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(CLOUT)

Contents

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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.2). 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.

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

Case 1725: MAL 9; 17[1]

United States of America: U.S. Court of Appeals, Eleventh Circuit
Case No. 16-15535
SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC
14 November 2017
Original in English
Available on the internet: https://law.justia.com

Abstract prepared by S.I. Strong, National Correspondent

[**Keywords**: *courts; interim measures; judicial assistance; protective orders; arbitral tribunal*]

The plaintiffs-appellants ("the plaintiffs") sought an order requiring the posting of security in the amount of $667,528.86 by the defendants-respondents ("the defendants") in aid of an arbitration then pending in London, United Kingdom. The arbitration involved a commercial dispute arising out of a charter agreement.

In making this request, the plaintiffs relied on section 9-9-30 of the Georgia Code, which is analogous to article 9 MAL. The district court below denied the request on the grounds that such a remedy was not available as a matter of federal, maritime or arbitration law.

The court on appeal affirmed the decision below, after reviewing the legislative history of the MAL and concluding that article 9 was not meant to expand remedies available to court but simply confirmed the court's existing powers. Under this reading, article 9 MAL and, by extension, section 9-9-30 of the Georgia Code did not create any new substantive remedies such as the one requested by plaintiffs. The appellate court also recognized that the scope of powers granted to arbitrators under section 9-9-38 of the Georgia Code (equivalent to article 17 MAL) were not meant to be coextensive with judicial powers. Instead, the MAL and the drafters of the Georgia Code gave arbitrators greater leeway than judges to fashion interim relief. Because the type of relief sought here (security in aid of arbitration) was substantially beyond what was contemplated by the MAL in article 9, the plaintiffs' request was denied and the decision of the district court was affirmed.

Case 1726: MAL 36; 36(1)(a)(iii); 36(1)(b)(ii)

United States of America: U.S. Court of Appeals, Eleventh Circuit
Case No. 05-14092
Rintin Corp., SA v. Domar, Ltd.
1 February 2007
Original in English
Available on the internet: http://caselaw.findlaw.com

Abstract prepared by Jeremy Sharpe, National Correspondent

[**Keywords**: *arbitrability; public policy*]

The plaintiff-appellant, a Panamanian corporation (or "the appellant"), and the defendant-respondent, a Bermuda corporation (or "the respondent"), entered into a Shareholders' Agreement. The parties agreed that "[a]ny dispute which may arise from the interpretation, execution or termination" of the Shareholders' Agreement shall be submitted to arbitration "according to the provisions of the Florida International Arbitration Act and in compliance with the rules of the American Arbitration Association (AAA)." A dispute arose between the parties, and the respondent filed a demand for arbitration before the AAA. The appellant refused to

[1] Information on this court decision was provided to the UNCITRAL secretariat by Mr. J. Rooney.

submit to arbitration and filed suit in Florida state court, seeking a declaration that the matters raised before the AAA were not arbitrable. The court denied the appellant's application. The AAA tribunal issued an award ordering the Bermuda corporation to buy out the Panamanian corporation's stock at a premium price, and ordering this latter to terminate a number of foreign lawsuits against the affiliates of the Bermuda corporation. The Florida District Court rejected the appellant's motion to vacate the arbitral award. The Panamanian corporation appealed to the U.S. Court of Appeals for the Eleventh Circuit. The appellant argued that the award should be vacated under the 2007 Florida International Arbitration Act in force at the time (the "Florida Act") on grounds that (i) there was no written undertaking to arbitrate, as the Shareholders' Agreement was void, (ii) the arbitrators' order that the appellant terminate its foreign lawsuits granted relief in favour of non-parties and thus resolved a dispute that the parties had not agreed to arbitrate, and (iii) the award was in violation of the public policy of Florida.

The Eleventh Circuit affirmed the judgment of the District Court confirming the award. The Eleventh Circuit held that Article 684.25 of the Florida Act (incorporating Article 36 MAL in part) provides for limited defences to the confirmation of an arbitral award, as well as a method for deciding whether those defences are established. The Circuit Court addressed each of the appellant's three defences. First, the Eleventh Circuit held that the District Court had correctly rejected the appellant's argument based on the invalidity of the Shareholders' Agreement under Article 684.25(1)(a) of the Florida Act, finding that the arbitrators' decision on this issue was binding on the court. Second, the Eleventh Circuit rejected the appellant's argument that the arbitrators had resolved a dispute not submitted to them, finding no "clear error" by the arbitrators pursuant to Article 684.25(1)(f) of the Florida Act (incorporating Article 36(1)(a)(iii) MAL). Third, the Eleventh Circuit rejected that the award violated public policy under Article 684.25(1)(d) of the Florida Act (incorporating Article 36(1)(b)(ii) MAL), finding that the appellant's dismissal of its foreign lawsuits was crucial to the overall relief granted.

