



**IMPROVING ON ENFORCEMENT OF INTERNATIONAL COMMERCIAL
ARBITRATION AWARDS IN ASEAN COUNTRIES
(Brunei Darussalam Perspectives)**

**Haji Mohammad Rosli bin Haji Ibrahim,
Brunei Darussalam Attorney Generals' Chambers**

A. INTRODUCTION

Brunei Darussalam's arbitration law is embodied in the Arbitration Act (Chapter 173 of the Laws of Brunei).

By way of background, the Act is based on:

(i) the Hong Kong Arbitration Ordinance (Cap. 341) which incorporates Hong Kong Ordinances of 1963, 1975 and 1982;

(ii) the Singapore Arbitration Act (Cap. 10) and the Arbitration (Foreign Awards) Act (Cap. 10A);

(iii) the U.K. Arbitration Acts of 1950, 1975 and 1979.

The Act is largely based on the said Hong Kong Ordinance (Cap. 341) which incorporates the U.K. 1950, 1975 and 1979 Acts but improves on them in a number of respects. This general scheme was followed in Singapore (Cap. 10 and Cap. 10A)¹.

The Act is a composite piece of legislation. It provides for conciliation, arbitration within Brunei Darussalam and enforcement of awards made pursuant to an arbitration agreement in a State or territory other than Brunei Darussalam, which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958 (hereinafter called the "New York Convention").

This paper will look at the enforcement aspect of the Act, and where relevant reference will also be made to other related legislation in Brunei Darussalam. The focus of the

¹ This is an extract from the 'Table of Sources' accompanying the draft Order (as the Act then was) prepared by the then Chief Justice of Brunei Darussalam, Dato Sir Denys Roberts which he forwarded to the then Minister of Law of Brunei Darussalam through his memorandum dated March 1992



discussion will be on improving the enforcement of international commercial arbitration awards. This will include discussions on uniform treatment of awards, conditions of recognition and enforcement as well as grounds for refusing recognition or enforcement.

B. UNIFORM TREATMENT OF AWARDS

Part III of the Act which deals with arbitration within Brunei Darussalam distinguishes between “domestic arbitration agreement” and other arbitration agreement.

Under section 8 (Part III) of the Act, which deals with an application by any party to an arbitration agreement to stay legal proceedings commenced by any other party to the arbitration agreement, “domestic arbitration agreement” is defined as an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State or territory other than Brunei Darussalam and to which neither an individual who is a national of, or habitually resident in, any State or territory other than Brunei Darussalam, nor a body corporate which is incorporated in, or whose central management and control is exercised in, any State or territory other than Brunei Darussalam, is a party at the time the proceedings are commenced. So an arbitration agreement is considered a domestic arbitration agreement if the seat of arbitration is in Brunei Darussalam and neither a foreign individual nor a foreign incorporation is a party to such agreement.

Under section 30 (Part III) of the Act, which deals with agreements which exclude the right of appeal in relation to an award, the term “domestic arbitration agreement” is defined in a substantially similar fashion except that instead of the said individual or body corporate not being a party to the arbitration agreement at the time the proceedings are commenced, the definition stipulates that neither of them is a party at the time the arbitration agreement is entered into.

Apart from providing for the provisions regarding “domestic arbitration agreement” and other arbitration agreement, the Act also provides, in Part IV, for the enforcement of New York Convention awards.

Brunei Darussalam acceded to the New York Convention on 25 July 1996 and it entered into force on 23 October 1996². Section 44 (1) of the Act provides that a New York Convention award shall be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 36³.

² http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

³ Which provides “An award on an arbitration agreement may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.”



By far it can be seen that the Act is structured in such a way that it differentiates between “domestic arbitration agreement” (which may result in ‘domestic’ awards), other arbitration agreement and New York Convention awards (necessarily ‘foreign’ awards). This clearly draws a distinction between ‘domestic’ and ‘foreign’ awards. Such structure is based on territorial borders.

It has been commented⁴ that the traditional distinction between “foreign” and “domestic” awards is rather inappropriate because of the limited importance of the seat of arbitration in international cases. The seat of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place.

In this respect, the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) (hereinafter called the “Model Law”) treats awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made. It distinguishes between “international” and “non-international” awards, which is substance based, instead of relying on the traditional distinction between “foreign” and “domestic” awards, which is territorial based.

Article 35 of the Model Law deals with recognition and enforcement of awards. It provides “*An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36*”. Article 36 deals with the grounds for refusing recognition or enforcement.

