United Nations A/CN.9/SER.C/ABSTRACTS/180

General Assembly

Distr.: General
27 April 2017

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.17-02695 (E) 030517 040517

Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases Relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention (NYC)

Case 1664: NYC [V]; V(1)(b); V(2)(a); [V(2)(b)]
Colombia: Corte Suprema de Justicia
Case No. 11001-0203-000-2008-01760-00
Drummond Ltd. v. Ferrovias en Liquidacion, Ferrocariles Nacionales de Colombia S.A. (FENOCO)
19 December 2011
Original in Spanish
Available at: http://www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org[1]

On 13 September 1991, Drummond and Ferrovias entered into a contract for private transportation which contained an arbitration agreement providing for ICC arbitration in Paris. On 9 September 1999, Ferrovias and Fenoco concluded a concession contract. On 24 June 2003, an arbitral tribunal issued a partial arbitral award deciding on jurisdiction. On 25 July 2005, it issued another partial award and the final award was issued on 10 June 2006. Drummond sought to enforce the award in Colombia. Fenoco opposed enforcement on the grounds that the award dealt with rights over property located in Colombia, subject to the exclusive jurisdiction of Colombian Courts, that the award violated Colombian public policy, that the award dealt with a matter beyond the arbitration agreement and that the proceeding violated due process.

The Corte Suprema de Justicia (Supreme Court) granted enforcement of the award. It first noted that both Colombia and France were parties to the NYC, which was thus applicable. It added that Article V NYC impedes the parties to raise grounds other than those contained in that Article. Regarding Fenoco's argument that the award related to rights over property located in Colombia, the Corte Suprema de Justicia rejected the argument, holding that it was not a ground for non-enforcement as foreseen by the NYC. Regarding Fenoco's argument that the arbitral award violated Colombian public policy, the Corte Suprema de Justicia noted that "public policy" within the meaning of the NYC cannot be the same as in a national context. Public policy under the NYC relates to fundamental principles such as good faith, prohibition of abuse of rights, and due process. As such, a violation of a mandatory rule of the State where enforcement is sought cannot in itself amount to a violation of public policy. In the present case, the Court held that no violation of the fundamental rules of Colombia had occurred. The arbitral tribunal had limited its orders to execute the contract at hand. On Fenoco's argument that the arbitral tribunal had issued fines in violation of public policy, the Court held that an act contrary to a rule of public law has to be of such magnitude as to impede the award's enforcement in Colombia. The Court held that this was not the case. Regarding Fenoco's argument that, in accordance with French law, arbitration with public entities is not permitted and therefore, the reciprocity requirement was not complied with, the Corte Suprema de Justicia noted that the reciprocity requirement had been complied with as both countries are parties to the NYC. Regarding Fenoco's argument that the arbitral award had dealt with a subject matter that falls under the exclusive jurisdiction of Colombian Courts and therefore the award's enforcement would be contrary to Article V(2)(a) NYC, the Court recalled that an arbitral tribunal has no jurisdiction to rule on the validity of an administrative act. But it noted that in the present case, the arbitral tribunal had dealt with a contractual dispute which was arbitrable. On Fenoco's argument that the award had been

[1] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

rendered in violation of due process (Article V(1)(b) NYC), the Corte Suprema de Justicia noted that service of process was intended to let the respondent know about the proceedings so that it can present its defence. However there is no formal requirement for service of process. The Corte Suprema de Justicia noted that Ferrovias participated to the arbitral proceeding and that Colombian minimum guarantees had been respected as Ferrovias had the opportunity to present its defence. It dismissed Fenoco's arguments.

