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Contents

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Introduction

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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.

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Cases relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1755: MAL 34
Australia: Supreme Court of Queensland (Court of Appeal)
[2018] QCA 39
Mango Boulevard Pty Ltd. v. Mio Art Pty Ltd. & Anor
20 March 2018
Original in English
Published in http://www.austlii.edu.au

Abstract prepared by Albert Monichino and Luke Nottage

[**Keywords:** *arbitrators; arbitral awards; award-setting aside; public policy*]

The appellant and the respondents were in dispute in connection with a joint venture for the development of land, which included a share sale agreement (SSA). The SSA contained a formula and process by which the price for the shares was to be determined. If agreement could not be reached on the price, that dispute was to be (and was in fact) referred to arbitration. In determining the price for the shares, the arbitrator used his own methodology of valuation, which was not in accordance with the parties' submissions, or with the evidence given by the parties' expert witnesses.

At first instance,[1] the appellant sought unsuccessfully to set aside the award relying on ss 34(2)(a)(ii) ("the party making the application … was otherwise unable to present the party's case") and 34(2)(b)(ii) ("the award is in conflict with the public policy of this State") of the *Commercial Arbitration Act 2013* (Qld). These provisions are based on Article 34 MAL, which has been adopted as the core of new *Commercial Arbitration Act* legislation (applicable only to domestic arbitrations) enacted since 2010 in all six States and both Territories of Australia.

In the Queensland Court of Appeal, the appellant sought to overturn the trial judge's decision, alleging that the arbitrator breached the rules of natural justice, and that the decision-making process was contrary to the public policy of Australia. However, despite the fact that the arbitrator adopted a share-valuation methodology not advanced by either party, and which was not put to the appellant's expert witnesses, the Queensland Court of Appeal nevertheless dismissed the appeal and upheld the arbitral award.

In the Court of Appeal, the majority (McMurdo and Fraser JJA)[2] accepted that it was the arbitrator, and not the parties, who came up with the approach used to value the shares; that the arbitrator's approach only came to light *after* the evidence was closed; and that the arbitrator's reasoning was *not* put to any of the relevant expert witnesses.

However, the majority carefully considered and relied on what the Full Court of the Federal Court said in *TCL Air Conditioner (Zhongshan) Company Ltd. v. Castel Electronics Pty Ltd.* (2014) 232 FCR 361 — that an award should not be set aside under MAL Article 34 unless there was:

> "… demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness."

Accordingly, and using "*real unfairness*" and "*real practical injustice*" as the touchstone for determining whether the award should be set aside, the majority observed that the arbitrator clearly raised the possibility of his reasoning during final addresses and that "*it could not be said that ultimately, the appellant was denied an opportunity to argue a case in response to it*." The majority noted that it was open to the appellant to seek to recall its witnesses had it wished to do so, but it chose not to. McMurdo and Fraser JJA stated that the valuation methodology adopted by the

[1] See *Mango Boulevard Pty Ltd. v. Mio Art Pty Ltd. [2017] QSC 87*.
[2] JJA: Justices of appeal.

arbitrator was in fact addressed by the award debtor (i.e. it was given an opportunity to be heard) "*by submissions which were made some weeks after the subject was first raised by the arbitrator.*"

In a separate judgment, Morrison JA took a similar view to the majority, and agreed that the appeal should be dismissed. His Honour said that "*the evidentiary foundation*" for the proposition ultimately relied on by the arbitrator, and his "*process of reasoning*", were raised with (and understood by) Senior Counsel for the appellant and the appellant chose to respond by way of submissions instead of seeking to re-open its case to adduce further evidence on the point.

In relation to the fact that the relevant valuation methodology relied on by the arbitrator was not pleaded, Morrison JA said this point could be put to one side as the parties "*accepted that the point was alive*", and because the appellant did not object to the point being agitated. Morrison JA said that even if you accepted that the arbitrator did not squarely give the appellant's expert a chance to answer the proposition relied on by the arbitrator, no injustice was perpetrated on the appellant because its Senior Counsel was fully alive to the issue, and provided submissions in response. Morrison JA continued and said:

> "Contrary to [the appellant's] contentions, it is not possible to conclude that there has been real unfairness or real practical prejudice in this case. [The appellant] understood the point and chose to respond to it in a particular way, which, as it happened, did not include recalling [the expert] Mr Cox. That was a forensic choice made by [the appellant]."