The underlined phrase evinces that the Model Law does not have regard to the seat of arbitration.

In some instance when parties negotiate their contracts each of them may wish to resolve any dispute between them by way of arbitration at their place of residence. If none of them budge and maintain their own position they may end up agreeing to a neutral place which has little or no connection with the dispute.

Assuming that the parties’ arbitration agreement is governed by a similar provision to Article 45 of the Model Law, the winning party would have the advantage of enforcing the arbitral award since the award will be recognized and enforced irrespective of the place in which it was made.

⁴ In Part Two of the Explanatory Note to the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) by the UNCITRAL Secretariat, obtainable at www.uncitral.org

This uniform treatment of international awards seems favourable and worth considering with a view to replace the traditional distinction between 'foreign' and 'domestic' awards.

C. CONDITIONS OF RECOGNITION AND ENFORCEMENT

Reciprocity

Under section 44 (1) (Part IV) of the Act, a New York Convention award is enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 36⁵. That section further provides⁶, inter alia, that any New York Convention award which would be enforceable under Part IV is treated as binding for all purposes on the persons as between whom it was made. This provision seems to be giving effect to Article III of the New York Convention⁷.

In comparison, Article 35 (1) of the Model Law stipulates that any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of Article 35 (2)⁸ and of Article 36⁹. The corresponding provisions to Articles 35 (2) and 36 are sections 45 and 46 of the Act respectively.

Due to the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement under the Model Law.

On this issue of reciprocity, Article I paragraph 3 of the New York Convention, inter alia, provides that "...any State may on the basis of **reciprocity** declare that it will apply the convention to the recognition and enforcement of awards made only in the territory of another Contracting State..." (emphasise added).

⁵ Which provides that "An award on an arbitration agreement may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

⁶ Under subsection (2).

⁷ Which provides, inter alia, "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon..."

⁸ This article provides for the conditions of enforcement of an arbitral award, namely by providing the original award or a copy thereof, and the court may request a translation of the award into the official language of the State if this was not done in the first place.

⁹ This article sets out the grounds for refusing recognition or enforcement.



Based on such provisions, Brunei Darussalam has introduced the Reciprocal Enforcement of Foreign Judgments Act (Chapter 177 of the Laws of Brunei) mainly to provide for the enforcement in Brunei Darussalam of judgments given in foreign countries which afford reciprocal treatment to judgments given in Brunei Darussalam and for facilitating the enforcement in foreign countries of judgments given in Brunei Darussalam. “Judgment” under the Reciprocal Enforcement of Foreign Judgments Act includes an award in proceedings on an arbitration.

Therefore, under the Reciprocal Enforcement of Foreign Judgments Act, where it appears to the Attorney General that the recognition and enforcement accorded by the courts of any foreign country to judgments given in the High Court of Brunei Darussalam substantially less favourable than that accorded by the courts of Brunei Darussalam to judgments of the superior courts of that country, the Attorney General may by order direct that no proceedings shall be entertained in any court in Brunei Darussalam for the recovery of any sum alleged to be payable under a judgment given in a court of that country¹⁰.

This implicates that a foreign arbitral award may not be enforced in Brunei Darussalam if an arbitral tribunal in the country in which the award was made accords less favourable treatment than that accorded by an arbitral tribunal in Brunei Darussalam to awards of an arbitral tribunal in that country.

If one considers that seat of arbitration is less significant and that treatment of foreign arbitral award should not be based on territorial ground then perhaps reciprocity should be best excluded from forming part of the conditions for recognition and enforcement of foreign arbitral award.

Requirement to present copy of arbitration agreement

The conditions for enforcement under the Act are set out in section 45¹¹, which among others include the requirement to produce the original arbitration agreement or a duly certified copy of it. In comparison, the Model Law with the amendment made in 2006 has deleted the requirement to present a copy of the arbitration agreement. The amendment was made to liberalise formal requirements and reflect the amendment made to Article 7 on the form of the arbitration agreement.

¹⁰ Section 10 of the Reciprocal Enforcement of Foreign Judgments Act.

¹¹ Which provides “The party seeking to enforce a Convention award must produce – (a) the duly authenticated original award or a duly certified copy of it; (b) the original arbitration agreement or a duly certified copy of it; and (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.”