Case 1665: NYC [II; III]; V; V(1); V(1)(a); V(1)(b); V(1)(e); V(2); V(2)(b)
Colombia: Corte Suprema de Justicia
Case No. 11001-0203-000-2007-01956-00
Petrotesting Colombia SA & Southeast Investment Corporation v. Ross Energy S.A.
27 July 2011
Original in Spanish
Available at http://www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org[2]

On 28 June 2001, the parties entered into a Consortium agreement containing an arbitration agreement providing for the American Arbitration Association (AAA) in New York. A dispute arose and on 19 June 2006, an award was rendered in favour of Petrotesting against Ross Energy. Petrotesting sought to enforce the arbitral award in Colombia pursuant to Law No. 315 of 1996, Decree No. 1818 of 1998, and the NYC. Ross Energy opposed enforcement on various grounds based on Article V NYC. It argued that the award was not properly translated, that a proceeding on the same subject matter was pending before a United States Court, that the dispute was not arbitrable as it referred to rights over property located in Colombia, that the award contains decisions on matters beyond the scope of the arbitration agreement, that the award violated Colombian public policy, and that it was not properly served notice of the proceeding.

The Corte Suprema de Justicia (Supreme Court) granted enforcement to the award. It first considered that the reciprocity requirement was fulfilled as both Colombia and the United States are parties to the NYC. Regarding Ross Energy's argument on translation mistakes, the Corte Suprema de Justicia, after taking into account several testimonies, considered that there was no alteration in the meaning of the award and rejected this argument. With respect to other grounds contained in Article V, the Corte Suprema de Justicia held that it was for the party opposing enforcement to prove that the grounds in Article V(1) NYC are met while the grounds of Article V(2) can be raised *sua sponte* by the Court. On Ross Energy's argument that a proceeding on the same subject matter as the arbitration proceeding was pending before a United States Court, the Corte Suprema de Justicia considered that it was not a ground under Article V NYC. It added that the United States proceeding had been dismissed by the United States Court because of the existence of an arbitration agreement. The Corte Suprema de Justicia dismissed the argument. On Ross Energy's argument regarding the arbitrability of the dispute (because it concerned rights over property located in Colombia), the Corte Suprema de Justicia held that (i) it was not a ground for non-enforcement under Article V NYC and (ii) the award dealt with personal rights. Regarding Ross Energy's argument that the arbitration agreement was not valid (Article V(1)(a) NYC) because Colombian law does not allow the conclusion of arbitration agreements in public contracts, the Corte Suprema de Justicia considered that the arbitration agreement was not in the public contract for oil exploitation but in the Consortium Agreement and as such had been validly entered into. On Ross Energy's argument that the award violated public policy (Article V(2)(b) NYC), the Corte Suprema de Justicia noted that in private

[2] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

international law, public policy does not refer to the same concept as in the internal law, and the applicable concept here is international public policy, which refers to fundamental principles of the State. The Corte Suprema de Justicia considered that the agreement at stake did not involve any national interests and dismissed the argument. Regarding Ross Energy's argument that it was not properly served notice (Article V(1)(b) NYC), the Corte Suprema de Justicia noted that while it did not participate to the arbitration proceedings and was not present at the hearing, no formal requirement existed with regard to service of process and that the absence of the respondent does not in itself invalidate the proceeding. It considered that it was a ground contained in Article V(2)(b) NYC as it relates to due process. As such, the Corte Suprema de Justicia noted that the parties had been given an equal opportunity to present their defence: Ross Energy had been aware of the proceeding, it claimed it was not able to present its defence because the proceeding was in English and its financial situation did not allow for translation but the Corte Suprema de Justicia noted that the arbitration agreement provided for English as the language of arbitration. It dismissed the argument. Regarding Ross Energy's argument that the award was rendered beyond the scope of the arbitration agreement because while the arbitration agreement was contained in the Consortium Agreement, the arbitral tribunal ruled over a dispute related to an Operation Agreement, the Corte Suprema de Justicia analysed the arbitration agreement and held that it provided for arbitration for all disputes arising out of the Consortium Agreement and operations taking place under this Consortium Agreement. The Corte Suprema de Justicia dismissed the argument.

