United Nations A/CN.9/SER.C/ABSTRACTS/183

General Assembly

Distr.: General
28 August 2017

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.17-06116 (E) 290817 300817

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: (http://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 web-site 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 UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1690: MAL 34(3)[1]
Ireland: High Court
[2009] IEHC 391
Moohan et al. v. S. & R. Motors [Donegal] Ltd.
31 July 2009
Original in English

[**Keywords:** *arbitrability; arbitral proceedings*]

An Irish construction company, the plaintiff, commenced an action against a motor company, the defendant, for costs associated with the construction contract of a car showroom. The construction costs are not at issue in this particular iteration of the proceedings, just in previous claims; the construction contract included an arbitration clause for any challenges for defective work, a delay in construction and for safety concerns, which was the subject of the appeal. The case at hand is the third time the disputing parties have made it before the Judge. The first time, the Judge remanded the above aspects of the case to arbitration, and the second time the Judge heard an appeal of the arbitral award granting the defendant costs associated with construction defects upon which the Judge once again remanded the accounting of the award to the arbitrator. In the second part of the proceedings, the arbitrator had calculated and subtracted the awarded costs from what the plaintiff was due under the initial judicial court case, even though the arbitration had no competency to adjudicate that particular part of the case. Thus, the case was sent back to arbitration to recalculate the costs.

Subsequently, the arbitrator issued a corrected award to take into account the substantive challenge to the initial decision, and communicated the award to the disputing parties. The plaintiff in the initial case, the party against whom the award was issued, once again appealed the arbitration decision to the High Court — this time taking issue with the awarding of arbitration costs to the opposing party.

The Court analysed whether the appeal was timely, both under domestic law and under the UNCITRAL Model Law on Arbitration. Under Article 34(3) MAL, there is a strict 3-month time limit in which to appeal the decision, with the clock starting at the time when the party "has received the award." On the other hand, in Irish domestic law, the arbitral award can be appealed within 6 weeks after the arbitrator communicates to the parties that the award is available. Though within the 3-month limit, the 6-week limit had elapsed. Nevertheless, the Court held that in the interest of justice it could extend the time limit for domestic arbitration appeals. As the plaintiff had done nothing unreasonable and was not culpable of any delay, and given that the characteristics of the corrected award caused the delay, there was an interest in extending the time limit. Thus, the Court did not have to rule on whether the arbitration was domestic or international in nature because in both cases the appeal would have been timely.

Even so, the plaintiff's appeal failed on the merits because the High Court must see errors so fundamental that it cannot allow them to remain unchallenged in order to overturn such an arbitral award, which it did not see here. The Court found that the defendant's unsuccessful claims did not materially lengthen the proceedings so as to require a shifting of costs and thus found that awarding costs to the defendant was valid.

[1] This case is cited in the UNCITRAL Digest on the Model Law on Internal Commercial Arbitration (2012).

Cases Relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL) and to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention (NYC)

Case 1691: MAL 18; 34(2); NYC V
South Africa: Constitutional Court
CCT 97/07, [2009] ZACC 6
Lufuno Mphaphuli & Associates (PTY) Ltd. v. Nigel Athol Andrews Bopanang Construction CC
20 March 2009
Original in English
Available at: http://www.saflii.org

[**Keywords:** *award-setting aside; equal treatment; arbitral proceedings; public policy*]

The case involved an application by a South African consulting firm, the appellant, for leave to appeal to the Constitutional Court of South Africa ("Constitutional Court") a decision of the Supreme Court of Appeal upholding a judgment of the High Court in Pretoria. In the latter judgment, an application by the respondent to have an arbitrator's award made an order of court was granted, and an application by the appellant for review and setting aside the award was dismissed. The dispute arose out of a subcontracting agreement with the respondent, who vacated the construction site prior to completion as the consulting firm had failed to make payment. The arbitrator issued an award in which he found the appellant to be liable for an amount of R339,998.83.

The appellant argued that the arbitration award should be set aside because the arbitrator held what it argued was three "secret" meetings with the respondent during the course of the arbitration. Secondly, the appeal pointed to the fact that not all correspondence between the respondent and the arbitrator was furnished to the appellant; and thirdly, the appellant submitted that the arbitrator committed a gross irregularity by "effectively ignoring the pleadings filed before him" and awarding amounts in excess of what had been claimed and invoiced.