The decision of the Queensland Court of Appeal in this case is consistent with recent cases in Australia in which the courts have taken a narrow (or restrictive) approach to applications to set aside arbitral awards on the grounds of breach of the rules of natural justice. Australian courts have thereby furthered the aims of the MAL (as well as the additional express paramount object added to the *Commercial Arbitration Act* legislation) and the *International Arbitration Act* (Cth)[3] applicable to international arbitration and giving force to both the MAL and the New York Convention, namely "*to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense*."

Case 1756: MAL 34; [36][4]
Australia: Federal Court of Australia (Full Court)
[2014] FCAFC 83
TCL Air Conditioner (Zhongshan) Co Ltd. v. Castel Electronics Pty Ltd.
16 July 2014
Original in English
Published in: http://www.austlii.edu.au

Abstract prepared by Albert Monichino and Luke Nottage

[**Keywords:** *arbitrators; arbitral proceedings; award-setting aside; award-recognition and enforcement*]

This long-running dispute concerned an exclusive distribution agreement for the distribution in Australia by the respondent of air-conditioning units manufactured by the appellant in China. A dispute arose between the parties with respect to alleged breaches of the agreement by the appellant by distributing non-branded competing products in Australia.

The dispute was submitted to arbitration in Victoria in accordance with the parties' agreement. The arbitral tribunal issued an award in favour of the respondent. The appellant sought to set aside the award on the basis that it was contrary to public policy. Conversely, the respondent sought to have the award enforced, which the

[3] (Cth) means Commonwealth.
[4] See CLOUT case 1757.

appellant resisted. On both fronts, the appellant argued that the arbitral tribunal breached the rules of natural justice by making findings of fact on the assessment of damages in the absence of probative evidence, alternatively without affording it the opportunity to make submissions in respect of the proposed findings. At first instance,[5] the Federal Court found against the appellant and in favour of the respondent.

The Full Court dismissed the appellant's appeal, holding that there is no technical "no evidence" subrule of the rules of natural justice in an international arbitration context. The court stated (in [83]) that the making of a factual finding by an arbitral tribunal without probative evidence may, in certain circumstances, reveal a breach of the rules of natural justice: "This would be so when the fact was critical, was never the subject of attention by the parties to the dispute, and where the making of the finding occurred without the parties having an opportunity to deal with it. That is unfairness; the parties have not been given an opportunity to be heard." However, the court emphasized that a factual conclusion unsupported by probative evidence does not necessarily breach the rules of natural justice.

The Full Court disagreed with the view of the primary judge that any breach of the rules of natural justice amounted to a breach of public policy (on the interpretation of s 19 of the IAA). Rather, the court held that a substantial denial of natural justice was required to enliven the court's discretion to set aside, or resist enforcement of, an award under Articles 34 and 36 of the Model Law. The court opined that an international arbitration award would not be set aside unless there was "real unfairness or real practical injustice" in the way that the arbitration was conducted or resolved, by reference to established rules of natural justice or procedural fairness.

The Full Court stressed that this would not ordinarily involve a detailed re-examination of evidence or the tribunal's fact-finding process and reasoning. In this context, the court repeatedly indicated (at [53]) that the primary judge ought not to have allowed the appellant to spend three days on the setting aside/enforcement application, re-agitating factual matters canvassed before the arbitral tribunal "when the substance of the complaint is the evidential foundation for, and reason process towards, facts as found".

The decision illustrates the pro-arbitration approach adopted by the Australian courts, including through their express finding that a lack of evidence does not automatically lead to a breach of the rules of natural justice.

