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## CASE LAW ON UNCITRAL TEXTS (CLOUT)

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## 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 1681: NYC V(1)(b)**
Brazil: Superior Tribunal de Justiça
SEC 3.660
*Devcot S/A v. Ari Giongo*
28 May 2009
Original in Portuguese
Available at: http://www.stj.jus.br

Abstract published on www.newyorkconvention1958.org[1]

Devcot S/A (Devcot) entered into a contract for the purchase and sale of cotton with Ari Giongo. The contract provided for arbitration in accordance with the Rules of Arbitration of the International Cotton Association (ICA). A dispute arose and an award was rendered in Devcot's favour, who subsequently requested recognition and enforcement ("homologação") before the Superior Tribunal de Justiça (Superior Court of Justice). Ari Giongo opposed recognition and enforcement arguing that service of process had to have been done by letter rogatory but instead all correspondence had been sent by courier. Furthermore, the Respondent stated that he had not been aware of the arbitral proceedings until he was notified of the request for recognition and enforcement.

The Superior Tribunal de Justiça granted recognition and enforcement to the foreign award based on the Brazilian Arbitration Act (the Arbitration Act). It observed that previously the Supremo Federal Tribunal (Federal Supreme Court) had required that service of process be made by letter rogatory. However, this was no longer the case after the enactment of the Arbitration Act, which allows notifications in arbitral proceedings by regular mail so long as the Brazilian party to an arbitration is granted sufficient time to exercise its right of defence. The Superior Tribunal de Justiça also found that the Respondent, in showing that he had not been notified of the arbitral proceedings, had not met the burden of proof in accordance with Article 38(III) of the Arbitration Act (which mirrors Article V(1)(b) NYC). It quoted from the opinion of a Brazilian scholar that the general rule was that the Respondent carried the burden of proving that it had not been given the opportunity to present its case. However, since it was usually unreasonable to place such a burden on the Respondent, where such an objection was raised the Claimant would have to demonstrate that the other party was notified, pursuant to Article V(1)(b) NYC and Article 38(III) of the Arbitration Act.

[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.

**Case 1682: NYC II(1)(3)**
Brazil: Superior Tribunal de Justiça
Special Appeal 1.015.194
*General Electric do Brasil S/A v. Tecnimed Paramedics Eletromedicina Comercial Ltda.*
17 March 2009
Original in Portuguese
Available at: http://www.stj.jus.br

Abstract published on www.newyorkconvention1958.org[2]

General Electric do Brasil S/A (GE) and Tecnimed Paramedics Eletromedicina Comercial Ltda. (Tecnimed) entered into representation, distribution and sale contracts for the years from 1999 to 2001. The contracts contained an arbitration agreement providing for arbitration under the auspices of the Inter-American Commercial Arbitration Commission. A dispute arose and the parties argued the validity of the arbitration agreement before the Brazilian and American courts stating that the contracts were no longer in force at the time the dispute arose. Meanwhile, an award was rendered in Miami, United States of America. Tecnimed filed a claim before a Brazilian court seeking damages and a declaration that it was not bound to pay the amount ordered by the award. The Court of First Instance dismissed the claims without prejudice due to the existence of an arbitration agreement. Tecnimed appealed to the Tribunal de Justiça do Rio Grande do Sul (Rio Grande do Sul Court of Appeals) who reversed the decision, characterizing the parties' contract as an adhesion contract. It found that the formal requirements for a valid arbitration agreement in an adhesion contract had not been met, thus, the arbitration agreement was not valid. GE appealed to the Superior Tribunal de Justiça (Superior Court of Justice) arguing that the arbitration agreement was valid and binding and that the decision of the Tribunal de Justiça do Rio Grande do Sul violated the Brazilian Arbitration Act, the Civil Code, the Code of Civil Procedure, the 1975 Inter-American Convention on International Commercial Arbitration and Article II(1)(3) NYC. The Superior Tribunal de Justiça found the Special Appeal to be inadmissible on procedural grounds. It held that GE was precluded from raising arguments based on the NYC because it had previously not raised any of these objections before lower courts.