Case 1666: NYC IV
Colombia: Corte Suprema de Justicia
Case No. 11001-0203-000-2011-00581-00
Pollux Marine Services Corp. v. Colfletar Ltda
12 May 2011
Original in Spanish
Available at: http://www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org[3]

Company Pollux Marine Services Corp. (Pollux Marine) requested recognition and enforcement of the arbitral award rendered on 7 December 2007 in a dispute opposing Pollux Marine and Colfletar Ltda. The Corte Suprema de Justicia (Supreme Court) denied enforcement of the award. It considered that enforcement was subject to requirements under both Article 695 of the Code of civil procedure (that the foreign decision is final in accordance with the laws of the country in which it was obtained and a duly certified and authenticated copy has been presented to the court in Colombia) and Article IV NYC that requires the party seeking enforcement to present a duly authenticated copy of the award, with a translation in the official language of the country where enforcement is sought. The Corte Suprema de Justicia considered that the party seeking enforcement did not comply with these requirements as it had not proved that the award was final in accordance with the law of the country where it was rendered (the petitioner only stated that the award was final in accordance with English law). The Corte Suprema de Justicia added that it did not present any legal translation of the arbitration agreement.

[3] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

Case 1667: NYC V(1)(b); V(1)(d); V(2)(b)
Germany: Oberlandesgericht München
Case No. 34 Sch 10/11
14 November 2011

Abstract published on www.newyorkconvention1958.org[4]

Two German companies entered into a settlement agreement regarding a corporate acquisition operation. The settlement agreement provided for arbitration in Zurich under the DIS (German Institution of Arbitration) Rules. The Claimants initiated proceedings claiming for damages for breach of the settlement agreement. The Defendant argued that the damages were contractually limited to the value of a property which was lower than the amount claimed for. The arbitral tribunal granted the full amount of damages finding that the value was assessed by the Claimants' expert and had served as a basis to the Parties' settlement negotiations. Also considering other factual elements, the arbitral tribunal held that the Defendant's expert report which came to a lower value was not convincing in this regard. The Claimants sought enforcement in Germany. The Defendant opposed the application of enforcement arguing a violation of its right to be heard by the arbitral tribunal. The Defendant asserted that the arbitral tribunal which lacked proper expert knowledge, had violated its right to be heard by following the Claimants' expert valuation without itself assessing the question by application of a proper valuation method, without appointing an expert and without addressing the Defendant's expert report. The Claimants submitted, on the contrary, that the arbitral tribunal was not obliged to appoint an expert as the German Civil Procedure Code which would have required such an appointment does not apply but the DIS Rules the parties had agreed on. The Claimants further asserted that the tribunal's assessment of the evidence was correct and would not amount to a violation of German "ordre public", in any event.

The Oberlandesgericht (Higher Regional Court) München declared the award enforceable. It held that the right to be heard as a basic principle laid down in the German Constitution (Article 103(1) Grundgesetz) also applies to arbitration. Therefore, the arbitral tribunal needs to consider the Parties' position and their applications on the admission of evidence concerning facts relevant to the case. With regard to the alleged violation of Articles V(1)(b), V(2)(b) and V(1)(d) NYC, the Oberlandesgericht found that in the case at hand, the arbitral tribunal did consider the question of the property's value, and discussed in detail which expert's view should prevail. The Oberlandesgericht further found that the arbitral tribunal had the right to proceed the way it did in the framework of the DIS Rules. Thus, the tribunal did not violate the Defendant's right to be heard.