Case 1757: MAL 34; 35[6]
Australia: Federal Court of Australia
[2012] FCA 21
Castel Electronics Pty Ltd. v. TCL Air Conditioner (Zhongshan) Company Ltd.
23 January 2012
Original in English
Published in http://www.austlii.edu.au

Abstract prepared by Albert Monichino and Luke Nottage

[**Keywords:** *arbitral awards; award-setting aside; courts; enforcement*]

An Australian distributor and a Chinese manufacturer entered into an exclusive distribution agreement for the manufacturer's air conditioners, governed by Victorian law and providing for arbitration in Victoria. The distributor alleged a breach due to the manufacturer selling them in Australia other than under the manufacturer brand name ("xxx" products). An arbitral tribunal issued a detailed award for A$2.8m in damages plus costs, in favour of the distributor who then sought to enforce the award

[5] See *Castel Electronics Pty Ltd. v. TCL Air Conditioner (Zhongshan) Company Ltd.* [2012] FCA 21.
[6] See also CLOUT Case 1756.

in the Federal Court of Australia under Chapter VIII of MAL, given the force of law by s 16 of the International Arbitration Act 1974 (Cth)[7] (IAA).

In this judgment, Murphy J granted distributor's enforcement application, and dismissed the manufacturer's separate application to set aside the award due to violation of "public policy" under Article 34 MAL, further defined in IAA s 19(b) by reference to "natural justice". The manufacturer's key contention concerned the arbitral tribunal's assessment of the distributor's loss arising from the manufacturer's sale of "xxx" products in Australia. While it appeared to be common ground between the parties before the arbitral tribunal that the extent of the distributor's lost sales could not be calculated precisely, the manufacturer contended that upon rejecting the distributor's expert evidence, the arbitral tribunal was bound to accept the manufacturer's expert evidence. Instead, the tribunal found that the distributor's lost sales were 22.5 per cent of the sales of "xxx" products in Australia (a figure lying between the figures adopted by the parties' competing experts). The manufacturer objected that the tribunal instead plucked the 22.5 per cent figure "from the air" (at [135]) and thereby violated two rules of natural justice (and public policy) when making the award:

(a) The "no evidence" rule, at [103]ff — no evidence supported the factual findings made by the arbitral tribunal in connection with the assessment of the distributor's loss; and

(b) The "hearing" rule, at [157]ff — the manufacturer was not afforded a reasonable opportunity to address the relevant findings made by the tribunal, allegedly not based directly on evidence or arguments put before it.

Murphy J first considered the general principles relating to the concept of "public policy" in the IAA, holding:

(a) Where award enforcement is sought at the arbitral seat, "public policy" has a similar meaning in relation to both an application to set aside the award and one to enforce the award (at [123]);

(b) The court will only exercise its discretion sparingly to set aside, or refuse enforcement of, an award, and only where it is satisfied that fundamental notions of fairness or justice have been offended (at [34]);

(c) The court should adopt a (detailed) review sufficient to determine whether relevant rules of natural justice had been breached (at [60]).

Murphy J rejected the manufacturer's contention that there had been a breach of the "no evidence" rule and concluded that the tribunal had acted on rationally probative evidence in arriving at the figure of 22.5 per cent. He held that the tribunal was entitled to have regard to the fact that the manufacturer's expert based his opinion on incomplete data, and had not taken into account certain lay evidence which pointed to a figure higher than the 7.4 per cent figure put forward by the manufacturer's expert.

Regarding the "hearing" rule, Murphy J accepted that an arbitrator is not entitled to decide a matter by taking into account evidence or arguments extraneous to the hearing without giving the parties notice and an opportunity to respond. However, he concluded at [175]–[6] that a reasonable litigant in the manufacturer's shoes would have understood the possibility of the reasoning of the type that led to the Tribunal's findings — in particular, rejecting the manufacturer's substitution rate of 7.4 per cent and adopting a higher substitution rate.

Accordingly, the court rejected the manufacturer's contention that there had been a breach of the rules of natural justice in connection of the making of the award. In any event, Murphy J noted that any breach of the rules of natural justice that might be found was minor, and certainly not one that could be described as offending fundamental notions of fairness or justice. He therefore was not persuaded that a case

[7] (Cth) means Commonwealth.

had been made out for the exercise of his discretion to set aside the award, even if a breach of the rules of natural justice had been established (at [178]).