To the applicability of the Constitution to private arbitral awards, Section 34 of the Constitution reads as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." The Judge did not find Section 34 to be directly applicable to private arbitration as private arbitration, as conventionally understood, is ordinarily not held in public, nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be.

The Judge pointed out that an arbitration agreement containing a provision that is contrary to public policy in light of the Constitution is null and void to that extent. As to the question of fairness in arbitration proceedings, the Judge found that fairness is one of the core values of the constitutional order. With reference to section 33 of the United Kingdom Arbitration Act 1996 and Article 18 MAL, the Judge held that it is an implied term of every arbitration agreement that it be procedurally fair, but what constitutes fairness in any proceedings will depend firmly on context. As such, the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument.

By reference to the approach taken in the New York Convention (Article V), the Model Law (Article 34(2)) and in the United Kingdom of Great Britain and Northern Ireland, the Judge held that the values of the Constitution would not be best served by interpreting Section 33(1) of the Arbitration Act 42 of 1965 in a manner that enhances the power of courts to set aside private arbitration awards. Given that international law suggests that courts should be careful not to undermine the achievement of private arbitration by enlarging their powers of scrutiny imprudently,

the Judge found that the Constitution would require a court to construe the grounds set out in Section 33(1) reasonably strictly in relation to private arbitration. As a result, courts shall be respectful of the intentions of the parties when assessing the fairness of arbitration proceedings as the goals of private arbitration may well be defeated if courts are too quick and too willing to find fault in the matter in which an arbitration has been conducted.

As to the appellant's arguments for setting aside the award, the Judge observed that the arbitration agreement, construed in the context of the arbitrator being a quantity surveyor, the purpose of the arbitration and the process actually adopted, set out an informal, investigative method of proceeding. As to the "secret meetings", the Judge held that the meetings did not prevent the appellant from presenting its case fairly given the nature of the proceedings agreed upon, and particularly the fact that the arbitrator set out the preliminary conclusions he had reached arising from the meetings and gave both parties an opportunity to comment thereon.

Furthermore, the Judge did not find the correspondence that was not furnished to the appellant to be a gross irregularity as each party had an opportunity to persuade the arbitrator that his preliminary conclusions were wrong. As to the claim of the arbitrator overstepping his mandate, the Judge concluded that the appellant did not dispute this manner of proceeding because its understanding of the arbitration agreement was precisely the understanding proffered by the arbitrator — the arbitration was to be based on the re-measured quantities and not on the invoiced amounts.

The appeal was therefore dismissed.

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

Case 1692: NYC II

Bosnia and Herzegovina: District Commercial Court in Bijeljina
59 0 Ps 018507 12 Ps 3
Elektrogospodarstvo Slovenenije d.o.o. (EGS) v. Rudnik i termoelektrana Ugljevik
17 September 2012
Original in Bosnian

The Slovenian company, as claimant, commenced an action against the respondent company from Republika Srpska (Bosnia and Herzegovina) for the payment of debt and the supply of electricity. In its response to the action, the respondent objected to the lack of jurisdiction of the court, due to the existence of an arbitration clause in the Self-Management Agreements between the parties from 1981 and that were based on the association of labour and resources for the construction and usage of a thermal power plant. The claimant challenged that assertion, noting that the arbitral dispute resolution in the present case is not possible, due to the fact that both of the agreements refer to the Community of Yugoslavian electrical industry that does not exist anymore (and with it the arbitration agreement) because of the dissolution of the Socialistic Federal Republic of Yugoslavia. As a result, the case was heard by the District Commercial Court in Bijeljina.

The High Commercial Court in Banja Luka in deciding the appeal annulled the decision of the lower court (in which the Court declared its lack of jurisdiction), dismissing the action and remanding the case back to retrial. In the retrial, the claimant asked primarily for the examination of its procedural objection on the jurisdiction of the court, considering that the High Commercial Court failed to proceed to this examination.

The District Court thus went on examining the jurisdictional objection. The Court referred to the provisions of the two Self-Management Agreements, and noted that its provisions contain the arbitration clauses in cases of any possible disputes regarding the construction of energy facilities and the usage of the mine and thermal power plant

Ugljevik, and the arbitration body of the Community of Yugoslavian electrical industry. However, the Court further noted that by the *Law of termination of association of Yugoslavian electrical industry*, the existence of the Community of Yugoslavian electrical industry terminated and that all the rights, obligations, resources, documentation and labour were taken over by the "Electrical industry of Serbia", and the "Electrical network of Serbia".