**Case 1683: NYC II(2)**
Brazil: Superior Tribunal de Justiça
SEC 978
*Indutech SpA v. Algocentro Armazéns Gerais Ltda.*
17 December 2008
Original in Portuguese
Available at: http://www.stj.jus.br

Abstract published on www.newyorkconvention1958.org[3]

Indutech SPA (Indutech) and Algocentro Armazéns Gerais Ltda. (Algocentro) had an ongoing business relationship. The contract, which was not signed by the parties, provided for arbitration under the auspices of the Liverpool Cotton Association in the United Kingdom of Great Britain and Northern Ireland. A dispute arose between the parties and Indutech obtained a favourable award. It requested recognition and

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enforcement ("homologação") before the Superior Tribunal de Justiça (Superior Court of Justice). Algocentro did not appear and the Superior Tribunal de Justiça appointed a public defender to act on Algocentro's behalf. The public defender opposed recognition and enforcement on the grounds that there was no evidence that the award was final. Moreover, he argued that the contract had not been signed by the Respondent. The Superior Tribunal de Justiça denied recognition and enforcement to the foreign award based on the Brazilian Arbitration Act (the Arbitration Act). Relying on Article 4 of the Arbitration Act (which is comparable to Article II(2) NYC but not identical) it held that, under Brazilian law, an arbitration agreement, in order to be valid, required explicit consent in writing. Due to the lack of signatures or any other form of consent in writing to the contract there was no evidence that Algocentro had agreed to the arbitration agreement. Thus, the recognition and enforcement of the award would violate the Arbitration Act, the principle of party autonomy and Brazilian public policy. The Superior Tribunal de Justiça relied on its own precedents, including Challenged Foreign Award No. 866 (SEC No. 866). In that decision it had found that the lack of a signature or any other form of consent in writing was a bar to the recognition and enforcement of a foreign award, in accordance with Article II(2) NYC.

**Case 1684: NYC V(1); V(2)**
Brazil: Superior Tribunal de Justiça
SEC 894
*Litsa Líneas de Transmisión del Litoral S/A v. S V Engenharia S/A and Inepar S/A Indústria e Construções*
20 August 2008
Original in Portuguese
Available at: http://www.stj.jus.br

Abstract published on www.newyorkconvention1958.org[4]

In 1995, Litsa Líneas de Transmisión del Litoral S/A (Litsa) entered into a contract for the construction of high voltage transmission lines with S V Engenharia S/A (SVE) and Inepar S/A Indústria e Construções (Inepar) which contained an arbitration agreement providing for International Chamber of Commerce (ICC) arbitration. A dispute arose concerning certain payments held by Litsa against Sade Vigesa Industrial e Serviços S/A (SVIS) and Sade Vigesa Montajes S/A (VM). These two companies were acquired by Inepar, thus the arbitral proceedings were conducted with SVE and Inepar as Respondents. The award was rendered in Uruguay and Litsa sought recognition and enforcement ("homologação") of the award before the Superior Tribunal de Justiça (Superior Court of Justice). Inepar and SVE opposed recognition and enforcement on the grounds that (i) service of process had not been properly made; (ii) the award could not be enforced because there was a challenge against the award pending before the Uruguayan courts; (iii) the Brazilian Arbitration Act (the Arbitration Act) was not applicable because the arbitration agreement was signed prior to its enactment and the requirements for recognition and enforcement in the country where the award was rendered prior to seeking recognition and enforcement in Brazil applied; (iv) there had been a violation of due process; and (v) Inepar had not assumed all the rights and obligations of the acquired companies. The Superior Tribunal de Justiça granted recognition and enforcement to the foreign award based on the Arbitration Act. The Superior Tribunal de Justiça held that there was no issue with providing service of process through public notice because several attempts had been made without success to serve the Respondents in person. It also dismissed the argument regarding the impossibility of granting recognition and enforcement because of pending challenge proceedings in Uruguay because the Claimant had

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sought the recognition and enforcement of the arbitral award and not a judicial decision on the challenge to the award. The Superior Tribunal de Justiça also held that Inepar had assumed all the obligations of the acquired companies and had fully presented its case before the Tribunal, thus, no violation of due process had occurred. The Superior Tribunal de Justiça also held that the Arbitration Act was applicable and it was no longer necessary to seek recognition and enforcement in Uruguay before making the same request in Brazil. Finally, the Court held that recognition and enforcement could be denied only if at least one of the exceptions described in Articles 38 and 39 of the Arbitration Act (which mirror Article V(1) and V(2) NYC) were applicable, which was not the case.