Turning to the distributor's application for enforcement, the court noted that under Article 35 MAL, the distributor needed only to produce the original (or copy) of the award to a competent court, and that it had done so. As the court had rejected the manufacturer's arguments that there had been a breach of the "no evidence" rule or the "hearing" rule, it held at [185]–[6] that there was no compelling reason why the award should not be enforced.

Case 1758: MAL 34(1)
India: Supreme Court
M/S. Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.
15 December 2016
Original in English
Published in English

[**Keywords:** *arbitration clause; arbitral awards; procedure*]

An American seller (the claimant) and an Indian buyer (the defendant) entered into a contract for sale of copper concentrate to be delivered in two separate consignments. The payments were to be made after the delivery of the consignments. A dispute arose between the parties concerning the dry weight of the concentrate copper. The arbitration clause of the contract contained a two-tiered arbitration procedure providing for a first instance institutional arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration ("ICA Rules") to be held in India. In the event of disagreement between the parties in respect of the correctness of the first award, the arbitration agreement granted either party a right to appeal against the first award before an appellate tribunal to be constituted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules"), to be held in London. The governing law of the main contract was Indian law.

The seller invoked the arbitration clause. The arbitrator appointed by ICA made a NIL award with no order for damages. The seller invoked the second part of the arbitration agreement. The ICC tribunal delivered an award in favour of the seller, who thereafter commenced enforcement proceedings in India, under the Indian Arbitration and Conciliation Act of 1996 (hereinafter — the "A&C Act"), against the purchaser that challenged the validity of the ICC.

The defendant argued against the claimant's submissions, stating that a two-tiered arbitration would be contrary to public policy. In the first instance court, the ICC award was held enforceable, at appeal in the High Court the decision was reversed. The matter was appealed to the Supreme Court.

The Supreme Court considered a two-tier arbitration permissible and allowed under the A&C Act.

First of all, the court noted that the possibility of the two-tier arbitration had been explicitly agreed upon by the parties in the text of their arbitration clause and there were no provisions or rules preventing them from entering into such an agreement. Moreover, taking into account the defendant's submissions in regards to that matter, and after analysing relevant Indian case law and academic writings, the court stated that the A&C Act did not preclude two-tier arbitration and therefore the party autonomy had to be respected.

The court also referred to Article 34(1) MAL, after which the A&C Act had been modelled, and commentaries and reports given in regards to that text. It noted that that Article had always been considered as the one that would not exclude recourse to a second arbitral tribunal if "such appeal within the arbitration system was envisaged" or agreed by the parties to the case. Thus, there were "nothing in the A&C Act that prohibited the contracting parties from agreeing upon a second instance or appellate

arbitration — either explicitly or implicitly", and "no such prohibition or mandate [could] be read into the A&C Act".

Case 1759: MAL 1(3)
India: The High Court of Karnataka (Bangalore)
Mr. Naeem Mohamed Rahmathulla v. M/S Bearys Properties & …
13 February 2013
Original in English

[**Keywords:** *arbitrability; commercial; internationality*]

The petitioners were four joint owners of a property in India, two of them residing in India and two abroad, who applied to the High Court of Karnataka (Bangalore) for appointing an arbitrator to resolve a dispute with the defendant under a Joint Development Agreement (hereinafter — the "Agreement") the parties had previously concluded to develop the property. The application was filed on the grounds that the disputed questions of the parties — concerning the fact that the nature of the construction put up by the defendant under the Agreement was contrary to the sanction plan and that certain agreed amounts had not been paid by the defendant — had required adjudication by the arbitrator. However, the defendant, called upon to agree to the arbitrator, did not agree to the name the petitioners had proposed. Thus, the petitioners applied to the court.

The defendant pleaded for a dismissal of the application stating that the court had no jurisdiction over the case, since the fact that two petitioners resided abroad implied that both the Agreement and the disputes related to it should be considered as arising out of international commercial arbitration. Therefore, the application for the appointment of the arbitrator should be considered by the Hon'ble Chief of Justice of India or his designate. Also, according to the defendant, there were no disputes for the arbitrator to adjudicate on, since the petitioners had not summoned the defendant correctly because the application referred to a partnership and not a company, the legal form under which the defendant was currently registered.