Cases relating to the UNCITRAL Arbitration Rules

Case 1727: UNCITRAL Rules (1976 and 2010) 21(3); UNCITRAL Rules (2010) 23(2)

United States of America: U.S. Court of Appeals, Ninth Circuit
Case No. 11-17186
Oracle America, Inc. v. Myriad Group A.G.
26 July 2013
Original in English
Available on the internet: http://caselaw.findlaw.com

Abstract prepared by Jeremy Sharpe, National Correspondent

The defendant-appellant ("the appellant") and the plaintiff-respondent ("the respondent") entered into a series of licenses and agreements to govern the appellant's use of computer programming software and testing protocols developed by the respondent. A dispute arose between the parties. The appellant submitted a demand for arbitration against the respondent pursuant to an arbitration clause in the parties' Source License, which provided that "any dispute arising out of or in relation to [the] License" would be settled by arbitration administered by the American Arbitration Association and under the UNCITRAL Arbitration Rules. The arbitration clause in the Source License further stated that disputes relating to intellectual property rights or claims arising out of the parties' TCK Licence should fall within the "exclusive jurisdiction" of a competent court. The appellant moved in the U.S. District Court for the Northern District of California ("the District Court") to compel arbitration. The District Court granted the appellant's motion with respect to the respondent's breach of contract of claim, but denied the appellant's motion with respect to its other claims. The District Court later granted the respondent's motion to enjoin the appellant from

arbitrating its non-contract claims, holding that the court had exclusive jurisdiction to determine the arbitrability of claims relating to intellectual property and the TCK License. The appellant appealed the District Court's order.

The U.S. Court of Appeals for the Ninth Circuit reversed the District Court's order. The court confirmed the presumption that a court, rather than an arbitral tribunal, should decide which issues are arbitrable, "unless the parties clearly and unmistakably provide otherwise." The Ninth Circuit held that there was no reason to deviate from the consistent case law that the incorporation of the UNCITRAL Rules constituted clear and unmistakable evidence that the parties agreed that the arbitrator, rather than a court, should decide issues of arbitrability. It noted that the parties' disagreement over whether the Source License had incorporated the 1976 or the 2010 version of the UNCITRAL Rules was immaterial, as Article 21(3) of each version vests the arbitrator with apparent authority to decide questions of arbitrability. The Ninth Circuit rejected the respondent's argument that Article 23(2) of the 2010 UNCITRAL Rules grants courts and arbitrators concurrent jurisdiction to decide an arbitrator's jurisdiction. It held that even if the UNCITRAL Rules assume that certain national laws grant parties an irrevocable right to challenge an arbitrator's jurisdiction in courts, the central purpose of the U.S. Federal Arbitration Act was to ensure that agreements to arbitrate were enforced pursuant to their terms. The Ninth Circuit rejected the respondent's argument that the parties had agreed that a court should decide the arbitrability of disputes relating to intellectual property rights and the TCK License. It held that the arbitrator should determine whether a claim falls within its jurisdiction or within the exclusive jurisdiction of a competent court.

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

Case 1728: NYC V(1)(d)

United States of America: U.S. Court of Appeals, Eleventh Circuit
Case No. 16-16163
Bamberger Rosenheim, Ltd. v. OA Development, Inc.
17 July 2017
Original in English
Available on the internet: http://caselaw.findlaw.com/us-11th-circuit/1868056.html

Abstract prepared by S.I. Strong, National Correspondent

The plaintiff-appellant ("the plaintiff") brought a motion to enforce an arbitral award rendered against the defendant-respondent ("the defendant") following an arbitration held in the United States in Atlanta, Georgia. At the time of the arbitral proceeding, the plaintiff objected to the venue, claiming that the arbitration should go forward in Tel Aviv, Israel, but the arbitral tribunal decided that the arbitration would proceed in Atlanta. After the defendant prevailed in the arbitration, the plaintiff brought a motion to vacate the award and the defendant brought a motion to confirm the award. The district court below confirmed the award, and the appellate court affirmed.

Although the arbitration took place in the United States, the New York Convention was implicated because the arbitration was considered "non-domestic" as a matter of national law. In particular, the court was asked to consider whether the arbitral procedure had been conducted "in accordance with the agreement of the parties," as required under article V(1)(d) NYC.

