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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 at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of 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 a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (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 Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, 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 on 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, by individual contributors, or 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 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York Convention" (NYC)[1]

Case 2029: NYC II; II(3)
Australia: Federal Court of Australia
Case No. VID 903 of 2006
BHPB Freight Pty Ltd v. Cosco Oceania Chartering Pty Ltd
23 April 2008
Original in English
Published: [2008] FCA 551
Available at: www.austlii.edu.au/databases.html

Abstract published on www.newyorkconvention1958.org

In proceedings before the Federal Court of Australia, BHPB Freight Pty Ltd ("BHPB") alleged that it was induced by misleading and deceptive conduct of Cosco Oceania Chartering Pty Ltd ("Cosco") to enter into a charterparty of a cargo vessel with a third party. Cosco applied to have the proceedings stayed and referred to arbitration, invoking an arbitral clause contained in the charterparty and s 7 of the International Arbitration Act 1974 (Cth) ("the Act") (giving effect to NYC Article II(3) by providing that where proceedings instituted by a party to an arbitration agreement to which the Court determines the NYC applies are pending in a court, on the application of another party to the arbitration agreement, the court must stay the proceedings and refer the parties to arbitration). Alternatively, Cosco argued that the Court had an inherent power to order the stay.

The Federal Court refused to order the stay. It held first, that Cosco was not entitled to invoke s 7 of the Act. In so ruling, it noted that s 7(2) of the Act required that one party to an arbitration agreement institute a proceeding against another party to the agreement. However, it held that Cosco was not a party to the arbitration agreement and did not, moreover, satisfy the criteria set forth in s 7(4) of the Act for being deemed to be a party to the arbitration agreement. Second, it held that it did not have an inherent power to grant the stay and even if it did, this was not a case in which the power should be exercised.

Case 2030: NYC II
Brazil: Superior Tribunal de Justiça (Superior Court of Justice)
Interlocutory Appeal 1.046.883
BNP Paribas v. Banco Fontecindam S/A and others
13 October 2008
Original in Portuguese
Available at: www.stj.jus.br (Official website of the Superior Tribunal de Justiça)

Abstract published on www.newyorkconvention1958.org

The parties signed a Memorandum of Understanding (MOU) establishing inter alia the sale of assets from Bank Fontecindam to Banque National de Paris (BNP). After the signature of the MOU, BNP decided to terminate the agreement. Bank Fontecindam sought damages for termination before the Brazilian courts. The Court of First Instance dismissed the claims without prejudice due to the existence of an arbitration agreement.

The Claimant appealed to the Tribunal de Justiça de São Paulo (São Paulo Court of Appeals) asserting that there was no valid arbitration agreement because the MOU

[1] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. Several of the following abstracts are reproduced as part of the CLOUT documentation so that they can be officially translated into the six languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

was not a final contract and only established the parties' intention to sign an arbitration agreement in the future.

The Tribunal de Justiça de São Paulo granted the Claimant's request. The Respondent appealed to the Superior Tribunal de Justiça (Superior Court of Justice) claiming violations of the Brazilian Code of Civil Procedure, the Brazilian Arbitration Act, the 1923 Geneva Protocol on Arbitration Clauses and Article II NYC.

The Superior Tribunal de Justiça dismissed the appeal on procedural grounds. It held that the appeal could not be heard because it was an attempt to review the interpretation of the contract, which was not allowed in this kind of recourse.

Case 2031: NYC II; II(2); III
Colombia: Corte Suprema de Justicia (Supreme Court of Justice)
Case no. 472
Sunward Overseas SA v. Servicios Maritimos Limitada Semar (Colombia)
20 November 1992
Original in Spanish