Nevertheless, the Court noted that the domestic legislation, namely the Civil Procedure Act, does not contain any provisions regarding the determination of the validity of the arbitration agreement. However, provisions of international treaties authorize the courts, to assess the validity of arbitration agreements in the pre-arbitration stage. Referring to Article II NYC, the Court noted that each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any disputes which have arisen or which may arise between them in respect of a defined legal relationship; while the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement, will refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Thus, the Court has the competency to assess the validity of the arbitration agreement before commencing the arbitration procedure.

In accordance to Article II NYC, for the arbitration agreement to be considered valid, it needs to prove important elements, such as its written form, arbitrability of the dispute, competence of the parties, matter of the present or future dispute, and not to be null and void, inoperative or incapable of being performed. In assessing these elements in regard to the Agreement between the parties, the Court found that all of these elements were fulfilled. The fact that the Community of Yugoslavian electrical industry termination did not affect the validity of the arbitration agreement in full because the agreement did not refer to institutional arbitration, but to ad hoc arbitration. Thus, the Court confirmed its lack of jurisdiction in the present case, due to the existence of a valid arbitration agreement, and subsequently dismissed the action of the claimant.

The High Commercial Court in Banja Luka then rejected the appeal of the claimant and upheld the decision of the District Court in Bijeljina.[2]

Case 1693: NYC [I]; V
South Africa: South Gauteng High Court, Johannesburg
508/2012
Pierre Fattouche v. Mzilikazi Khumalo
6 May 2014
Original in English
Available at: http://www.saflii.org

The plaintiff, defendant and a third party entered into a written sale of shares agreement on 1 May 2006. A dispute arose between the parties and pursuant to an agreement the dispute went to arbitration. On 12 March 2009, the arbitrator issued an award in Paris (further to the agreement of the parties) in which the respondent was obliged to pay the plaintiff a sum of US$5 million. As the respondent did not make payment, the plaintiff applied for the award to be made enforceable in South Africa.

The High Court had to assess whether the exception to the general rule of recognition and enforcement of foreign arbitral awards in the Protection of Businesses Act of 1978 Section 1, pursuant to which Ministerial approval is requested to enforce certain foreign arbitral awards, was applicable. If so, the award would not directly be made enforceable by the Court.

The respondent argued that the arbitral award was in connection with civil proceedings arising from a transaction related to the mining of raw materials as contemplated in Section 1(3) of the Protection of Businesses Act. To counter, the

[2] High Commercial Court in Banja Luka 59 0 Ps 018507 12 Pz 4, 14th of March 2013.

plaintiff argued that Section 1(3) was inapplicable as the transaction dealt with the sale of shares and not raw materials, which would allow its enforcement under South African law. The Court, in turn, adopted a narrow interpretation of the words "matter or material," and thus held that Section 1(3) was inapplicable.

The respondent further alleged that the parties had entered into an oral agreement under which the plaintiff was obliged not to proceed to litigation or to any execution of the arbitral award until the respondent had obtained two mining licenses in Armenia. The High Court was not convinced thereof as the correspondence between the parties showed a continuous undertaking by the defendant to make payment to the plaintiff and there was no mention of such agreement between the parties.

As the respondent set out no valid defence to the plaintiff's claim, the High Court held that the claimant was entitled to the enforcement of the award pursuant to Section 4 (consistent with Article V NYC) of the Recognition and Enforcement of Foreign Arbitral Awards Act No 40 of 1977, which gives effect to South Africa's accession to the New York Convention.