[4] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

Case 1668: NYC II; V
Italy: Corte di Cassazione
Case No.: 13231
Del Medico & C. SAS v. Iberprotein Sl
16 June 2011
Original in Italian

Abstract published on www.newyorkconvention1958.org[5]

A Spanish company (Iberprotein) and an Italian company (Del Medico) entered into an agreement by executing a standard form contract of the Grain and Feed Trade Association (GAFTA). The agreement referred to the general terms and conditions, which contained an arbitration clause. A dispute arose and an award was rendered in London on 4 April 2002 in favour of Iberprotein. By an ex parte order (decreto) issued on 17 September 2002, the President of the Corte di Appello di Bari (Bari Court of Appeal) allowed enforcement of the award in Italy. Del Medico filed a petition against the enforcement order under Article 840 of the Italian Code of Civil Procedure (opposizione) before the Corte di Apello di Bari, which was dismissed. It then applied to the Corte Suprema di Cassazione (Supreme Court), claiming that the award had been rendered on the basis of an invalid arbitration agreement. Del Medico argued that the arbitration agreement had not been expressly approved by the parties, and that the mere reference in the agreement to the general terms and conditions containing the arbitration clause did not comply with the requirement of Article II NYC that the arbitration agreement should be concluded in writing. Del Medico further alleged that the reasoning of the Corte di Appello di Bari was insufficient and contradictory in that the Court maintained, on the one hand, that the arbitration agreement was valid since arbitration agreements incorporated by reference were valid under English law, which was applicable as the law of the seat of the arbitration under Article V NYC, while noting, on the other hand, that Del Medico's defence was grounded on the lack of knowledge of the arbitration agreement.

The Corte Suprema di Cassazione affirmed the decision of the Corte di Appello di Bari and dismissed the petition against the enforcement order. It first noted that the principles set forth in Article 833 of the Italian Code of Civil Procedure (pursuant to which an arbitration clause contained in the general conditions incorporated into a written agreement between the parties is valid, provided that the parties had knowledge of the clause or should have had such knowledge by using ordinary diligence) may also be inferred from a correct reading of the NYC. It observed that such a provision is the result of an evolution aimed at overcoming formalistic difficulties in international arbitration, in compliance with Article II NYC. The Corte Suprema di Cassazione held that the definition of an "agreement in writing" under Article II NYC is broad enough to encompass an arbitration agreement entered into "per relationem imperfectam", i.e. via a generic reference in the agreement to the arbitration clause included in the GAFTA general terms and conditions. After noting that the opposing party had not claimed that it was unaware of the GAFTA rules, it held that in its capacity of professional businessman in the field at hand, Del Medico could not pretend to have been ignorant of the GAFTA rules. The Corte Suprema di Cassazione also noted that Del Medico had failed to properly challenge the finding of the lower court and of the arbitral tribunal that English law applied to the issue of whether the arbitration agreement had been validly approved by the parties, as the law governing the main contract. While noting that Del Medico had failed to contradict this ruling, the Corte Suprema di Cassazione recalled that the arbitration agreement is autonomous and that Article V NYC provides that enforcement may be

[5] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

refused where the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. The Corte Suprema di Cassazione finally dismissed Del Medico's argument that the reasoning of the lower court was contradictory.

Case 1669: NYC V(1)(e); V(2)(b)
United States of America: U.S. Court of Appeals, Ninth Circuit
Case No. 99-56380, 99-56444
The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, as Successor in Interest to the Ministry of War of the Government of Iran v. Cubic Defense Systems, Inc., as Successor in Interest to Cubic International Sales Corpo
15 December 2011
Original in English
Available at: http://www.ca9.uscourts.gov/

Abstract published on www.newyorkconvention1958.org[6]

The Appellee, the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran (the "Ministry"), obtained an arbitral award in 1997 against the Appellant, Cubic Defense Systems, Inc. ("Cubic"), based on a contract that had been terminated following the Iranian Revolution. The arbitral proceedings, seated in Switzerland, were conducted under the auspices of the International Court of Arbitration of the International Chamber of Commerce. The Ministry subsequently filed a petition in the United States District Court for the Southern District of California to confirm the award. The District Court confirmed the award, but denied the Ministry's request for post-award, prejudgment interest and attorneys' fees.