Abstract published on www.newyorkconvention1958.org

Semar Maritimos chartered a vessel owned by Sunward Overseas to carry a cargo of 10,000 tons of maize from El Salvador to Colombia. Following a dispute on the value of the cargo, on 17 February 1988, an award was rendered in New York in favour of Sunward Overseas. A United States District Court granted leave for enforcement. Sunward then requested enforcement of the award before the Corte Suprema de Justicia (Supreme Court). The Corte Suprema de Justicia granted enforcement, applying both national law and the requirements of the NYC. It first held that Articles 693 and 694 of the Colombian code of civil procedure required that the State where the decision was rendered gives the same recognition and enforcement to decisions rendered in Colombia. In the present case, the Corte Suprema de Justicia held that it was the case since both the United States of America and Colombia have ratified and implemented the NYC. The Corte Suprema de Justicia then noted that one of the effects of the NYC is the binding character of the arbitration agreement as intended by Article II NYC. The Corte Suprema de Justicia acknowledged that the award was binding within the meaning of Article III NYC. The Corte Suprema de Justicia then examined the conditions set forth by the NYC and established that no objection could be made to the enforcement of the award: the dispute arose out of commercial rights, the award was not contrary to public policy, and the dispute was not of exclusive jurisdiction of Colombian Courts.

Case 2032: NYC I; I(1); III
Colombia: Corte Suprema de Justicia (Supreme Court of Justice)
Case No. 7474
Merck & Co Inc. (US), Merck Frosst Canada Inc., Frosst Laboratories Inc. (Colombia) v. Tecnoquimicas S.A. (Colombia)
26 January 1999
Original in Spanish
Available at: www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org

A dispute arose between the companies Merck and Frosst on the one hand and Tecnoquimicas on the other. The contracts entered into by the parties provided for arbitration under the auspices of the International Chamber of Commerce (ICC). A sole arbitrator, nominated by the ICC, issued an interim award on jurisdiction on 29 July 1998. The sole arbitrator held that the arbitration agreements were valid, that he had jurisdiction over the dispute and ordered Tecnoquimicas to refrain from pursuing the arbitral proceedings it had started before the Chamber of Commerce of Bogota. Merck and Frosst requested enforcement of the award in Colombia. By decision of 12 November 1998, the sole Justice at the Corte Suprema de Justicia (Supreme Court) denied recognition. The Claimants appealed. On appeal, the Corte

Suprema de Justicia confirmed and dismissed the application for recognition of the award. It first affirmed that it is for the enforcing judge to exercise control over the arbitral award, and in particular to verify that he had jurisdiction. The Corte Suprema de Justicia considered that the control must be made in accordance with international conventions (the NYC) and as subsidiary matter, with national law. The Corte Suprema de Justicia noted that both the United States and Colombia are parties to the NYC, and hence that it is applicable to the present case. The Corte Suprema de Justicia recalled the requirements set forth in the NYC. However, it noted that the NYC did not define the word "award". It considered that "award" should be construed in accordance with the spirit of the NYC. It defined an "arbitral award" as a decision of arbitrators putting an end to an arbitral proceeding by deciding over the dispute. The Corte Suprema de Justicia noted that Article I(1) NYC adopted a substantial criterion in stating that it applies to awards "arising out of differences between persons", thus considering that not all arbitral decisions are enforceable but only those which decide a dispute. The Corte Suprema de Justicia concluded that an "arbitral award" within the meaning of the NYC does not include an award on jurisdiction.

Case 2033: NYC I; III; V; V(1); V(1)(d)
Colombia: Corte Suprema de Justicia (Supreme Court of Justice)
Case No. E-7474
Merck & Co Inc. (US), Merck Frosst Canada Inc., Frosst Laboratories Inc. (Colombia) v. Tecnoquimicas S.A. (Colombia)
1 March 1999
Original in Spanish
Available at: www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org

The parties entered into an agreement containing an arbitration clause providing for arbitration under the auspices of the International Chamber of Commerce (ICC) in Newark. Following a dispute, Merck & Co Inc., Merck Frosst Canada Inc. and Frosst Laboratories Inc. initiated an ICC arbitration proceeding on 3 February 1997. On 29 July 1998, a sole arbitrator rendered an award whereby he affirmed his jurisdiction and ordered the Respondent to refrain from pursuing the arbitral proceeding before the Chamber of Commerce of Bogota. The ICC Secretariat issued an order whereby it affirmed that the award was final.

