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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.

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Printed in Austria

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

Case 2039: MAL 8(1)
Armenia: First Instance Court of General Jurisdiction, Court of Appeal
Civil Case No. ԼԴ/1017/02/17 (LD/1017/02/17)
Hajik Geliji v. VKS Armenia LLC and VKS Textilveredelung LLC
2 May 2019
Original in Armenian
Available at: http://www.datalex.am/?app=AppCaseSearch&case_id=30962247438236554

Abstract prepared by Parandzem Mikayelyan, National Correspondent

[**keywords:** *arbitration agreement, award, court, proceeding, admissibility, refusal, appeal*]

H. Geliji (the "Claimant") brought a claim to the First Instance Court against VKS Armenia LLC and VKS Textilveredelung LLC (the "Respondents") with respect to a sale and transfer of shares contract (the "Contract") containing an arbitration clause. The arbitration clause provided that all disputes in connection with the Contract and its validity shall be finally settled in accordance with the Rules of Arbitration of the German Arbitration Institute, excluding the jurisdiction of courts of general jurisdiction; the place of arbitration shall be Cologne; the number of arbitrators shall be three, the Contract shall be governed and construed by Armenian law. The Claimant argued that the Contract, including the arbitration clause, had never entered into force and asked for the Court's confirmation.

The First Instance Court decided that the case was inadmissible since the Contract contained an arbitration clause, whereby the parties had undertaken to submit all disputes arising out of the Contract to arbitration. Therefore, the case was not subject to examination by the courts pursuant to Article 91(1)(1) of the then applicable Civil Procedure Code ("CPC"), which stipulated that a judge shall not admit a case if it is not subject to examination at courts.

Alleging that he had been denied justice, the Claimant filed a successful appeal before the Court of Appeal. With reference to CPC 91(1)(1), 91(1)(3) and 91(1)(4), the Court explained that the existence of an arbitration agreement was not in itself a ground for refusing the admission of the case. An arbitration agreement, pursuant to the court's reasoning, did not exclude a court action, nor did it stay or terminate an ongoing court proceeding. The said agreement could be a ground to dismiss the case without consideration of its merits in accordance with CPC 103(3), only if one of the parties requested so with reference to the arbitration agreement, as long as the possibility to submit disputes to arbitration had not been extinguished, or the arbitration agreement did not prohibit the other party to apply to court in cases provided by law (reflecting the objective of MAL 8(1)). The Court thus observed that not the existence of an arbitration agreement, but the reference thereto by one of the parties shall form a ground to dismiss the case without consideration. The Court of Appeal further substantiated this statement with reference to Article 4(2) of the Law of the Republic of Armenia "On Commercial Arbitration" (reflecting the objective of MAL 8(1)) which stipulated that in case a party to an arbitration agreement brings a court action against the other party, seeking a final determination with respect to a dispute subject to an arbitration agreement, and in case the other party does not object to the court proceeding on the basis of the arbitration agreement, it is considered that the parties have waived their right to settle the dispute by arbitration. The Court explained that the law allowed a court to try a case which the parties had subjected to arbitration unless one of the parties referred to the arbitration agreement or the possibility to go to arbitration had been extinguished. A party's failure to object to the court proceeding on the basis of an arbitration agreement should be regarded as a waiver to settle the dispute in question through arbitration. Hence, such a failure by the interested party could allow the court to try and resolve the dispute on its merits. Finding that the First Instance Court had committed a breach of procedural law by way of disregarding the above, the Court of Appeal repealed the inadmissibility

decision of the lower court. The Court of Cassation refused the appeal filed by the Respondents on inadmissibility grounds.

In the second round, the First Instance Court seized of an action brought by the Claimant dismissed the case without consideration of its merits given the objection to the court proceeding by the Respondents on the basis of the arbitration agreement. By applying CPC 103(3), as discussed above, as well as Article 8(1) of the Law "On Commercial Arbitration" (corresponding to MAL 8(1)), the Court concluded that all the grounds to dismiss the case without consideration of its merits were met: (i) the Court was seized of a matter which was the subject of an arbitration agreement; (ii) the Respondents filed a request to dismiss the case without consideration not later than when submitting their first statement on the substance of the dispute; and (iii) while alleging that the possibility to apply to arbitration had been extinguished, the Claimant did not submit any evidence.

Upon the Claimant's appeal, the Court of Appeal found that the decision of the First Instance Court was groundless. Particularly, the Court stated that CPC 103(3) was inapplicable, given that the case was not related to the invalidity of the Contract, nor did it arise out of the Contract. Rather, the Claimant's claim sought the Court's confirmation that the Contract had not entered into force. As such, the claim was out of the scope of the arbitration agreement/did not conform to the arrangement of the parties. In view of the Court of Appeal, the lower court also failed to consider the statement reached by other courts previously seized of this action, that the existence of an arbitration agreement could not exclude a court action. Accordingly, the Court of Appeal repealed the decision of the First Instance Court. The Court of Cassation refused the Respondents' appeal on inadmissibility grounds.