Cubic appealed, arguing that the award should not have been confirmed because it violated United States public policy against trade and financial transactions with the Islamic Republic of Iran, or, alternatively, that it had not become binding on the parties. Cubic also disputed the application of post-judgment interest. The Ministry cross-appealed the District Court's denial of post-award, prejudgment interest and attorneys' fees.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision, but remanded for the District Court to reconsider granting the Ministry post-award, prejudgment interest and attorneys' fees. First, the Court considered Cubic's public policy defence to enforcement in accordance with Article V(2)(b) NYC and rejected it, stating that this defence is construed very narrowly given the strong federal policy favouring confirmation of foreign arbitral awards. The Court recognized that United States relations with the Islamic Republic of Iran ("Iran") were heavily regulated pursuant to a sanctions policy prohibiting payments to Iran, but noted that special federal licensing programmes created exceptions to the sanctions policy. The Court then distinguished between confirmation versus enforcement or payment of an award, and saw no reason to refuse to confirm the arbitral award, which in the Court's view was not synonymous with requiring payment of the award. Next, the Court analysed Cubic's argument that the award had not become binding on the parties in accordance with Article V(1)(e) NYC, and rejected it. The Court held that the award was binding and final as all arbitration appeals had been exhausted, which Cubic did not dispute. The Court also held that the District Court's judgment was a money judgment subject to post-judgment interest because it identified the parties for and against whom judgment was entered and the definite and certain sum owed to the judgment creditor. The District Court's judgment satisfied the criteria for a money judgment

[6] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

by expressly incorporating the terms of the arbitral award, which indicated a definite and certain sum that Cubic owed to the Ministry. Finally, the Court held that a district court may, in its discretion, award post-award, prejudgment interest and attorneys' fees in an action to confirm an arbitral award, unless otherwise provided in the award. Thus, the Court vacated the District Court's denial of the Ministry's request for post-award, prejudgment interest and attorneys' fees and remanded for reconsideration.

Case 1670: [NYC]
United States of America: U.S. District Court, Southern District of California
Case No. 11CV1819 JLS (MDD)
Ariel Freaner v. Enrique Martin Lutteroth Valle, Hotelera Coral S.A. de C.V.
17 November 2011
Original in English

Abstract published on www.newyorkconvention1958.org[7]

The Plaintiff, Ariel Freaner ("Freaner"), entered into an agreement to design and develop a website for the Defendants, Enrique Martin Lutteroth Valle and Hotelera Coral (collectively, "Defendants"), which contained an arbitration clause requiring the parties to arbitrate any controversy or claim arising out of or related to the agreement pursuant to the arbitration rules of the American Arbitration Association ("AAA") in California. The law governing the contract was California law. When a dispute arose, Freaner sued in California state court, alleging breach of contract. The Defendants removed the case to the United States District Court for the Southern District of California pursuant to Section 205 of the Federal Arbitration Act ("FAA"), which grants a federal district court removal jurisdiction over cases it determines relate to an arbitration agreement governed by the NYC. Freaner then filed motions to compel arbitration and remand the case back to state court.

The United States District Court for the Southern District of California denied Freaner's motion to remand and compelled the parties to arbitrate their dispute. The Court held that it had jurisdiction over the dispute because (i) the arbitration agreement "falls under" the NYC, and (ii) the subject matter of the litigation related to the arbitration agreement. The Court explained that an arbitration agreement "falls under" the NYC if it arises out of a commercial relationship and at least one of the parties to the agreement is not a United States citizen or there is some other "reasonable relation" with a foreign state. The Court held that the arbitration agreement between the parties fell under the NYC because it arose from a commercial relationship, i.e. it was based on a goods and services contract, and Hotelera Coral, one of the defendants, was foreign, i.e. a Mexican entity.