On 26 January 1999, the Suprema Corte de Justicia (Supreme Court) denied enforcement of the award because it was not considered an "award" within the meaning of the NYC. Merck filed a recourse ('recurso de suplica') before the Suprema Corte de Justicia (Supreme Court). The Companies Merck and Frosst filed a recourse against the order of 26 January 1999 rejecting the request for enforcement of the ICC interim award rendered on 29 July 1998. The Corte Suprema de Justicia held that no enforcement should be granted to the award and confirmed the decision of 26 January 1999. The Suprema Corte de Justicia noted that the 26 January 1999 decision did not refer to the ICC Rules with respect to the enforcement proceedings. It considered that the two are different: the enforcement proceeding has to comply with the rules of the State where enforcement is sought, in accordance with the NYC. The Corte Suprema de Justicia analysed Article I(1) NYC as applying to awards which finally or partially settle disputes between legal or natural persons. However, the Corte Suprema de Justicia held that in the present case, the award affirmed the jurisdiction of the arbitral tribunal and ordered Tecnoquimicas to refrain from continuing the arbitral proceedings it had initiated before the Chamber of Commerce of Bogota without settling the dispute on the merits. The Corte Suprema de Justicia considered that, under the NYC, "arbitral awards" substantially put an end to the arbitral proceeding and settle the dispute.

Case 2034: NYC V; III; V(1)(e)
Egypt: Cairo Court of Appeal
Case No. 7/121
Egyptian British Company for General Development (GALINA) v. Danish Agriculture Seelizer Company
26 May 2004
Original in Arabic

Abstract published on www.newyorkconvention1958.org

After Danish Agriculture Seelizer Company requested the enforcement of an arbitral award issued in Denmark according to the Rules of the International Chamber of Commerce (the "ICC Rules") before the Alexandria Court of First Instance, Egyptian British Company for General Development (GALINA) filed a lawsuit before the Cairo Court of Appeal, requesting the setting aside of said award.

The Court decided that it lacked jurisdiction to rule on the challenge made by GALINA. It noted that the application of the Egyptian Arbitration Law is limited by its Article 1 to arbitration proceedings held in Egypt and international arbitration proceedings which the Parties agreed to submit to the Egyptian Arbitration Law and that this position corresponds to Egypt's commitment under the NYC to recognize and enforce foreign arbitral awards, as well as to the Parties' agreement to hold arbitration proceedings outside of Egypt without submitting them to the Egyptian Arbitration Law, with the result that they agreed that their dispute shall escape the jurisdiction of the Egyptian Courts.

The Court deducted from Articles III and V(1)(e) NYC that only the Courts of the State where the award was issued have jurisdiction to rule on requests for its setting aside. As Egypt acceded to the NYC by Presidential Decree No. 171/1959, the provisions of the NYC are applicable even when in contradiction with the Egyptian Code of Civil and Commercial Procedure and Arbitration Law. The rule that Egyptian Courts lack jurisdiction to rule on requests for the setting aside of foreign arbitral awards is a rule relating to jurisdiction and may be applied by the Court *sua sponte*. Since the arbitral award challenged by GALINA was issued in Denmark and the Parties did not agree on the application of the Egyptian Arbitration Law, this law does not apply to the arbitral award.

Case 2035: NYC III
Egypt: Cairo Court of Appeal
Abdel Wahed Hassan Suleiman v. Danish Dairy and Agriculture Seelizer Company
25 September 2005
Original in Arabic
Published in: Lebanese Review of Arab and International Arbitration, No. 38 (2006), pp. 54–55.

Abstract published on www.newyorkconvention1958.org

On 29 November 2000, an award was issued following arbitration proceedings under the Rules of the International Chamber of Commerce (the "ICC Rules"). Danish Dairy and Agriculture Seelizer Company ("Danish Dairy") requested enforcement of the award before the Alexandria Court of First Instance, which decided that it lacked jurisdiction to rule on the matter and referred it to the Cairo Court of Appeal, reasoning that the Cairo Court of Appeal had jurisdiction under the Egyptian Arbitration Law because the award had been issued in an international commercial arbitration. The Chairman of the 75th Commercial Circuit of the Cairo Court of Appeal held that the Cairo Court of Appeal lacked jurisdiction over enforcement of foreign arbitral awards since the NYC provides that the contracting States commit to enforce foreign awards in accordance with their rules of procedure and the Egyptian Code of Civil and Commercial Procedure ("Code of Procedure") provides for the jurisdiction of the Courts of First Instance. However, in pursuance of Article 110 of the Code of Procedure, which requires the Court to rule on matters referred to it, the Chairman of the 75th Commercial Circuit ruled on the matter and granted

enforcement to the award. Abdel Wahed Hassan Suleiman ("Mr. Suleiman") appealed before the 91st Commercial Circuit of the Cairo Court of Appeal.

