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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.3). 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 website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

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

Case 1748: MAL 29
Greece: Hellenic Supreme Court of Civil and Penal Justice (Areios Pagos)
Case No. 1713/2008
ALPHA national broadcaster SA v. WIND Hellas telecommunications SA
13 October 2008
Original in Greek
Available at: www.dsanet.gr (website of the Athens Bar Association)

Abstract prepared by Artemis Malliaropoulou

[**Keywords**: *arbitral proceedings; arbitrators; presiding arbitrator; decisions*]

On 26 February 1998 the claimant initiated arbitration proceedings against the respondent on the basis of the arbitration clause contained in the cooperation agreement which the parties had previously concluded. The agreement provided for the cooperation between the parties in relation to mobile phone services of pay-as-you-go nature. When the respondent terminated the contract, the claimant sought compensation for alleged unlawful termination before the arbitral tribunal. The arbitral tribunal partially accepted the claimant's request and the claimant was awarded a certain amount of money plus interest (award No. 30/2006).

The respondent filed applications before the Athens Civil Court of Second Instance requesting the annulment of the award on the basis of absence of real deliberation between the members of the arbitral tribunal. The Court of Second Instance held that no real deliberation took place and that the opinions of the arbitrators on the factual and legal context were not explained in the award, which, thus, violated Article 897 paragraph 5 of the Hellenic Code of Civil Procedure. Such provision refers, among others, to the application of the majority principle to all decisions taken by an arbitration panel, unless otherwise agreed in the arbitration agreement, and to the requirement that all arbitrators sign the arbitral award (save for a few exceptions where the award can be signed by the chairman of the panel and one of the arbitrators only). Based on the evidence brought before it, the Court of Second Instance annulled the arbitral award because, as it was stated and proved, the presiding arbitrator arrived at the final meeting of the arbitral tribunal having already drafted the award. He simply asked the other arbitrators to sign the award, despite their potential reservations that could be included but not reported in a thorough way. One of the co-arbitrators insisted on reviewing the draft award and having time to add his dissenting opinion, while pointing out the lack of a deliberative process. The presiding arbitrator denied him that opportunity arguing that granting additional time would amount to a delay that would constitute denial of justice.

Further to the decision of the Athens Civil Court of Second Instance (decision No. 4113/2007), the claimant filed an application for appeal before the Hellenic Supreme Court of Civil and Penal Justice, arguing that the decision interpreted a provision of substantive law in a wrongful way or that there was a wrongful assumption of the facts under that provision and more specifically that the annulment ground invoked was not included in the restrictive list of grounds described in the context of the law 2735/1999, which was the applicable law concerning international arbitration.

Citing law 2735/1999 (which enacts the MAL), the Supreme Court held that lack of real deliberations or improper deliberations between the members of the arbitral tribunal is a ground for setting aside an arbitral award, as it is specified in Article 34 paragraph 2dd of such law. The Supreme Court also noted that any breach of Article 29 of law 2735/1999, which mirrors Article 29 MAL, is considered to be a breach of the arbitral procedure agreed upon by the parties and it constitutes a ground for annulment under Article 34, paragraph 2dd, of the law 2735/1999.

The Supreme Court upheld the decision of the Court of Second Instance, although it based its reasoning on the provisions of law 2735/1999 (and not the Hellenic Code of

Civil Procedure). The court thus rejected the appeal and affirmed the annulment of the arbitral award.

Case 1749: MAL 16; 34
India: Supreme Court
Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products
23 January 2018
Original in English
Published in English

Abstract prepared by Medha Rao

[**Keywords**: *jurisdiction; competence; procedure; courts*]

The appellant (the respondent in the arbitration proceedings) and the respondent (the claimant in the arbitration proceedings) entered into a letter of intent for the supply of 800 mt of defoamers by the respondent to the appellant. The dispute arose when the appellant refused to pay the respondent in response to the latter's legal notice. The respondent invoked arbitration and thereafter a sole arbitrator was appointed. Post the framing of issues, the arbitrator based on the submissions of the parties decided to first take up the issue of limitation and thereafter passed an award in favour of the respondent stating that its claims were not barred by limitation.

Subsequently, a petition under Section 34, Indian Arbitration and Conciliation Act, 1996 ("Act") (consistent with Article 34 MAL) was filed before the District Judge, Jagatsinghpur challenging the award on limitation on the basis that the aforesaid award was a "First Partial Award". The said petition was dismissed by the District Court, Jagatsinghpur on the grounds that the award on limitation could not be termed as an interim award and hence the Court lacked the jurisdiction to entertain the said petition. The appeal to the High court of Orissa was also dismissed on the same grounds and thereafter the matter came to be referred to the Supreme Court.

