“The 1958 New York Convention is the most successful, multilateral instrument in the field of international trade law. It is the centrepiece in the mosaic of treaties on arbitration laws that ensure acceptance of arbitral awards in arbitration agreements. Courts around the world have been applying and interpreting the Convention for over 50 years in an increasing unified and harmonized fashion.” – Professor Pieter Sanders speaking in April 2011, when he was the last surviving participant of the 1958 New York Conference on International Commercial Arbitration which drafted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention).

The origin of the Convention lay in the earlier Convention of 1927, the Geneva Convention on the Execution of Foreign Arbitral Awards, and subsequent drafting by the International Chamber of Commerce in 1955 of what was seen then as an ambitious draft Convention to provide for the enforcement of international awards. This draft was presented to the UN Economic & Social Council (ECOSOC) which in turn prepared a draft Convention on Foreign Arbitral Awards. This was the draft that the New York Conference worked on feverishly during those weeks of May/June 1958.

Lord Mustill, co-author of one of the leading textbooks on arbitration and a former Lord of Appeal, described the Convention as perhaps the most effective instance of international legislation in the entire history of commercial law.

The Convention is extraordinary; it has gained universal acceptance and if it was suggested today that such a Convention be drawn up, it would no doubt fail as nations jealously guard their sovereign right to determine the rights of citizens under their own laws.

It is the foundation stone for international trade and commerce, one of the objectives of the United Nations post-Second World War, that nations which are bound together by trade will no longer resort to war. Given the number of localised wars and conflicts ongoing today, the cynics may say that this has not worked. However, it is self-evident that since the end of the Second World War in 1945, which began some 21 years after the end of the First World War, there has been no global conflict on our planet on the scale of those conflicts seen in the late nineteenth and early twentieth century.

What is also remarkable about the Convention is that it is a treaty, freely entered into by governments in order to regulate their respective courts to ensure that arbitral awards, given in foreign states, receive recognition and enforcement. The Convention promotes international commerce and the settlement of international disputes through arbitration. It facilitates the recognition and enforcement of foreign arbitral awards and the enforcement of arbitration agreements. Courts are required to adopt a pro-enforcement approach when interpreting the Convention and those few grounds set out in Article V in relation to when enforcement may be refused are required to be construed narrowly. Currently, 150 states are party to the Convention.
On 24 February 2014, the United Kingdom submitted a notification to the Secretary General of the United Nations to extend the territorial application of the Convention to the British Virgin Islands. The Convention is set out in Part X of the Arbitration Act, 2013 and, by section 84 of the Arbitration Act, 2013, Convention Awards are enforceable in the territory in the same manner as they would be in any other Convention country.

Since the Convention is an international treaty, it is part of public international law. Consequently, the court, when called upon to apply the Convention, must interpret it in accordance with the rules of interpretation of international law which are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. So the Convention should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in light of context, object, and purpose. It is only where the Convention is ambiguous that one would refer to the travaux préparatoires (Article 32 of the Vienna Convention), which would mean recourse to the various texts and records relating to the preparatory work for the drafting and execution of the Convention.

The Convention is a very short document; it comprises 16 Articles contained in four pages. Its prime purpose is set out in the first three articles:

a) to recognise and enforce arbitral awards made in the territory of a state other than the state where recognition and enforcement of such awards are sought;

b) that contracting states should recognise arbitration agreements and give effect to them and stay court proceedings brought in breach of a valid arbitration agreement; and

c) that contracting states should recognise arbitral awards as binding and enforce them in that territory as if it were a domestic arbitral award of that same territory with no higher conditions or fees than would normally be applicable.

The procedure to obtain recognition and enforcement is straightforward and expressed succinctly in Article IV of the Convention. A party wishing to obtain recognition and/or enforcement shall supply:

a) the duly authenticated original award or a duly certified copy;

b) the original arbitration agreement between the parties;

c) if the award or the agreement is in a language foreign to the state where enforcement is sought, it is required that there be a translation of those documents into the local language.

The tenor of the Convention is pro-enforcement and nowhere is this better seen than in Article V which provides the grounds upon which recognition and/or enforcement may be refused. There are five grounds including that:

a) the parties to the agreement were under some incapacity or the arbitration agreement was not valid under the law of the agreement or under the law of the country where the award was made; or

b) the losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case; or

c) the award deals with matters falling outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission provided that if the decisions on matters submitted to arbitration can be separated from those not submitted then that part of the award may be recognised and/or enforced; or
d) the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or not in accordance with the law of the country where the arbitration took place; or

e) the award has not yet become binding on the parties or has been satisfied or suspended by the competent authority in the country in which, or under the law of which, the award was made.

The second part of Article V adds some additional grounds for refusal of recognition and enforcement which are that:

a) the subject matter of the dispute was not capable of settlement by arbitration under the laws of the country where recognition and/or enforcement is sought; or

b) recognition or enforcement would be contrary to the public policy of that country.

The Convention has been hugely successful in promoting international trade because the parties to international commercial agreements have the means to resolve their disputes through arbitration and those arbitral awards can be given recognition and enforcement in the home country (or any other country) where assets can be located of the losing party as if it were a judgment of the local court. It is important that those who trade with BVI companies know that, if there is a dispute, they can have recourse through arbitration and ultimately, if it is required, that the arbitration award will be recognised and enforced in the BVI.

By providing this recourse and adopting the Arbitration Act, 2013, based on the UNCITRAL Model Law on Arbitration, the BVI cements its position as one of the principal competitors in the region for attracting the cream of international business.
This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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For further information please contact: leslie.cline@codancanada.com