In the case, the plaintiff finally argued that Sections 1(2) and 1(3) of the Protection of Businesses Act were unconstitutional because of South Africa's accession to the New York Convention. The plaintiff further contended that these provisions were discriminatory to foreign awards as contrary to the intention of the Convention and a state interference in foreign trade agreements. On the contrary, the respondent submitted that that Protection Business Act only introduced additional procedural requirements for the enforcement of certain foreign arbitration awards. The High Court expressed that on a broad interpretation of Sections 1(2) and 1(3) of the Act, virtually every transaction would be subject to approval by the Minister. Further, it acknowledged that those Sections might be considered unconstitutional, among others, on the basis of the Constitution providing that South Africa is bound by international agreements, such as the New York Convention, that were ratified by South Africa when the Constitution was enacted. In this respect, the Court stated that pursuant to the Constitution "when interpreting any legislation every court must prefer any reasonable interpretation… that is consistent with international trade law…". However, as the parties had not sought for the Minister of Finance, the Minister of International Affairs and Cooperation and the Minister of Justice and Constitutional Development to be joined to the proceedings, the issue on constitutionality of the Protection of Businesses Act could not be adjudicated upon. Moreover, a postponement was not necessary as the High Court was able to decide the matter on the facts before it. The Court thus granted the enforcement of the award and ordered the respondent to pay the amount due to the applicant and interest on that sum.

Case 1694: NYC V(2)(b)
United Kingdom: High Court of Justice
[2017] EWHC 1348 (Comm)
Anatolie Stati et al. v. The Republic of Kazakhstan
6 June 2017
Original in English
Available at: http://www.bailii.org

The claimants sought damages in arbitration that, in the matter of exploration and extraction of hydrocarbons, amounted to more than US$245m related to the construction of a liquefied petroleum gas plant. The government-defendant claimed the plant should be valued as scrap because, they contended, the project behind it had failed, whereas the claimants argued that the plant should be valued as a going concern. Of note, a bid for an acquisition of the plant by a subsidiary of the state amounts to a value of US$199m, which was then assessed as the value of the plant and awarded as damages; the bid convinced the tribunal that the experts' conclusion that the plant was a failed project and must be considered to have negative value was not persuasive.

To complicate matters, however, in raising issue with the claimants' application for enforcement of the award both in English and United States Courts, the defendant applied to a Swedish Court to set aside the award; Sweden had been the seat of arbitration. All courts acknowledge that the award fell within the New York Convention.

After an application to the United States court, a subpoena on a third party produced documents that the State argued revealed fraud by the claimants. Nevertheless, both the Swedish court and the United States court refused motions by the State to amend the application to add the alleged fraud to its grounds. As the other jurisdictions had not addressed the question of whether there was fraud, the Judge found that the English court was not estopped from hearing that particular grounds for refusing enforcement. Article V(2)(b) NYC notes that relevant public policy can and does differ from country to country, such that a Swedish or United States court decision on public policy does not contravene with a differing interpretation by English courts of its public policy.

The Court notes that it will do nothing for the integrity of arbitration as a process or its supervision by the courts, or the New York Convention, or for the enforcement of arbitration awards in various countries, if the fraud allegations in the present case were not examined at a trial and decided on their merits. Thus, the Court held that in the interests of justice further examination was required, and the defendant was given the permission to amend its pleadings against the claimants' application for enforcement.

Case 1695: NYC III; V; V(1); VI
United Kingdom: Supreme Court[3]
[2017] UKSC 16
IPCO Limited v. Nigeria National Petroleum Corporation
1 March 2017
Original in English
Available at: https://www.supremecourt.uk

The respondent has been attempting to enforce a Nigerian arbitration award against the branch of the Federal Government of Nigeria that regulates and participates in the country's petroleum industry since late 2004. The arbitral award, in excess of US$150 million plus interest was decided after a contractual dispute originating from a signed agreement to construct an export terminal in 1994. The appellant, the government entity, initially challenged it before the Nigerian Federal High Court, though the respondent subsequently went to the United Kingdom to seek enforcement of the award under the New York Convention.

It was initially determined both in the UK Commercial Court and the Court of Appeal that the government's fraud challenge in the Nigerian court system on the amount of the claimant's damages was made bona fide. At the outset of the English proceedings, the Judge made an ex parte order for enforcement as of November 2004, which the appellant subsequently sought to set aside given the on-going proceedings for the fraud challenge in Nigeria.

The lower court set the appellant's security for a part of the award sum, and the respondent received an immediate payment of roughly a tenth of the award. However, the Nigerian judicial proceedings were not resolved with relative dispatch as had been expected. Eight years after the initial ex parte order, the respondent yet again renewed its application to enforce the award in England under the New York Convention. The lower court dismissed this renewed attempt given the active proceedings, though the Court of Appeal took a different view; it renewed the application and set the respondent's security at US$100 million, in addition to that already provided.