One of the concerns expressed at the Working Group level of the UNCITRAL¹² when the matter was considered was that the deletion could amount to inconsistency between the Model Law and Article IV of the New York Convention, which required that the arbitration agreement or a certified copy thereof be presented. But on the other hand it was noted that Article VII paragraph 1 of the New York Convention recognized the right of a party to enforce an arbitral award in the manner allowed by applicable national law. Therefore, if certain national law does not impose the requirement of presenting a copy of the arbitration agreement there will be no such inconsistency by virtue of Article VII paragraph 1 of the New York Convention.

Another concern was that the deletion would have a negative impact on Article 36 of the Model Law where the grounds upon which enforcement of an award might be refused rested on the terms of the arbitration agreement. Although the requirement of presenting a copy of the arbitration agreement was included in the 1985 text of the Model Law, the footnote to paragraph 2 to Article 35 of the Model Law explained that the conditions set forth in that paragraph were intended to set maximum standards and left it open to a Member State to impose less onerous conditions to be met by a party seeking enforcement. With a view to liberalise formal requirements imposed on a party who wish to enforce an arbitral award, the Working Group eventually agreed to remove the requirement to present a copy of the arbitration agreement from the Model Law.

The idea of imposing formal requirements less rigorously without compromising all the necessary considerations in the process of enforcement of an arbitral award can be seen as an attempt to facilitate and hasten such process.

Another room for improvement is in relation to the requirement to produce the duly authenticated original award under section 45 of the Act. It had been stated¹³ that the words “duly authenticated” had given rise to problems in practice and were open to different interpretations. In the Model Law these words had been deleted.

These would obviously be among the factors to be taken into account in improving the legal regime on enforcement of a foreign arbitral award in Brunei Darussalam.

¹² As stated in the Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006) which was presented by the UNCITRAL (in its thirty-ninth session New York, 19 June-7 July 2006) obtainable at www.uncitral.org

¹³ Supra 12.



D. GROUNDS FOR REFUSING RECOGNITION OR ENFORCEMENT

These grounds are embodied in section 46 of the Act, the first of which provides that enforcement may be refused if “a party to the arbitration agreement was (under the law applicable to him) under some incapacity”.

Until the amendment in 2006, the wordings of this ground were substantially identical to those in the Model Law. But in 2006, the Model Law was amended and the ground, among others, now reads “a party to the arbitration agreement referred to in article 7 was under some incapacity”. It was modified because it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Why does the law only applicable to such party and not the other party also? Why does it refer to the law applicable to the party and not to the arbitration agreement instead? These uncertainties have perhaps driven the UNCITRAL to make such modification. To avoid such potential problematic clause Brunei Darussalam should perhaps follow suit.

E. CONCLUSION

The Model Law provides a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

Since its adoption by UNCITRAL, the Model Law has been accepted as an international legislative standard for a modern arbitration law and a significant number of jurisdictions, including the ASEAN, have enacted arbitration legislation based on the Model Law.

With a view to greatly improve its arbitration legislation and enhance the confidence of foreign parties as the primary users of international arbitration, Brunei Darussalam will introduce 2 new sets of arbitration legislations based on the Model Law, which will replace the current Arbitration Act (Chapter 173 of the Laws of Brunei). These new laws will take into account the most recent developments in arbitral disputes¹⁴. The aim is to ensure that both Brunei Darussalam’s arbitration laws and rules are arbitration friendly and that it is in line with the latest developments and trends taking place in international arbitration arena¹⁵.

¹⁴ “Opening and Keynote Speech on International Commercial Arbitration” by YB Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli, the Honourable Attorney General of Brunei Darussalam.

¹⁵ Supra 14.



The introduction of the new arbitration legislations will certainly open a new chapter of arbitration as an alternative dispute settlement mechanism in Brunei Darussalam. No doubt Brunei Darussalam will benefit from it¹⁶.

¹⁶ One example which has seen the positive result as a consequence of adopting the Model Law is Singapore. Singapore adopted the Model Law in 1994. By the end of 2004, the Singapore International Arbitration Centre (SIAC) (which is considered an important international arbitration centre in the region) administered more than 819 cases. In 2004, 81 cases were administered by SIAC of which 51 were international cases. These numbers refer only to SIAC-administered cases. There are many more ad hoc arbitration cases held in Singapore outside SIAC including arbitrations under the ICC which has its Asian centre in Singapore. Cases that come before SIAC involve much higher sums than before. Between 2000 and 2005, the total amount of claims reached about US\$1 billion per year (Chan Sek Keong, Singapore's Attorney-General "Singapore's Experience with the Work of UNCITRAL" <http://cisgw3.law.pace.edu/cisg/biblio/keong.html>).