The Cairo Court of Appeal rejected Mr. Suleiman's appeal on grounds unrelated to the NYC. It upheld the order of the Chairman of the 75th Commercial Circuit except for its holding that the Cairo Court of Appeal lacked jurisdiction over enforcement of foreign awards. It noted that the NYC provides that the contracting States would not impose substantially more onerous conditions on the enforcement of foreign arbitral awards than are imposed on the enforcement of domestic arbitral awards. The Court held that the Egyptian Arbitration Law would apply to the enforcement of foreign arbitral awards because it provides less onerous conditions than those in the Code of Procedure. It noted that the "rules of procedure" mentioned in the NYC cover all laws organizing the proceedings, including the Egyptian Arbitration Law. Therefore, pursuant to Article III NYC, the Court applied the provisions of the Egyptian Arbitration Law, under which the Cairo Court of Appeal has jurisdiction to rule on the enforcement of arbitral awards.

Case 2036: NYC V; III; V(1)(e)
Egypt: Cairo Court of Appeal
Case No. 22/119
Engineering Industries Company & Sobhi A. Farid Institute v. Roadstar Management & Roadstar International
29 September 2003
Original in Arabic

Abstract published on www.newyorkconvention1958.org

On 1 April 1996, a contract for the transfer of know-how was concluded and contained an arbitration agreement providing for arbitration in Lugano, Switzerland according to the Rules of the International Chamber of Commerce (the "ICC Rules").

On 4 February 2002, an arbitral award was rendered by a sole arbitrator applying Swiss Law and ordered Engineering Industries Company and Sobhi A. Farid Institute to pay damages to Roadstar Management and Roadstar International who then requested enforcement of the award before the North Cairo Court of First Instance.

On 9 April 2003, Engineering Industries Company and Sobhi A. Farid Institute ("the Claimants") filed a lawsuit before the Cairo Court of Appeal, requesting the suspension of the enforcement of the award and its setting aside. Roadstar Management and Roadstar International ("the Respondents") objected to the jurisdiction of the Cairo Court of Appeal on the basis of Article 1 of the Egyptian Arbitration Law and Article V NYC, claiming that the Egyptian Arbitration Law is not applicable to the dispute given that the arbitration was held in Lugano and the Parties did not agree on submitting it to the Egyptian Arbitration Law.

The Court accepted the Respondents' jurisdictional objection. It noted that the application of the Egyptian Arbitration Law is limited by its Article 1 to arbitration proceedings held in Egypt and international arbitration proceedings which the Parties agreed to submit to the Egyptian Arbitration Law and that this position corresponds to Egypt's commitment under the NYC to recognize and enforce foreign arbitral awards, as well as to the Parties' agreement to hold arbitration proceedings outside of Egypt without submitting them to the Egyptian Arbitration Law, which entails that they agreed that their dispute should escape the jurisdiction of the Egyptian Courts. The Court deducted from Articles III and V(1)(e) NYC that only the Courts of the State where the award was issued have jurisdiction to rule on requests for its setting aside. As Egypt acceded to the NYC by Presidential Decree No. 171/1959, the provisions of the NYC are applicable even when in contradiction with the Egyptian Code of Civil and Commercial Procedure and Arbitration Law. The rule that Egyptian Courts lack jurisdiction to rule on requests for the setting aside of foreign arbitral awards is a rule relating to jurisdiction and may be applied by the Court *sua sponte*. Since the arbitral award challenged by the Claimants was issued in Lugano, Switzerland and no evidence suggested that the Parties agreed on the application of

the Egyptian Arbitration Law, this law does not apply to the arbitral award and Egyptian Courts lacked jurisdiction to rule on the request for its setting aside. Accordingly, the Court of Appeal decided that it lacked jurisdiction to rule on the Claimants' challenge.