After considering the parties' submissions and provisions of applicable law, the High Court sustained the petitioners' application.

First of all, taking into account not only the relevant provisions of the Indian Arbitration and Conciliation Act of 1996 but Article 1(3) MAL as well, the court stated that in order to decide, whether the dispute was related to international commercial arbitration and if the court had jurisdiction, it had to consider not only the residential address of one party. According to the court, "a cumulative reading of the provisions" required "that the nature of the transaction entered, coupled with the nationality or domicile of the parties" and "the jurisdiction agreed upon" by them "would have to be looked into" before the dispute would be termed as the one of international commercial arbitration. Considering those aspects and also the fact that all four petitioners had indicated themselves as a single party to the Agreement and to the dispute, it could not be said "that one of the parties to the arbitration … [was] a foreign national so as to make it an 'International Commercial Arbitration' and take away the jurisdiction of [the] court".

Also, the court noted that the petitioners' submissions in regards to the content of the dispute showed that "the correctness or otherwise of the contentions" required adjudication which only an arbitrator could provide. And further, even though the defendant had been impleaded "by styling it as a 'partnership firm'" and not as a "company" "the company being the successor-in-interest would remain liable" under the case, and such a "curable defect" of the petitioners' application would not lead to its dismissal. With that, the court upheld the application and rejected the defendant's arguments all together.

Case 1760: MAL 1[8]
India: Supreme Court
R.M. Investments & Trading Co. ... v. Boeing Co.
10 February 1994
Original in English

[**Keywords:** *commercial; international*]

An Indian company (hereinafter — the "claimant") entered into an agreement with a foreign company (hereinafter — the "defendant"), producing aircrafts, for provision of consultant services for promoting sale of aircrafts in India. The agreement (hereinafter — the "Consultant Agreement") provided that a commission would be paid on any transaction entered into by the defendant in result, among others, of "any … commercial and managerial assistance" of the claimant. Two aircrafts were sold. A dispute however arose and the claimant applied to an Indian court to claim compensation and remuneration for the services it had rendered to the defendant under the Consultant Agreement.

That application was followed by a motion of the defendant requesting the court to stay the proceedings under the provisions of the Indian Foreign Awards (Recognition & Enforcement) Act of 1961 (hereinafter — the "Act") on the grounds that the dispute was covered by an arbitration clause in the Consultant Agreement. At the same time, the claimant requested certain amendments to its original claim and the addition of the defendant's counterparty under the Definitive Purchase Agreement as a party defendant. After a series of applications and appeals the Supreme Court was called upon to consider the case.

The court examined those applications and decided to uphold the decision to stay the proceedings.

In its reasoning, the court noted that in order to decide whether the Act was applicable to the dispute, the nature of the parties' legal relation had to be examined. A suit can be stayed only if the parties to the arbitration agreement had a "commercial" legal relation, according to provisions of the Act. Thus, the Supreme Court assessed the conditions and wording used in the Consultant Agreement and concluded that "the agreement to render consultancy services" was "commercial in nature" and the parties did stand "in commercial relationship with each other" as well. The Supreme Court also took guidance from Article 1 MAL in giving a wider meaning to the term "commercial" so as to include all "relationships of a commercial nature" such as "commercial representation or agency" and "consulting".

The court also stated that there was no need to implead the defendant's client as one of the defendants as the claimant had required. The Supreme Court noted that "the main relief in the suit" was claimed against the defendant only and it was "difficult to appreciate" how the case could proceed against the defendant's client alone if the proceedings against the defendant were stayed.

Establishing that and noting that other petitions filed by the claimant were not necessary considering their content, the Supreme Court dismissed them.

[8] This case is cited in the UNCITRAL Digest on the Model Law on International Commercial Arbitration, 2012 Edition.