**Case 1685: NYC IV; V(1)**
Brazil: Superior Tribunal de Justiça
SEC 1302
*Samsung Eletrônica da Amazônia Ltda. v. Carbografite Comércio Indústria e Participações Ltda.*
18 June 2008
Original in Portuguese
Available at: http://www.stj.jus.br

Abstract published on www.newyorkconvention1958.org[5]

A Brazilian and a Korean company entered into a contract containing an arbitration agreement providing for arbitration under the auspices of the Korean Commercial Arbitration Board. Subsequently, an award was rendered in Korea and the Claimant, a different Brazilian company, requested recognition and enforcement ("homologação") of the foreign award before the Superior Tribunal de Justiça (Superior Court of Justice). The Claimant sought recognition and enforcement in order to file for a motion to dismiss in proceeding before a Brazilian court in which the two parties to the arbitration and the Claimant were involved. The Respondent, Carbografite Comércio Indústria e Participações Ltda. (Carbografite), raised objections arguing that Samsung Eletrônica da Amazônia Ltda. (Samsung da Amazônia) never participated in the arbitral proceedings and thus it lacked standing to seek recognition and enforcement. It further argued the request was without purpose because it could not possibly lead to the dismissal of the lawsuit because it concerned a different dispute. The Superior Tribunal de Justiça granted recognition and enforcement. It considered, without directly referring to any provision of the NYC, that any person with a legal interest would have standing to seek recognition and enforcement. In the case at hand, the Claimant had a legal interest as the award could be useful for its arguments in the proceeding before the Brazilian courts. The Superior Tribunal de Justiça held that the mandatory requirements to the recognition and enforcement had been met. It indicated that Articles 37 and 38 of the Brazilian Arbitration Act (which mirrors Articles IV and V(1) NYC) had been complied with. It also held that there had been no violation of Brazilian sovereignty or public policy.

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**Case 1686: NYC V; V(1)(d); V(2)(b)**
China: Supreme People's Court
[2010] Min Si Ta Zi No. 32 ([2010] 民四他字第 32 号)
*Japanese Shin-Etsu Co., Ltd. v. Jiangsu Zhongtian Technology Corp.*
29 June 2010
Original in Chinese

Abstract published on www.newyorkconvention1958.org[6]

Japanese Shin-Etsu Co., Ltd. (Shin-Etsu) and Jiangsu Zhongtian Technology Corp. (Zhongtian) entered into a long-term sale and purchase agreement, which was governed by Japanese law and provided that any disputes arising out of or in relation to the parties' agreement were to be submitted to arbitration according to the rules of the Japan Commercial Arbitration Association (JCAA) in Tokyo. The agreement also stipulated that awards would be final and binding on both parties. A dispute arose between the parties and Shin-Etsu filed an arbitration with the JCAA in Tokyo on 12 April 2004. On 23 February 2006, an award was rendered in favour Shin-Etsu, who then filed an application for recognition and enforcement of the award before the Nantong Intermediate People's Court (referred to as Award No. 04-05). The court opined that the award should be refused recognition and enforcement according to Article V(1)(d) NYC since the arbitral proceedings did not conform to the arbitration rules as agreed upon by the parties. Shin-Etsu filed another arbitration under the parties' agreement with the JCAA on 22 August 2007. An award was rendered in favour of Shin-Etsu on 8 September 2008 (referred to as Award 07-11), who then applied for recognition and enforcement of the award before the Nantong Intermediate People's Court on 6 November 2008. Zhongtian challenged the application on the grounds that (i) the award should be refused recognition under Article V(1)(d) NYC since it had re-adjudicated a dispute already decided in Award No. 04-05 contrary to the arbitration agreement, the arbitration rules and the principle of finality of awards; (ii) the tribunal applied the principle of ex aequo et bono without the express authority as required under the arbitration rules; (iii) it was not permitted to present its case since the tribunal did not grant the use of interpreters; (iv) the tribunal did not grant time for responses to altered claims in accordance with the arbitration rules; and (v) Award No. 07-11 violated Chinese public policy. The Nantong Intermediate People's Court opined that the award should be refused recognition. In particular, the court opined that, under Articles V(1)(d) and V(2)(b) NYC, respectively, the arbitration proceedings were not in accordance with the parties' agreement, the applicable law and the arbitration rules and the award violated Chinese public policy since the award inappropriately criticised a Chinese court's opinion refusing recognition and enforcement of Award No. 04-05. The Nantong Intermediate People's Court reported its opinion to the Jiangsu Higher People's Court for review. The Jiangsu Higher People's Court confirmed, inter alia, that the application should not be recognized under Articles V(1)(d) and V(2)(b) NYC. In particular, the court opined that the award violated the arbitration rules, inappropriately commented on a decision of a Chinese court and prejudiced Chinese public policy. The Jiangsu Higher People's Court reported its opinion to the Supreme People's Court (最高人民法院) for review in accordance with the Notice of the Supreme People's Court on the Adjudication of the Relevant Issues About Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court. The Supreme People's Court confirmed that the award should not be recognized. In particular, the court opined that under to Article V(1)(d) NYC the arbitral proceedings in connection with the award did not conform to the parties' agreement. The court did not consider the issue of whether the award violated Chinese public policy.