For the second prong of its analysis, the Court explained that a dispute "relates to" an arbitration agreement if the agreement can "conceivably affect the outcome of the plaintiff's suit" or if it "will impact the disposition of the case," as long as it is not completely absurd or impossible. That is, if the defendant plausibly argues that the parties had agreed to arbitrate the subject matter of the pending suit and requests the court to compel arbitration, then the arbitration provision affects the "disposition of the case." Accordingly, the Court held that the present dispute "relate[d] to" an arbitration agreement within the meaning of Section 205 of the FAA because the Defendants demonstrated that the dispute was subject to arbitration pursuant to the parties' arbitration agreement. The Court then rejected Freaner's argument that the case ought to be remanded to California state court because California law, rather than federal law, should determine the question of the arbitrability of the underlying dispute. The Court held that there was no "clear and unmistakable" evidence that the

[7] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

parties agreed to apply California law instead of federal law to the question of arbitrability. The Court concluded that the choice-of-law clause designated California law to govern the merits of a dispute, not to determine whether a dispute is arbitrable in the first place. In the latter instance, the Court stated that federal law applies, and accordingly, removal to the District Court pursuant to Section 205 of the FAA was valid. The Court then directed the parties to arbitrate the dispute in accordance with the terms of their arbitration agreement, which neither party had opposed. The Court refused to decide the remaining issues presented by the parties, stating that its jurisdiction on removal was limited to determining the existence and enforceability of the arbitration provision, i.e. whether to compel arbitration.

Case 1671: [NYC]
United States of America: U.S. Court of Appeals, Ninth Circuit
Case No. 09-56714
Gary Smallwood v. Allied Van Lines, Inc., and Sirva, Inc., Delaware companies, dba Allied International
18 October 2011
Original in English
Available at: http://www.ca9.uscourts.gov/

Abstract published on www.newyorkconvention1958.org[8]

The Plaintiff-Appellee, Smallwood ("Smallwood"), entered into a contract to ship or store his belongings with the Defendants-Appellants, Allied Van Lines, Inc. and its affiliates (collectively, "AVL"). One of the documents exchanged by the parties contained an agreement to arbitrate disputes in Dubai. When a dispute arose between the parties, Smallwood sued AVL in California state court. AVL removed the action to the United States District Court for the Southern District of California on the basis that the Carmack Amendment ("Carmack"), which is the federal law applicable to the inter-state shipment of goods by domestic rail and motor carriers, pre-empted Smallwood's state law claims. AVL also sought to compel arbitration. The District Court held that Carmack pre-empted some, but not all, of Smallwood's state law claims, and denied arbitration of Smallwood's Carmack claims.

AVL appealed, arguing that Carmack allowed enforcement of foreign arbitration clauses or, alternatively, that the Federal Arbitration Act ("FAA") overrode any prohibition against arbitration contained in Carmack. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. The Court stated that the plain statutory text of Carmack granted a shipper the right to select his forum for bringing suit after a dispute arises and prohibited household carriers from forcing a shipper to agree to arbitrate claims as a contractual condition. Thus, the Court held that the parties' arbitration clause was unenforceable because it had been entered into prior to the dispute. The Court stated that parties may agree to arbitrate their disputes under Carmack but only if the shipper consents to arbitration after a dispute arises. The Court further stated that because the statutory language of Carmack was clear and Carmack was enacted after the FAA, the FAA's and NYC's mandate to enforce arbitration agreements did not override Carmack.