Case 1761: MAL 5; 8
Republic of Korea: Supreme Court
Decision 2010 Da 76573
22 December 2011
Original in Korean

Published in English: see Hi-Taek Shin, Seoul International Dispute Resolution Center [Arbitration-Related Decisions of Korean Courts: 2010–2014] (July, 2015)

Abstract prepared by Donghwan Shin, national correspondent

[**Keywords:** *arbitration agreement; courts; judicial intervention*]

The defendant, a construction company signed a contract with the plaintiff to build a combined heat and power plant. Part of the total payment was linked to a provision that the amount cannot be adjusted (hereafter "fixed amount agreement"). The construction contract also included an arbitration agreement providing that "differences in opinion regarding the facts and other disputes" are subject to arbitration under the Arbitration rules of the Korean Commercial Arbitration Board (KCAB). The defendant filed a request for arbitration at KCAB seeking increase of the amount to be paid. The defendant argued that the fixed amount agreement was null because it violated Korean domestic laws which allowed adjustments of the price reflecting changes of the circumstances post-contract. In response, the plaintiff brought the case to court seeking a decision that no payment obligation exceeding the amount originally agreed in the construction contract exists. In court, the defendant argued that the claim was against the arbitration agreement pursuant to Korean Arbitration Act Article 9 (which is consistent with Article 8 MAL), therefore, it should be dismissed without a decision on the merit. The plaintiff counter-argued that the arbitration agreement covered only disputes related to facts and did not extend to other issues. In this case, the issue was whether the fixed amount agreement was null in violation of Korean domestic laws, which was not an issue of fact but an issue of law or interpretation of contract provisions. Therefore, the dispute was not subject to arbitration.

Seoul High Court, the court of second instance, found for the defendant. After considering the textual meaning of the contract provisions and the purpose of the arbitration agreement, the court stated that disputes including issues of law or interpretation of contract provisions were also the subject of the arbitration agreement similarly to disputes on facts. The plaintiff appealed, but the Supreme Court concurred with the High Court's decision.

The Supreme Court affirmed the principle that if an arbitration agreement exists, parties should be held to settle all disputes arising out of their specific legal relations by arbitration, unless special conditions exist such as in the case of arbitration clauses with a clearly limited or particular scope.

In the present case, the Supreme Court found that the arbitration agreement in the construction contract did not clearly provide that the agreement was limited to "factual disputes". The Supreme Court referred to the High Court findings that: (1) some provisions in the construction contract including the arbitration agreement existed under the obvious premise that the issues related to contractual interpretation were obviously subject to arbitration; (2) if arbitrators were only concerned with factual findings, the courts would inevitably have to hear the case again since factual, contractual and legal issues are entrenched. Such a result would contravene the purpose of the Arbitration Act to resolve private disputes in a proper, impartial and rapid manner and the object of Article 6 of Korean Arbitration Act — which is consistent with Article 5 MAL — that the court cannot intervene in an arbitration except under special circumstances under the Act, and (3) if the arbitration was only confined to "factual issues", enforcement of arbitral awards could not easily occur.

On the basis of this reasoning and of the decision of the High Court, the Supreme Court dismissed the plaintiff's appeal since it considered the case subject to arbitration.

Case 1762: MAL 35; 36
Republic of Korea: Seoul Central District Court
Decision 2011Gahap29968
1 June 2011
Original in Korean

Published in English: Hi-Taek Shin, Seoul International Dispute Resolution Center [Arbitration-Related Decisions of Korean Courts: 2010–2014] (July, 2015)

Abstract prepared by Donghwan Shin, national correspondent

[**Keywords:** *arbitration agreement; award; courts*]

The plaintiff entered into a contract with the defendants to purchase blasted rock resulting from a new construction project. The plaintiff delayed part of its payment, and when a dispute arose between the parties on the amount of soil that was mixed with the rocks, the parties entered into an arbitration agreement at the Korean Commercial Arbitration Board (hereinafter "KCAB"). KCAB issued an arbitral award ordering the plaintiff to pay the defendants the unpaid amount plus delay damages.

The plaintiff applied to the court, contending that the arbitration agreement is invalid. The plaintiff argued that it did not owe any payment to the defendants because of the amount of soil mixed with the rocks and the additional costs it incurred. The defendants counter-argued that the plaintiff's suit was improper because an arbitration agreement concerning the dispute existed between the parties and an arbitration award had been rendered accordingly.