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**Case 1687: NYC V; V(2)(b)**
China: Supreme People's Court
[2010] Min Si Ta Zi No. 18 ([2010] 民四他字第 18 号)
*Tianrui Hotel Investment Co., Ltd. v. Hangzhou Yiju Hotel Management Co., Ltd.*
18 May 2010
Original in Chinese

Abstract published on www.newyorkconvention1958.org[7]

Hangzhou Yiju Hotel Management Co., Ltd. (Yiju) entered into two agreements for the franchise of a hotel chain with Tianrui Hotel Investment Co., Ltd. (Tianrui). A related agreement was also entered into between Yiju and an affiliate of Tianrui, SuBoAiTe (Beijing) International Hotel Management Co., Ltd. (SuBoAiTe), which was registered in China. In the agreements between Yiju and Tianrui, any dispute between the parties was to be submitted for resolution by a sole-arbitrator according to the Arbitration Rules of the London Court of International Arbitration (LCIA). A dispute arose between the parties when Yiju failed to pay fees pursuant to the agreements. On 21 November 2007, Tianrui file an arbitration with the LCIA, which issued an award in favour of Tianrui on 5 December 2008. Tianrui then filed an application for enforcement of the award in accordance with Article 267 of the Civil Procedure Law of the People's Republic of China with the Hangzhou Intermediate People's Court. Yiju objected to the application on the basis that (i) the agreements concluded by Yiju with Tianrui and SuBoAiTe violated Chinese law as well as Chinese public policy, and (ii) the applicable arbitration agreement was invalid for failing to specify the arbitration institution and the place of arbitration. In addition, Yiju launched a separate action before the Hangzhou Intermediate People's Court against SuBoAiTe arguing that the agreement between the two of them was invalid. With respect to the application for enforcement, the Hangzhou Intermediate People's Court opined that the award should not be enforced according to Article V(2)(b) NYC since it would conflict with the court's decision to invalidate the agreement between Yiju and SuBoAiTe in the separate action. The Hangzhou Intermediate People's Court reported its opinion to the Zhejiang Higher People's Court for review. The Zhejiang Higher People's Court confirmed that the award should not be enforced pursuant to Article V(2)(b) NYC. In particular, the court opined that Tianrui and SuBoAiTe had intentionally separated the agreements amongst the two of them in an effort to by-pass Chinese regulations on the admission of foreign companies in the franchise business in violation of Chinese public policy. The Zhejiang Higher People's Court reported its opinion to the Supreme People's Court (最高人民法院) for review in accordance with the Notice of the Supreme People's Court on the Adjudication of the Relevant Issues About Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court. The Supreme People's Court opined that the award should be recognized. In particular, the court opined that there was no ground for refusing recognition under Article V(2)(b) NYC since there had been no violation of Chinese public policy. The court also opined that the dispute between Yiju and SuBoAiTe arose under a different legal relationship and whether the conclusion of that dispute was consistent with the award in the present application was not a ground for refusal provided under Article V NYC.

[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.

**Case 1688: NYC I; II; II(2); IV; V(1)(a); V(1)(b)**
China: Supreme People's Court
[2009] Min Si Ta Zi No. 46 ([2009] 民四他字第46号)
*Aiduoladuo (Mongolia) Co., Ltd. v. Zhejiang Zhancheng Construction Group Co., Ltd.*
8 December 2009
Original in Chinese

Abstract published on www.newyorkconvention1958.org[8]