The issue to be decided by the Supreme Court was twofold, first was whether the award on limitation can be said to be an interim award and second, whether the issue concerns the jurisdiction of the arbitral tribunal and is consequently covered by Section 16, Act (consistent with Article 16 MAL). The appellant argued that the award on limitation was in fact an interim award and therefore recourse was available under Section 34, Act. The respondent however argued that the award on limitation is an award on the jurisdiction of the arbitral tribunal and is covered by the Kompetenz-Kompetenz principle of Section 16, Act. Further, the respondent also referred to Section 37, Act stating that a separate appeal of an award under Section 16, Act was only if such a plea was rejected and not accepted.

The court held that the expression "partial award" was not found in the Act and that the characterization of the award is contingent upon the facts of the case and the effect that the award had on the rights of the parties. Therefore, the court taking into account several provisions of the Act, including Section 31(6), determined that the award on limitation is an interim award. In respect to the point of whether an issue of limitation concerns the issue of jurisdiction under Section 16, Act, the court, after highlighting that Sections 16(1) to (4), Act are based on Article 16 MAL, stated that the Kompetenz-Kompetenz principle deals with the arbitral tribunal's jurisdiction in the narrow sense of ruling on objections with respect to the existence of validity of the arbitration agreement. Therefore, in the present instance, the award on limitation being an interim award was to be challenged separately under Section 34, Act.

Case 1750: MAL 16; 16(3)
Republic of Korea: Seoul Central District Court
Decision 2014 Gahap 4373
26 May 2014
Original in Korean

Abstract prepared by Donghwan Shin, National Correspondent

[**Keywords**: *jurisdiction; competence*]

The defendant filed a motion for arbitration against the plaintiff at the Korean Commercial Arbitration Board ("KCAB") seeking compensation for damages allegedly caused by the breach of equipment supply contracts ("Supply Contract") by the plaintiff. The defendant argued in its request that English would be the language of arbitration according to an agreement in the Supply Contract. The plaintiff argued that there was no agreement regarding the language of arbitration, therefore, Korean should be the language of the proceedings under Article 50 of KCAB Arbitration Rules.

The chairman of the arbitral tribunal sent a letter to the parties allowing the use of English, Korean, or both English and Korean while emphasizing that the letter should not be considered as the final decision of the tribunal on the language of the arbitration. Subsequently, the arbitral tribunal rendered the decision that the language of arbitration should primarily be English and, within the prescribed 30 days, the plaintiff objected to it arguing that the decision exceeded the authority of the arbitral tribunal.

The plaintiff brought the case to court pursuant to Article 17(1) ~ (5) of the Korean Arbitration Act seeking recognition of the fact that the arbitral tribunal acted outside its jurisdiction when it ruled on the language of arbitration (Article 17(1) ~ (5) of Korean Arbitration Act is consistent with Article 16 MAL).

Regarding the letter of the chairman, the court found that it could not be deemed as an exercise of the arbitral tribunal's authority to determine arbitral language, because it was just aimed at encouraging an agreement between the parties. Therefore, the letter was not subject of the court's review. As for the tribunal's decision on language, the court found no evidence that showed that the tribunal had rendered the decision as a preliminary question, therefore, it did not satisfy the requirements for the court's review either (Article 16(3) MAL).

Therefore, the plaintiff's claims against the defendant were dismissed.

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

Case 1751: **MAL 1(2); 8; NYC IV; V**
Republic of Korea: Seoul Central District Court
Decision 2012Gadan348225
26 September 2013
Original in Korean

Abstract prepared by Donghwan Shin, National Correspondent

[**Keywords**: *arbitration agreement; validity*]

The plaintiff agreed to provide a pilot training service to the defendant against the payment of service fees. The contract included an arbitration clause for any dispute between the plaintiff and the defendant stating that the seat of arbitration should be in Singapore under the Singapore Arbitration Act. Eventually, the plaintiff filed for arbitration at the Singapore International Arbitration Center claiming the payment of the training fees by the defendant. The arbitral tribunal rendered an award in favour of the plaintiff and when the defendant failed to comply with it, the plaintiff brought the case to court seeking enforcement of the award. The defendant counterclaimed

stating that the plaintiff's employees had embezzled the service fees it had paid. The plaintiff being the employer, it was thus liable for damages to the defendant pursuant to Article 756 of the Korean Civil Law (torts).