The court noted the following: (1) the arbitration agreement stipulated that the parties would settle the dispute at KCAB under KCAB arbitration rules and relevant laws of the Republic of Korea, which adopted MAL, and the arbitral award is final and binding on the parties; (2) the plaintiff did not argument over the non-existence of the agreement during the arbitral proceedings; (3) a written statement certifying an agreement to arbitrate is needed for requesting arbitration under KCAB's arbitration rules, and the plaintiff submitted such a statement upon request. The court also stated that according to Article 35 MAL, an arbitral award has the same effect of a final and binding court decision, and any application to set aside the award can only be made through the courts. Moreover, even though the arbitration agreement states that the plaintiff "may appeal", this is only possible by making an application to the court, according to Article 36 MAL. Finally, regardless of the dispute concerned, arbitration agreements settle disputes arising from a given legal relationship between the parties, whether contractual or not.

Based on the above reasoning, the court stated that an arbitration agreement concerning the dispute at hand exists between the parties in accordance with MAL and dismissed the plaintiff's application.

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

Case 1763: NYC V(1)(c); V(2)(b)
Australia: Federal Court of Australia
[2013] FCA 882
Coeclerici Asia (Pte) Ltd. v. Gujarat NRE Coke Limited
30 August 2013
Original in English
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Abstract prepared by Albert Monichino and Luke Nottage

An award was made by an arbitral tribunal in London in favour of a Singaporean company against an Indian company and its managing director. Application was made to enforce the award in the Federal Court of Australia under section 8 of the

International Arbitration Act 1974 (Cth[9]: "the IAA"), which gives effect to Article V NYC. The award creditor sought orders in aid of enforcement, appointing receivers over the shares in Australian companies held by the award debtors, in order to avoid their dissipation.

The award debtors resisted enforcement of the award on two bases. First, they submitted that they were not permitted a reasonable opportunity by the arbitral tribunal to put their case in the arbitration proceedings (section 8(5)(c) of the IAA). Second, they submitted that the said failure by the arbitral tribunal meant that there was a breach of the rules of natural justice in connection with the making of the award and consequently it would be contrary to the public policy of Australia to enforce the award (under sections 8(7)(b) and 8(7A)(b) of the IAA).

Foster J found on a brief review of the facts that the award debtors had been given a reasonable opportunity to present their case. In doing so, he noted (at [92]) that the *lex arbitri* (the English *Arbitration Act 1996*) and procedural rules chosen by the parties (through the London Maritime Arbitrators' Association) required "speed, efficiency and a minimum of formality" in the arbitral procedure.

Separately, Foster J noted that an application had been made by the award debtors at the seat of the arbitration to set aside the award on the basis that it was infected by "serious irregularity". In doing so, the award debtors relied upon the same facts and matters relied on to resist enforcement of the award in Australia. In the circumstances, his Honour held that there was an issue estoppel which precluded the award debtors from raising the same arguments to resist enforcement of the award. Foster J proceeded to say (at [103]):

> "*The English High Court of Justice is the court of the seat of the arbitration. Under the [New York] Convention and the IAA, any application to set aside the Award must be made in that Court. Even if there were no issue estoppel or res judicata, it would generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration. It would be a rare case where such an outcome would be considered appropriate*."

Next, the Court, in aid of enforcement, appointed receivers over the shares in question. Foster J noted (at [108]) that the Court had power under section 57 of the *Federal Court of Australia Act 1976* (Cth) to appoint receivers and that it may exercise the discretion to appoint receivers in aid of enforcement of a judgment provided "*it can be shown that other methods of execution would be inadequate or extremely inconvenient*".

The Full Court of the Federal Court of Australia affirmed the decision of Foster J.[10] The Full Court's decision found it unnecessary to determine whether an issue of estoppel applied such that the enforcement court was bound to follow a determination of the court of the seat on the same issue. Nevertheless, at paragraph 65, it held that it will generally be inappropriate for the enforcement court of a New York Convention country to reach a different conclusion on the same question.

[9] (Cth) means Commonwealth.

[10] See *Gujarat NRE Coke Ltd. v. Coeclerici Asia (Pte) Ltd*. [2013] FCAFC 109.