Aiduoladuo (Mongolia) Co., Ltd. (Aiduoladuo) and Mongolia Yaojiang Co., Ltd. (Mongolia Yaojiang) entered into a construction contract. Zhejiang Zhancheng Construction Group Co., Ltd., formerly known as, Zhejiang Yaojiang Construction Group Co., Ltd. (Zhejiang Zhancheng) was a guarantor to the agreement. In the construction contract, any disputes were to be submitted for resolution either before a court or in arbitration and Mongolian law governed the agreement. A dispute arose between the parties when Mongolia Yaojiang refused to perform its obligations under the agreement. Aiduoladuo filed for arbitration against Mongolia Yaojiang before the Mongolia National Arbitration Court (MNAC); however, because Mongolia Yaojiang could not be located, Aiduoladuo re-filed its arbitration against Zhejiang Zhancheng. On 1 August 2007, an award was rendered in favour of Aiduoladuo, who then applied to the Shaoxing Intermediate People's Court for recognition and enforcement pursuant to Article IV NYC. Zhejiang Zhancheng objected to the application on the grounds that (i) it had been incorrectly identified as a party in the dispute, in particular because it had no factual or legal connection to Mongolia Yaojiang and that its company stamp (which appears in the construction contract) was made fraudulently, (ii) the arbitration agreement, providing for both litigation before courts and arbitration, was null and void because it was ambiguous and conflicted with itself and (iii) it did not have proper notice of the arbitration proceedings. The Shaoxing Intermediate People's Court opined that the award should not be recognized. In particular, the court opined, according to Article V(1)(b) NYC and Article 269 (now Article 267) of the Civil Procedure Law, that there was no evidence to show that Zhejiang Zhancheng had received proper notice of the arbitration proceedings. The Shaoxing Intermediate People's Court reported its opinion to the Zhejiang Higher People's Court for review. The Zhejiang Higher People's Court confirmed that the award should not be recognized. In particular, the Zhejiang Higher People's Court opined, according to Article V(1)(b) NYC, that Zhejiang Zhancheng did not have proper notice of the arbitration proceedings. Furthermore, the court opined that the arbitration agreement was invalid under Chinese law since it had provided for both parties could submit their disputes before the People's Courts and arbitration. The court did not address the issue concerning the alleged fraud regarding the application of Zhejiang Zhancheng's company stamp to the construction contract. The Zhejiang Higher People's Court reported its opinion to the Supreme People's Court (最高人民法院) for review in accordance with the Notice of the Supreme People's Court on the Adjudication of the Relevant Issues About Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court. The Supreme People's Court confirmed that the award should not be recognized. In particular, the court opined that Article I NYC applied to the review of the award. Pursuant to Article V(1)(b) NYC, the court opined that Zhejiang Zhancheng did not have proper notice of the relevant arbitral notices. In addition, the court opined that there was no ground for refusal under Article V(1)(a) NYC as the arbitration clause in the present application was valid. With respect to the allegation that the company stamp in the construction agreement did not belong to Zhejiang Zhancheng, the court opined that if this could be proved, then the court could

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refuse recognition and enforcement of the award under Article II(2) NYC as there would be no written agreement between the parties.

**Case 1689: NYC V; V(1)(b); V(1)(d)**
China: High People's Court of Jiangsu Province
(2009) Zhen Min San Zhong Zi No. 2 ([2009]镇民三仲字第 2 号)
*I. Schroeder KG. (GmbH & Co.) v. Jiangsu Huada Foodstuff Industry Corp.*
5 November 2009
Original in Chinese

Abstract published on www.newyorkconvention1958.org[9]

On 19 September and 4 December 2007, I. Schroeder KG. (GmbH & Co.) entered into two agreements with Jiangsu Huada Foodstuff Industry Corp. for the purchase of frozen snow peas. The agreements were governed by German law and contained an arbitration clause providing for arbitration in accordance with the rules and conditions of the Commodities Association of the Hamburg Stock Exchange (CAHSE). A dispute arose between the parties when Jiangsu Huada Foodstuff Industry Corp. failed to deliver the purchased goods. I. Schroeder KG. (GmbH & Co.) filed an arbitration with the CAHSE, which rendered an award in favour of I. Schroeder KG. (GmbH & Co.) on 3 September 2008. I. Schroeder KG. (GmbH & Co.) applied on 5 August 2009 for recognition and enforcement of the award with the Jiangsu Higher People's Court (江苏省高级人民法院). Jiangsu Huada Foodstuff Industry Corp. opposed the application under Articles V(1)(b) and V(1)(d) NYC on the grounds that the related arbitral documents were not served to the statutory representative of Jiangsu Huada Foodstuff Industry Corp. and the CAHSE had no competency to render an award. The Jiangsu Higher People's Court opined that the award should be recognized and enforced. In particular, the court opined that the notice of appointment of the arbitrator and the arbitration proceedings had been properly served on Jiangsu Huada Foodstuff Industry Corp., who did not present evidence to the contrary. In addition, the court opined that the parties had selected that disputes arising from agreements would be resolved by an arbitrator or expert of the CAHSE. Furthermore, the court opined that the arbitral award did not violate China's public order and that the contractual dispute between the parties was allowed to be submitted to arbitration under Chinese law.

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