The court held that the question of where an arbitration was to be held was a procedural issue that was for the arbitral tribunal to decide, absent some indication to the contrary. In so deciding, the court noted that its approach was consistent with that taken by four other U.S. circuit courts of appeals. Furthermore, the court indicated that its task on review was simply to determine whether the arbitral tribunal "(even

arguably) interpreted the parties' contract, not whether [it] got the meaning right or wrong." (citation omitted).

Case 1729: NYC III
United States of America: U.S. Court of Appeals, District of Columbia Circuit
Case No. 11-7093
GSS Group Ltd. v. National Port Authority
25 May 2012
Original in English
Available on the internet:
https://www.cadc.uscourts.gov/internet/opinions.nsf/21ED597E6AB2382185257A09004DFC86/$file/11-7093-1375606.pdf

Abstract prepared by S.I. Strong, National Correspondent

The plaintiff-appellant ("the plaintiff") sought to confirm a foreign arbitration award against the Liberian defendant-respondent ("the defendant"). The district court below dismissed the petition on the grounds that the court lacked personal jurisdiction as a matter of national constitutional law, even though the Port Authority was subject to statutory personal jurisdiction under the Foreign Sovereign Immunities Act. The appellate court affirmed.

The appellate court recognized that Article III NYC requires contracting states to "recognize [foreign] arbitral awards as binding and enforce them in accordance with" local procedural law. According to national constitutional law, private parties, including foreign corporations, are entitled to the full panoply of due process protections, including the right to assert jurisdictional defences relating to whether the corporation in question has sufficient "minimum contacts" with the relevant U.S. forum to allow the court to assert personal jurisdiction over the defendant. In this case, the question arose as to whether the defendant should be considered a foreign corporation or an agency or instrumentality of a foreign state. The issue was critical because (1) foreign states and (2) foreign instrumentalities that are controlled by foreign states such that a principal-agent relationship arises are not entitled to the due process protections of the Fifth Amendment to the U.S. Constitution. Since the defendant was considered an independent juridical entity for purposes of this motion, despite its connections to Liberia, it was entitled to the due process protection. Given that the defendant had no connection with the United States, the motion to enforce the foreign arbitral award was properly dismissed for lack of personal jurisdiction.

Case 1730: NYC [II; II (3)]; V; V(2)(b)
United States of America: U.S. Court of Appeals, Second Circuit
Case No. 07-4974
Telenor Mobile Communications v. Storm LLC
8 October 2009
Original in English
Available on the internet: https://law.justia.com

Abstract prepared by Jeremy Sharpe, National Correspondent

The respondent, a Norwegian company, commenced arbitration under the UNCITRAL Rules against the appellant, a Ukrainian company, for breach of a shareholders agreement. The appellant's parent then sued the appellant in a Ukrainian court, which declared the shareholders agreement null and void, because the appellant's agent was found to have lacked authority to execute the agreement. The appellant then sought to dismiss the arbitration, citing the Ukrainian court decision. The tribunal rejected the appellant's request, and then ruled against the appellant on the merits. The U.S. District Court for the Southern District of New York denied the appellant's motion for vacatur, and confirmed the award.

The appellant appealed the decision to the U.S. Court of Appeals for the Second Circuit, arguing that the tribunal had "manifestly disregarded the law" by failing to

(i) give preclusive effect to the Ukrainian court decision, and (ii) require a trial on the disputed issue of whether the parties had agreed to arbitration, citing *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26 (2d Cir. 2001). The appellant further argued that it was contrary to New York public policy to force a party to comply with an arbitral award that would cause it to violate a foreign judgment.

The Second Circuit rejected the appeal, upholding the arbitral award. Emphasizing the strong public policy in favour of international arbitration, the court confirmed that judicial review of arbitral awards is very limited, and that the party opposing enforcement has the burden of proving one of the defences under Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 207 (consistent with Article V NYC). Although U.S. courts "may also consider whether the award was in manifest disregard of the law," the Second Circuit found that the tribunal had not disregarded the law by failing to give preclusive effective to the Ukrainian court decisions, given the lack of "rudimentary due process" accorded to the respondent in the judicial proceedings. The Second Circuit further found that the tribunal had not "manifestly" disregarded *Sphere Drake* by failing to arrange a trial on the "arbitrability" of the shareholders agreement. Under *Sphere Drake*, "when the making of the agreement to arbitrate is placed in issue," a court must set the issue for trial if the party challenging the agreement presents "some evidence in support of its claim." The appellant had provided no such evidence, as it failed to establish that its agent lacked apparent authority to conclude the shareholders agreement.