[3] Affirmed in the High Court of Justice, Queen's Bench Division, on 14 March 2014 and in the Court of Appeal (Civil Division) on 11 November 2015.

The parties subsequently agreed to adjudicate the fraud issue in English rather than Nigerian proceedings but that particular agreement was subject to the security payment by the respondent set out by the Court of Appeal.

The Arbitration Act 1996 gives effect to the UK's obligations under the New York Convention, allowing refusal of recognition only in several cases. This includes a provision mirroring Article V(1) NYC, if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award is made. This was particularly relevant in the earlier application for enforcement, though in taking account of the fact that both parties agreed to adjudicate their issue in English court, the Court noted that the Court of Appeal's order for security fell outside of the scope of the New York Convention, which left untouched the ordinary procedural powers of the domestic courts.

The appellant argued that as Article III of the Convention limits a Contracting State from imposing substantially more onerous conditions to the enforcement of foreign awards than on the enforcement of domestic arbitral awards, if a domestic creditor is able to obtain security for an award, yet a court could not order security against a foreign party, then it would be discriminating procedurally against foreign awards.

To this argument, the Supreme Court noted that the New York Convention reflects a balancing of interests, with a prima facie right to enforce countered by rights of challenge. Article III NYC may serve as a caution against interpreting or applying English procedural provisions in a sense that discriminates against Convention awards by imposing substantially more onerous rules of procedure. But this is only so long as "the conditions laid down in" the remaining articles of the Convention do not otherwise set out requirements. To this end, Articles V and VI NYC, according to the Court, exclude requiring security for an award in the face of a properly arguable challenge.

Thus, the appeal was allowed and the US$100 million security was set aside, while the fraud challenge was remitted to the lower court for further proceedings.

Case 1696: NYC V(2)(b)
United Kingdom: High Court of Justice
[2017] EWHC 251 (Comm)
Sinocore International Co. Ltd. v. RBRG Trading Ltd.
17 February 2017
Original in English
Available at: http://www.bailii.org

Parties to the case contracted for the sale of steel coils, in which the claimant would supply to the defendant the goods in exchange for an irrevocable letter of credit (L/C hereinafter) for 100 per cent of the contract price in strict conformity with the sales contract, which was governed by Incoterms 2000. The contract contained an arbitration clause in case of disputes, which provided that "any dispute would be determined according to Chinese law, that the language of the arbitration would be Chinese and that the venue of arbitration proceedings would be Beijing, China". The appellant issued a conforming L/C, though the issuing bank ("The Bank" hereinafter) amended the L/C at the behest of the appellant without agreement by the other party, which made the letter of credit ineffective.

The defendant commenced an arbitral proceeding in China for damages caused by the appellant's alleged forged bills of lading, the timing of which would have prevented its management from inspecting the presumably defective goods. The appellant subsequently counterclaimed for damages for a breach of contract, and the arbitrator dismissed the defendant's claim and stated that the defendant was liable for a breach of contract. It further found that the submission of forged bills of lading under the L/C was a deception of The Bank rather than the other party to the proceeding, and thus did not influence its consideration.

The appellant filed a petition to enforce the Chinese arbitral award against the defendant under the United Kingdom's obligations under the New York Convention and relevant domestic texts under the Arbitration Act 1996. An order was written by the lower court to give effect to the award, but the defendant appealed on the grounds that recognition of the award would be contrary to public policy, akin to Article V(2)(b) of the Convention. The defendant contended that the recognition of the award gives effect to a claim based on forged documents, or commercial fraud contrary to the policy of English courts.

The Court notes the strong presumption that New York Convention awards are enforceable, and that public policy defences are to be treated with extreme caution. Though in the case of corrupt practices a court should not enforce an award, in the case where the illegality does not appear on the face of an award, it is more complicated. Further, the arbitral tribunal itself considered and rejected the alleged illegality in its determination. Where the award is based on a lawful claim under a lawful transaction, even if the transaction is "tainted", the Court determined it would recognize and enforce it as such.

As the sales contract and its intended performance was entirely lawful, the award was found not to be contrary to public policy and the appellant's claim against enforcement was dismissed.