The court determined that the defendant's counterclaim was not receivable, since it was counter to the arbitration agreement. Citing Korean Arbitration Act ("KAA") Article 9 (which is consistent with Article 8 MAL), the court stated that when a matter is the subject of an arbitration agreement, if a party raises a plea concerning the existence of the agreement, the action should be rejected. The court further stated that KAA Article 9 shall apply even in cases where the place of arbitration is not the Republic of Korea. This is in line with KAA Article 2 (consistent with Article 1(2) MAL). The court also found that the defendant's counterclaim was directly or closely related to the performance, validity and continuation of the contract and for those reasons it falls under the arbitration, an additional reason for the court to reject the defendant's counterclaim.

In regard to the plaintiff's claim for the enforcement of the arbitration award, the defendant argued that it had not been properly notified of the arbitral proceedings and because of its tort action against the plaintiff, the defendant could not present its case to the arbitral tribunal. Therefore, the enforcement of the award should be rejected pursuant to Article V(1)(b) NYC. Moreover, the defendant argued that the contract was null and void since the defendant was deceived by the plaintiff into signing the contract and thus recognition and enforcement should be rejected pursuant to Article V(2)(b) NYC.

The court rejected both arguments. The court ruled that the purpose of Article V(1)(b) NYC is not to encompass all situations in which the right of being properly notified was denied but only exceptional situations in which the right of defence was remarkably and unacceptably denied. The facts of the case show that the defendant appointed an attorney right after the commencement of the arbitral proceedings. Also, the action in tort initiated by the defendant against the plaintiff is not a valid reason to avoid participating in the arbitral proceeding. The court further stated that Article V(2)(b) NYC allows for refusal of an arbitral award on the basis of public policy of the enforcing country. Although the court of the country where enforcement is sought has the authority to review the award in order to reject or recognize it, such national court's discretion should be exceptional and applied restrictively. In the present case, the defendant's claims of fraud and unfairness pertain to the merits of the arbitration and thus a decision on those claims goes against the purpose of the New York Convention. Moreover, the recognition and enforcement of the arbitral award at hand does not go against the public order and norms of morality of the country. Finally, the court found that there was no evidence of the plaintiff's fraud to the defendant.

For these reasons, the court dismissed the defendant's counterclaim.

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

Case 1752: NYC V(1)(e)
Brazil: Superior Court of Justice
Challenged Foreign Award No. 5.782
EDF International S.A. v. Endesa Latinoamérica S.A. and YPF S.A.
2 December 2015
Original in Portuguese
Available at: http://www.stj.jus.br/

Abstract prepared by Naíma Perrella Milani

The claimant, a French company, sought recognition and enforcement of a foreign arbitral award issued in Argentina concerning a dispute on stock price variation. Recognition of the award was denied in light of the fact that it had been annulled by an Argentinian court of appeals and that the annulment decision had become final.

The Superior Court of Justice held that pursuant to Article 34 of the Brazilian Arbitration Law, foreign arbitral awards shall be recognized or enforced in Brazil in accordance with the international treaties effective in the internal legal system. According to the provisions of two of these treaties, i.e., Article V(1)(e) NYC and Article 5(1)(e) of the Inter-American Convention on International Commercial Arbitration (Panama Convention), recognition and enforcement of a foreign award may be refused 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 was made. In addition, Article 38(VI) of the Brazilian Arbitration Law also replicates these provisions.

Furthermore, Article 20(e) of the Protocol for Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters (Las Leñas Protocol) provides that foreign awards shall have extraterritorial effectiveness in the States Parties when they are final and/or enforceable in the State where they were issued. Article 216-D(III) of the Internal Regiment of the Superior Court of Justice sets forth that a foreign award must be final in order to be recognized and Article 15(c) of Decree-Law No. 4,657/1942, known as the Introduction to the Rules of Brazilian Law, sets forth that in order to be enforced in Brazil a foreign award must be final and enforceable in the place where it was made.

The Superior Court of Justice thus stated that the recognition procedure does not add effectiveness to the foreign award, but only releases the effectiveness contained therein. Recognition and enforcement of this same award was also denied in the United States of America, Spain and Chile.

Case 1753: NYC III; IV; V(1); V(1)(a); V(1)(b)
People's Republic of China: Jinan City Intermediate People's Court, Shandong Province
(2015) Ji Shang Wai Chu Zi No. 7
Glencore Grain v. Shandong Jinhe Cotton and Cotton Co., Ltd.
22 September 2016
Original in Chinese

The applicant applied to have an award[1] made by the International Cotton Association Limited (ICA) recognized and enforced. The respondent resisted recognition based on the following grounds: (a) the award arrived after the time specified in the award for appeal so it was unable to lodge an appeal: as such, according to Article V(1)(b) NYC, the recognition of the award should be refused; and (b) there was no arbitration agreement between the parties, because the agreement was a standard term contract and even if it did contain an arbitration clause, it was only an agreement on the arbitration rules rather than the institution and the seat of arbitration, therefore, according to Article V(1)(a) NYC, the recognition should be refused.