Case 2037: NYC III
Egypt: Cairo Court of Appeal
Case No. 32/119
John Brown Deutsche Engineering v. El Nasr Company for Fertilizers & Chemical Industries (SEMADCO)
06 August 2003
Original in Arabic

Abstract published on www.newyorkconvention1958.org

On 26 March 2001, an award was issued following arbitration proceedings in Geneva, Switzerland, between John Brown Deutsche Engineering ("John Brown") and El Nasr Company for Fertilizers & Chemical Industries (SEMADCO). John Brown requested enforcement of the award before the Chairman of the Cairo Court of Appeal, who rejected the request on 10 July 2002. On 21 July 2002, John Brown requested the Cairo Court of Appeal to overrule the Chairman's order and grant enforcement to the award, arguing that the award met all requirements for enforcement and was not contrary to public policy in Egypt. SEMADCO objected, arguing that the Cairo Court of Appeal did not have jurisdiction to rule on the request for enforcement and that the award contravened public policy in Egypt.

The Cairo Court of Appeal decided to overrule the Chairman's order and grant enforcement to the award, finding that it had jurisdiction to rule on the request for enforcement. The Court noted that Egypt had acceded to the NYC and that, therefore, the NYC was applicable even when in contradiction with Egyptian laws. It added that Article III NYC provides that the contracting States shall not impose substantially more onerous conditions on the enforcement of foreign arbitral awards than are imposed on the enforcement of domestic arbitral awards. The Court found that Articles 297 and 298 of the Code of Civil and Commercial Procedure, which are applicable to foreign arbitral awards and provide for the jurisdiction of the Courts of First Instance, impose more onerous conditions than those imposed by Articles 56 and 58 of the Egyptian Arbitration Law applicable to domestic arbitral awards. Accordingly, the Court held that enforcement of the award should be governed by Articles 56 and 58 of the Egyptian Arbitration Law, under which the Cairo Court of Appeal had jurisdiction to rule on the enforcement of the award. As John Brown had produced all the required documents and the award did not contravene public policy in Egypt, the Court of Appeal granted enforcement.

Case 2038: NYC II(2); V(2)(b)
Greece: Western Continental Court of Appeal of Greece
88/2021
27 September 2021
Original in Greek

A German lender and a Greek borrower entered into a loan contract in cryptocurrency ('Bitcoin'). The parties concluded the contract via a peer-to-peer lending website operated by a company based in the United States. The parties also agreed, through the terms of the website, that any dispute between them would be resolved by online arbitration through a provider also based in the United States. The borrower did not fulfil its obligations under the loan contract and the lender referred a claim to arbitration. An arbitral award was issued in favour of the applicant. The lender applied to the Court of First Instance of Agrinio[2] for the recognition and enforcement of the award in Greece. The Court recognized that an arbitration agreement in electronic form satisfied the requirement under article II(2) of the New York Convention (NYC)

[2] Court of First Instance of Agrinio, 23 October 2018, n. 193/2018 (not reported in CLOUT)

for the agreement to be “in writing”. In doing so, it relied on the 2006 UNCITRAL recommendation regarding the interpretation of article II(2). However, the Court dismissed the application as unfounded in substance, considering recognition and enforcement of the award to be contrary to public policy.

The lender appealed to the Western Continental Court of Appeal.

In its decision, the Court of Appeal reaffirmed the exhaustive nature of the grounds for refusing recognition and enforcement in article V of the Convention. The Court also acknowledged the commercial nature of the transaction for the determination of the applicability of the Convention.[3] The Court noted the intangible nature of cryptocurrencies and rejected their characterization as normal currency. It further noted the lack of domestic regulation, as well as pronouncements by the European Central Bank that cryptocurrencies are not considered to be money and are not issued by a central public authority. It also found that cryptocurrencies have a negative impact on the national economy due to, among other things, the risk of tax evasion and the volatility and fluctuation in their value, while highlighting the use of cryptocurrencies to further the commission of criminal acts and the existence of legal uncertainty affecting commercial transactions. The Court concluded that the recognition and enforcement of an arbitral award that treats cryptocurrency as money and acknowledges the existence of a debt in cryptocurrency would be contrary to the public policy of Greece, in line with article V(2)(b) of the Convention, and consequently dismissed the appeal.

[3] At the time of the decision, a declaration by Greece under article I(3) of the Convention was in effect, according to which the Convention is to be applied “only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of [Greece]”.