Case 1764: NYC II(3)
Brazil: Superior Tribunal de Justiça
Conflito De Competência Nº 139.519 - RJ (2015/0076635-2)
Petróleo Brasileiro S.A – Petrobras v. Agencia Nacional do Petróleo, Gás Natural e Biocombustíveis Espírito Santo State
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A publicly-held company (the Company) raised a conflict of competence between an arbitral tribunal constituted under the International Court of Arbitration of the International Chamber of Commerce (ICC) and the second Federal Regional Court, to define which one has jurisdiction to judge on the annulment of an administrative decision taken by the Brazil's National Oil Agency (ANP).

On the factual background, the ANP defined through an administrative decision[11] the size of the oil field called "Campo das Baleias", which would lead to an increase in the amount of royalties and additional fees for the exploration of crude and gas in that field payed by the Company to ANP itself. After the Company failed to have the administrative decision revoked, it requested for an arbitration at the ICC to obtain a declaration of nullity of the decision.

Before the constitution of the arbitral tribunal, ANP claimed the nullity of the arbitration clause at the Federal Courts of Rio de Janeiro, and requested an interim measure to suspend the arbitral proceedings. The interim relief was granted by the second instance of the Federal Courts. The Company raised a conflict of competence, claiming that the arbitral tribunal is the one with jurisdiction over the dispute. The Brazilian state of Espírito Santo, which is not a part to the arbitration clause, also presented an appeal to have the case judged by the Federal Courts, as it had economic interest in the dispute and did not agree on arbitration to decide this issue. The Company's claimed that only the arbitral tribunal could judge on its own competence, according to the principle of *Kompetenz-Kompetenz*, and that the arbitration clause was valid. ANP alleged instead that the principle of *Kompetenz-Kompetenz* is not applicable, as the administrative decision concerns non-disposable rights, originated from a *ius imperii* act, even though the arbitration clause might still be valid.

According to Justice Napoleão Nunes Maia Filho, who expressed the considerations of the minority, the object in dispute is of public interest and do not configure disposable rights, as it is related to the safeguard of national resources, and the principle of *Kompetenz-Kompetenz* is not applicable in the present case.

For the Justice, the interpretation of the *Kompetenz-Kompetenz* principle should follow the approach of the Prima Paint v. Flood & Conklin Manufacturing Co. case (1967). Such an approach establishes that the judiciary has the jurisdiction to appreciate the validity of the arbitration clause and other related issues. According to the minority position, the New York Convention establishes principles consistent with that approach as Article II(3) of the Convention recognizes that the local courts of a signatory State have the prerogative to examine the validity and extent of the arbitration clause, verifying that such agreement is null and void, ineffective or unenforceable. In the case at hand, the clause interferes with the rights of Espírito Santo's access to justice, a third party which did not agree to arbitration, and it is thus inapplicable, inoperative and even impracticable.

On the contrary, Justice Regina Helena, articulating the position of the majority, acknowledged that the provisions of Articles 8th and 20th of Brazilian Arbitration Law confer on the arbitral tribunal the prerogative to deliberate on the limits of its own attributions, before any other judicial body. This is without prejudice to the intent of the interested party to subsequently appeal to the local courts to perform the control

[11] RD 69/2014.

of the enforceability of the arbitration award, as set forth in the Brazilian Arbitration Law, Article 33, as amended by the Brazilian Law No. 13.129/2015.

The majority position also considered that although public interest is never disposable, contractual rights related to public interest might be. When the Public Administration enters into a contract, the relevant patrimonial rights can be the subject of arbitration, without this involving disposing of the public interest. Justice Regina Helena also clarified that arbitration does not preclude a third party's access to justice, as the arbitration clause also prescribed that the arbitral tribunal shall decide about the need for the participation of non-signatory parties in the arbitral proceedings. In addition, the Justice emphasized that Law No. 13.129/2015 clearly set out the principle of *Kompetenz-Kompetenz* and provided for judicial control *a posteriori*.

The final decision of the court thus recognized the applicability of the *Kompetenz-Kompetenz* principle and the authority of the arbitral tribunal to decide upon its own competence, with no prejudice to any subsequent decision over the enforceability of an arbitral award by the local courts.