The court noted that the applicant signed a contract with the respondent. They agreed that all rules and regulations of ICA, if not in conflict with the contract, would be binding to them from the date of signature of the contract. After the conclusion of the contract, the applicant applied to ICA for arbitration, claiming non-performance of the contract by the respondent and asking for compensation. ICA issued the award against the respondent on 15 November 2013 and the same day ICA sent the award to the respondent by email, in which the time limit for appeal was specified at 13 December 2013. The award was also sent by an international courier and was received on 23 December 2013. This procedure was in accordance with Article 316.3 of the Articles of Association and Regulations of ICA (2011) providing that "notice, documents, or any other communication could be sent by fax, telex or email. If this is the case, it shall have evidence of sending or receiving".

The court applied the New York Convention and held that Article 201.1.3 of the Articles of Association and Regulations of ICA (which provides that "any disputes

[1] Award No. A01/2012/199, 15 November 2013.

relating to the contract shall be resolved by arbitration in accordance with the Articles of Association of the International Cotton Association Limited") was not in conflict with the contract and should be applied to the contract signed by the parties. Therefore, the application for arbitration by the applicant to ICA complied to the contract. The court refused the argument of the respondent that there was no arbitration agreement. With regard to the fact that the respondent was unable to lodge an appeal, the court noted that after rendering the award, it was sent by both email and delivery to the respondent. Although the respondent argued that the date of reception of the award was after the expiry of date for appeal, service by email was permitted according to Article 316.3 and evidence of it was provided. The court thus refused the argument of the respondent that the award should not be recognized in violation of Article V(I) NYC.

In accordance with Article 283 of the Civil Procedure Law of the People's Republic of China and Articles III and IV NYC, the court thus recognized the award.

Case 1754: NYC IV(1)(b)
Spain: High Court of Justice of Catalonia (Civil and Criminal Chamber, 1st Section)
6 May 2016
Original in Spanish
Complete text available at: http://www.poderjudicial.es/

Abstract prepared by Maria del Pilar Perales Viscasillas[2]

Recognition was sought of an arbitral award issued in London, the object of which was the failure to fulfil certain terms of a charter party.

The grounds for opposing the exequatur were that Article IV(1)(b) NYC had been violated and, specifically, that there was no agreement in writing under which the parties were obliged to submit to arbitration any differences that might arise between them. The Court granted the request for an exequatur.

In this respect, the Court reiterated the doctrine already consolidated by Spanish judges in relation to the New York Convention: namely, the principle in favour of granting the exequatur. Under this approach, the correctness, validity and effectiveness of a foreign arbitral award must be assumed except when the existence of one of the grounds for refusal of recognition set out in the New York Convention is proved. When this occurs, the burden of justifying the existence of such ground(s) should fall on the party opposing the enforcement of the award, although the merits of the case should not be reviewed by the courts. The clear aim of this approach is the establishment of an effective instrument for the development of international trade.

In the case at hand, the central issue supporting opposition to enforcement was the alleged absence of a written agreement to submit any dispute to arbitration. On that point, the court held that the claim was inconsistent with the emails exchanged by the parties. The court recalled the settled case law of Spain in accordance with which it favoured a non-formalist approach, that is to say, it was understood that the requirement of a written agreement established in the Convention was merely for the purpose of having a record of the existence of an agreement. A similar approach has been taken in the UNCITRAL recommendation on the interpretation of Article II(2) NYC, pursuant to which the mechanisms envisaged in this provision have not been considered exhaustive and should include electronic media[3] (this was furthermore recognized by Article 9(3) of Arbitration Act No. 60/2003 of 23 December 2003).

The Court carefully reviewed the email correspondence between the parties and, specifically, between the intermediaries of the charterer and the ship-owner. In the charter party, it was agreed that any disputes that might arise would be submitted to international arbitration in London, with the application of English law, under the auspices of and in accordance with the rules of procedure of the London Maritime

[2] When the abstract was submitted to the UNCITRAL secretariat, Prof. P. P. Viscasillas was CLOUT National Correspondent for Spain.

[3] See www.uncitral.org.

Arbitrators Association. On the basis of the emails sent to the intermediaries of the applicant, the court found clearly that the charter party had been negotiated and concluded, with the charterer's consent indicated in the "Asbatankvoy (1969)" form, which contained the arbitration agreement, the terms of which were included "for reference".

In granting the exequatur, the court also referred to the fact that, since the dispute and arbitral proceedings had begun, no claim had been made regarding the non-existence of the arbitration clause or lack of awareness of the clause.