by Parties

Article V(1) of the Convention lists objections which must be raised and established by the party objecting to enforcement. These are:

- (a) the incapacity of a party;
- (b) the invalidity of the arbitration under the applicable law;
- (c) a lack of notice in relation to the proceedings or the appointment of the arbitrator or when a party was unable to present its case;
- (d) where there are matters beyond the scope of the submission for arbitration. Where only a part of the award can be impeached, if the rest of the award is severable, effect will be given to the part so severable;
- (e) where the composition of the tribunal or the procedure used was not in accordance with the agreement or of the *lex fori*;
- (f) where the award has not become binding or has been set aside or suspended in the country in which it was made.

(ii) Grounds which may be raised by the Court

Article V(2) of the Convention specifies objections which may be raised by the Court and on its own motion. These objections are to be considered under the law of the State of destination of the award:

- a) arbitrability of the dispute;
- b) contrariety to public policy.

b. The Enforcement Proceedings

In accordance with Article IV of the Convention, to obtain the recognition and enforcement of an arbitral award, the party applying for recognition and enforcement shall, at the time of the application, supply:

- a) the duly authenticated original award or a duly certified copy thereof,
- b) the original arbitration agreement or a duly certified copy thereof.

CONCLUSION

International arbitration is a means of alternative dispute resolution for international commercial transactions. Once a dispute between parties is settled, the winning party needs to collect the award or judgment. Unless the assets of the losing party are located in the country where the court judgment was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. International Conventions incorporate the necessary combination of rules and procedures that has to be available to commercial operators. However, one of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the courts of other countries. This difficulty has been sought to be removed through various international conventions. The New York Convention is one of the key instruments in international arbitration which applies to the recognition and enforcement of foreign arbitral awards. However, the world of international arbitration has changed since the creation of the Convention so it needs a complementary to the Convention which deals with the issues that have arisen in the practice of international arbitration during the last 50 years.

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