The Second Circuit also rejected the appellant's public policy defence, confirming that 9 U.S.C. § 207 (consistent with Article V(2)(b) NYC) "must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice." The court concluded that, "in light of the findings of the arbitration panel and the district court, it is the appellant's improper collateral litigation, and not the arbitral award, that is contrary to public policy[.]"

Case 1731: NYC [II]; II(2)[2]
United States of America: U.S. Court of Appeals, Second Circuit
Case No. 97-9436
Kahn Lucas Lancaster, Inc. v. Lark International, Ltd.
29 July 1999
Original in English
Available on the internet: http://caselaw.findlaw.com/us-2nd-circuit/1261357.html

Abstract prepared by S.I. Strong, National Correspondent

The plaintiff-respondent ("the plaintiff") sought to compel the defendant-appellant ("the defendant") to arbitrate a dispute pursuant to an arbitration provision found in certain Purchase Orders that had been issued by the plaintiff. The Purchase Orders indicated that the products in question had been "ordered from" the defendant as seller and referred to various terms and conditions printed on the reverse side. Those terms included language indicating that any disputes were to be arbitrated in the City of New York. The Purchase Orders were signed by the plaintiff but not by the defendant, although the defendant did not object to the Purchase Orders at the time they were issued.

A dispute arose between the parties regarding the merchandise in question and the plaintiff sought to compel arbitration. The defendant resisted on several grounds, including the fact that Lark had not signed the Purchase Orders in question.

The district court below held that the arbitration provisions were enforceable against the defendant under Article II NYC, relying on *Sphere Drake Insurance PLC v. Marine Towing, Inc.,* 16 F.3d 666 (5th Cir. 1994)[3]. The decision was overturned on

[2] See also CLOUT case 415 (which mainly focuses on the application of the CISG). The Secretariat has decided to publish case 1732 because of its relevance in respect to the application of the New York Convention.

[3] See CLOUT case 1732.

appeal, creating a split between the Second and Fifth Circuits regarding the interpretation of Article II(2) NYC. In holding that the arbitration provisions in the Purchase Orders were not binding on the defendant, the Second Circuit found that "the modifying phrase 'signed by the parties or contained in an exchange of letters or telegrams' [in Article II(2) NYC] applies to both 'an arbitral clause in a contract' and 'an arbitration agreement.'" In its decision, the Second Circuit relied on the placement of the comma in the English-language version of that clause, the grammatical construction of the French- and Spanish-language versions of that clause, and the legislative history (*travaux préparatoires*) of the NYC. The split between the Second and Fifth Circuits has not yet been resolved by the U.S. Supreme Court, and parties seeking to determine whether a particular provision is enforceable in the United States under the NYC will have to consider where their motion will be heard. Notably, although this case has been partially abrogated on other grounds by *Sarhank Group v. Oracle Corp*., 404 F.3d 657, 660 n.2 (2d Cir. 2005) (limiting *Kahn Lucas* "to the extent that *Kahn Lucas* is read as viewing an element of a claim as a jurisdictional requisite, the absence of which deprives the Court of subject matter jurisdiction"), *Sarhank* does not affect the issue discussed here.

Case 1732: NYC II; II(2)
United States of America: U.S. Court of Appeals, Fifth Circuit
Case No. 93-3200
Sphere Drake Insurance PLC v. Marine Towing, Inc. et al.
23 March 1994
Original in English
Available on the internet: https://law.justia.com/cases/federal/appellate-courts/F3/16/666/491774/

Abstract prepared by S.I. Strong, National Correspondent

The plaintiff-respondent ("the plaintiff") sought to compel the defendants-appellants ("the defendants") to arbitrate a dispute pursuant to an arbitration provision found in a protection and indemnity policy. A vessel that was insured under the policy sank before the policy was delivered to the defendants although the policy had gone into effect. Only at that time did the defendants discover the arbitration provision.

The district court below ordered the matter to arbitration despite the defendant claim that it was not bound by the arbitration provision, and the court on appeal affirmed. In so doing, the court held that Article II(2) NYC should be interpreted to mean that an "agreement in writing" could constitute either (1) an arbitral clause in a contract, with no additional qualifications, or (2) an arbitration agreement that was either signed by the parties or reflected in an exchange of letters or telegrams. This conclusion differs from *Kahn Lucas Lancaster, Inc. v. Lark International, Ltd.*, 186 F.3d 210 (1999 2d Cir.), from the U.S. Court of Appeals for the Second Circuit.[4] The split between the Second and Fifth Circuits has not yet been resolved by the U.S. Supreme Court, and parties seeking to determine whether a particular provision is enforceable in the United States under the NYC will have to consider where their motion will be heard.

[4] See CLOUT case 1731.