[8] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

Case 1672: NYC V(2)(b)
United States of America: U.S. Court of Appeals, Eleventh Circuit
Case No. 11-12257
Ricardo Maxwell v. NCL (Bahamas), LTD, d.b.a. NCL
18 October 2011
Original in English

Abstract published on www.newyorkconvention1958.org[9]

The Plaintiff-Appellee, Ricardo Maxwell ("Maxwell"), a Costa Rican seaman employed by the Defendant-Appellant, NCL (Bahamas), Ltd. ("NCL"), sued NCL in Florida state court for injuries allegedly sustained during the course of his employment. Maxwell claimed for negligence under the Jones Act, which provides seamen with a special statutory framework for bringing negligence and related claims against their employers. NCL, relying on the arbitration agreement in the parties' employment contract, sought to remove the case to the United States District Court for the Southern District of Florida pursuant to Section 205 of the Federal Arbitration Act ("FAA"). Section 205 of the FAA grants a federal district court removal jurisdiction over cases it determines relate to an arbitration agreement governed by the NYC.

The United States District Court for the Southern District of Florida found that the arbitration agreement was invalid on grounds of public policy and remanded the case back to state court. The District Court concluded that the arbitration agreement was invalid because it designated a foreign arbitral venue and the application of foreign law would deprive Maxwell of his United States statutory causes of action under the Jones Act.

NCL appealed to the United States Court of Appeals for the Eleventh Circuit. The United States Court of Appeals for the Eleventh Circuit compelled arbitration, reversing the District Court's decision to invalidate the arbitration agreement and to remand the case to state court. The Court held that the public policy defence in Article V(2)(b) NYC is not a valid defence to the enforcement of an arbitration agreement as it applies only at the arbitral award enforcement stage, not at the arbitration agreement enforcement stage. The Court stated that the only defences applicable at the arbitration agreement enforcement stage are fraud, mistake, and waiver because they could be applied neutrally throughout the world. Since none of these applied in the present dispute, the Court upheld the arbitration agreement and compelled arbitration.

Case 1673: NYC [II; II(3)]
United States of America: U.S. Court of Appeals, Eleventh Circuit
Case No. 10-15411
Lindel Nelson Watson v. Carnival Corporation, d.b.a. Carnival Cruise Lines
5 August 2011
Original in English

Abstract published on www.newyorkconvention1958.org[10]

The Plaintiff-Appellee, Lindel Nelson Watson ("Watson") sued his employer, the Defendant-Appellant, Carnival Corporation ("Carnival"), in Florida state court for injuries allegedly sustained within the scope of his employment. The parties had

[9] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

[10] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. The following abstract is reproduced as part of the CLOUT documentation so that it can be officially translated into the six official languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

entered into an employment contract in Spanish, which contained an arbitration provision. Relying on the arbitration provision, Carnival sought to remove the case to the United States District Court for the Southern District of Florida pursuant to Section 205 of the Federal Arbitration Act ("FAA"), which grants a federal district court removal jurisdiction over cases it determines relate to an arbitration agreement governed by the NYC. In its first removal attempt, Carnival failed to provide a certified English translation of the arbitration provision and the Court remanded the case to state court for lack of federal jurisdiction. Carnival then sought to remove the case to the District Court for a second time based on the same arbitration provision, this time attaching a certified English translation of the arbitration provision. Finding Carnival's second attempt to remove the case untimely, the District Court again remanded to state court and awarded Watson his attorneys' fees. Carnival appealed the award of attorneys' fees.

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court. It observed that both of Carnival's notices of removal to federal court were based on an arbitration provision in the parties' employment contract. The Court agreed that Carnival's failure to furnish a certified English translation of the arbitration provision justified remand back to state court. Although Carnival provided a certified English translation of the agreement in its second notice of removal, the Court concurred with the District Court that Carnival's second attempt was untimely. The Court explained that a defendant is entitled to seek removal a second time only if it has a new and different basis for doing so. The Court concluded that in the present dispute, Carnival did not have a different basis for removal since both proceedings were based on the same arbitration provision. The Court explained that in cases where a defendant has no objectively reasonable basis for seeking removal, the opposing side is entitled to its attorneys' fees. As there was no subsequent pleading or event that revealed a new and different ground for removal, the Court held that Carnival had no objectively reasonable basis for seeking removal and affirmed the District Court's grant of attorneys' fees to Watson.