Case 1697: NYC V(1)(c)
United Kingdom: Court of Appeal (Civil Division)
[2016] EWCA Civ 1290
Ashot Yegiazaryan v. Vitaly Ivonovich Smagin
19 December 2016
Original in English
Available at: http://www.bailii.org

The respondent alleged the appellant breached its obligation to put assets of a particular holding company in escrow in order to protect the respondent's 20 per cent interest in a real estate development project in Moscow. The appellant transferred the holding company's interests to a separate company, thus rendering the respondent's security in the equity valueless.

The respondent had agreed with the appellant that the real estate development project would be used as security for a loan the latter was seeking from a certain bank ("The Bank", hereinafter). This was signed on the condition that the appellant would deliver all of its shares in the holding company to The Bank to be held in escrow. The initial Escrow agreement and Shareholders' Agreement were subsequently extended by another agreement (the "2008 Agreement"), which governs the dispute at hand.

The respondent commenced an arbitration proceeding against the appellant pursuant to the Shareholders' Agreement, which included an arbitration clause "enabling consolidation in a single arbitration of claims arising under the Shareholders' Agreement and the Escrow Agreement 'or any instruments or documents delivered in connection therewith'". The arbitration clause further provided for the resolution of disputes in the London Court of International Arbitration. As the appellant did not comply with the requirements of the Agreements, the arbitral tribunal ordered the appellant to pay the respondent US$72 million in damages.

The first instance court rejected the appellant's claim that the arbitral tribunal lacked jurisdiction since the applicant was not a party to the Shareholders' Agreement or the Escrow Agreement and its signature in the 2008 Agreement was forged. The appellant appealed the decision, upon which the Court of Appeal immediately set aside the appellant's jurisdiction argument, as it was sole proprietor of the company that had signed the Agreements in question and was in complete control of it at the time of the contractual signing.

In analysing additional grounds for appeal against the enforcement of the arbitral award, the Court rejected the appellant's argument that the court of the seat of

arbitration should deal with all the issues of jurisdiction, since courts in other jurisdictions considering enforcement of the award would want to know the conclusion of the court of the seat on those matters. In this regard, the Court noted that Article V(1)(c) NYC enables an enforcing court to refuse to recognize or enforce an award where the award deals with a difference not contemplated by or not falling within the terms of submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration. Nevertheless, the dispute at hand fell squarely within the jurisdiction of the arbitration tribunal and the arbitrators effectively dealt with all manner of appeals raised by the appellant in the Court of Appeal. Thus, the appeal against the arbitral award enforcement was dismissed in favour of the respondent.

Case 1698: [NYC V(2)(b)]
United Kingdom: High Court of Justice
[2016] EWHC 510 (Comm)
National Iranian Oil Company v. Crescent Petroleum Company International et al.
4 March 2016
Original in English
Available at: http://www.bailii.org

The government plaintiff entered into a long term gas supply and purchase contract with the defendant in 2001, an agreement that contained an arbitration clause to be governed by the Laws of the Islamic Republic of Iran. The defendant commenced arbitral proceedings, claiming that the disputing party failed to deliver gas; the tribunal dismissed first the plaintiff's jurisdictional contentions and secondly determined the plaintiff was in breach of its obligations to deliver gas under the contractual terms.

The plaintiff proceeded to file its application to set aside the arbitral award against it on several bases, under the Arbitration Act 1996, including alleged corruption and the invalidity of the contractual assignment. The defendant wished to assign its contract to a subsidiary, also a named defendant, though the contract specified that neither party could, without the consent of the other party, assign the rights and obligations of the contract. To address the assignment issue, the Court noted that the plaintiff-government had signed a Guarantee Contract authorizing the assignment of the contract to the third party, which satisfies the necessary consent; the defendant did not need to obtain by delivery a copy of the approval to constitute written consent, and thus the Judge upheld the arbitrator's finding there in favour of the defendant.

The plaintiff then proceeded to challenge the award in reference to English public policy — though the arbitrator expressly found that the contract was not procured by corruption. The Judge found convincing the arbitral award, which had considered fully the facts, clearing the defendant of any corrupt behaviour in securing the contract. In addition, there was the absence of any fresh evidence to introduce to bolster the corruption claim.

The Court noted that English public policy applies even if the behaviour is not illegal in relevant foreign law, and particularly if a court is requested to enforce a contract procured by bribery. To that end, it is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other.

The Court however, resolved the case in favour of the defendant, allowing the arbitral award to be enforced in the jurisdiction given there was no public policy concern since the contract was not procured by bribery.