Case 2040: MAL 34(2)(a)(i), MAL 34(2)(b)(ii)
Armenia: First Instance Court of General Jurisdiction, Court of Appeal
Civil Case No. ԵԿԴ/2004/02/17 (YEKD/2004/02/17)
Seryozha Matevosyan v. ACBA-Credit Agricole Bank CJSC
7 June 2018
Original in Armenian
Available at: http://datalex.am/?app=AppCaseSearch&case_id=14355223812355147

Abstract prepared by Parandzem Mikayelyan, National Correspondent

[**keywords:** *award, public policy, courts, validity, arbitral proceedings*]

ACBA-Credit Agricole Bank CJSC (the "Bank") entered into an arbitration agreement with Seryozha Matevosyan and others on 21 June 2013, whereby the parties agreed to submit all disputes in connection with the guarantee agreement signed between them on the same date to arbitration at the Financial Arbitration Institution of the Union of Banks of Armenia, excluding the jurisdiction of the courts of general jurisdiction. Seryozha Matevosyan (the "Claimant") commenced an action with respect to the nullity of the guarantee agreement before the First Instance Court of General Jurisdiction in 2016. The Bank commenced arbitration on the basis of the arbitration agreement in February 2017 claiming money from the Claimant pursuant to the guarantee agreement. The Claimant argued in the arbitration that the parallel judicial proceeding concerning the nullity of the underlying guarantee agreement bars the arbitration and requested the stay of the arbitral proceeding. Nonetheless, the arbitral tribunal continued the proceeding and rendered an award in favour of the Bank in March 2017.

Within the framework of this judicial proceeding initiated in 2018 with respect to the annulment of the arbitral award, the Claimant argued that at the time of the commencement of arbitration, his obligations under the guarantee agreement had been extinguished, and the arbitration agreement was therefore no longer valid, which resulted in the nullity of the arbitral award pursuant to Article 34(2)(1)(a) of the Law of the Republic of Armenia "On Commercial Arbitration" (corresponding to MAL 34(2)(a)(i)). Furthermore, the Claimant contended that the refusal by the arbitral tribunal to stay the proceeding on the ground of a parallel judicial proceeding

concerning the nullity of the guarantee agreement amounted to a public policy breach pursuant to Article 34(2)(2)(b) of the Law "On Commercial Arbitration" (corresponding to MAL 34(2)(b)(ii)).

The First Instance Court stated and subsequently the Court of Appeal confirmed that none of the annulment grounds were met. The courts noted that the first argument under Article 34(2)(1)(a) of the Law "On Commercial Arbitration" was not independent and derived from the outcome of the action concerning the termination of the Claimant's obligations under the guarantee agreement. Having found that the guarantee agreement was still effective with respect to the Claimant, the courts acknowledged that the arbitration agreement also continued to be in force.

As to the public policy argument under Article 34(2)(2)(b) of the Law "On Commercial Arbitration", with reference to relevant provisions of the Civil Procedure Code, Rules of the Financial Arbitration Institution, and jurisprudence of the Court of Cassation, the First Instance Court and subsequently the Court of Appeal observed that the decision to stay the proceeding shall be motivated by the existence and mutual connection of certain circumstances. In this regard, rendering a decision to stay the proceeding is within the scope of the competence of the Financial Arbitration Institution, regardless of whether the decision grants or dismisses the stay request. The courts concluded that there had been no violation of public policy by way of making decisions within one's competence. The Court of Cassation refused the Claimant's appeal on inadmissibility grounds.

Case 2041: MAL 36(1)
Armenia: Court of Cassation
Civil Case No. ԵԿԴ/1636/17/15 (YEKD/1636/17/15)
Armeconombank OJSC v. Rive Intertrade LLC, Fudo LLC, Davit Petrosyan, Ruzanna Ghazaryan, Armen Tevosyan, Julietta Gevorgyan, and Ruben Sargsyan
22 July 2016
Original in Armenian
Available at: www.arlis.am/DocumentView.aspx?DocID=108426

Abstract prepared by Parandzem Mikayelyan, National Correspondent

[**keywords:** *award, recognition, enforcement, refusal, appeal, court, procedure*]

Upon the application of Armeconombank OJSC, the First Instance Court of General Jurisdiction recognized the domestic arbitral award as binding and issued a writ of execution. The appeal by respondents was dismissed by the Court of Appeal which resulted in a cassation complaint before the Court of Cassation. Respondents argued that the Court of Appeal had failed to consider that the arbitration agreements entered into between the parties were unlawful and were concluded in violation of the law. In particular, the parties allegedly did not have the appropriate authorization to conclude arbitration agreements. The Court of Cassation was therefore posed the question (among other matters) whether the decision of the First Instance Court of General Jurisdiction regarding the recognition and enforcement of the arbitral award might be subject to appeal before the Court of Appeal.

The Court of Cassation acknowledged that the Law of the Republic of Armenia "On Commercial Arbitration" (enacting the MAL in Armenia) limited itself to stipulating the grounds for refusal of the application regarding recognition and enforcement of the arbitral award, while leaving the matter regarding the procedure for examination of such an application, including the possibility of appeal, to the Civil Procedure Code. In this regard, the Court of Cassation noted that the Civil Procedure Code of the Republic of Armenia did not provide the procedure for examination of an application regarding recognition and enforcement of the arbitral award.

With a view to offering a solution, the Court of Cassation analysed the rationale behind Article 36(1) of the Law "On Commercial Arbitration (corresponding to MAL 36(1)). It observed that the judicial proceeding regarding the recognition and enforcement of an arbitral award is a manifestation of judicial control over the

arbitration proceeding. Within this judicial proceeding, the competent court verifies the existence of grounds excluding or allowing the recognition and enforcement of an arbitral award. In this respect, the exhaustive scope of grounds for refusal of recognition and enforcement of an arbitral award is not an end in itself and aims at protecting the subjective rights of the parties to the arbitration, on the one hand, and the interests of the State and the public, on the other hand. As far as the parties are concerned, these grounds seek to balance the interests of both parties to the proceeding. In particular, for the claimant, the exhaustive grounds indicate that the application for recognition and enforcement cannot be refused on any ground not specified therein. For the respondent, the exhaustive list prevents the recognition and enforcement of an arbitral award rendered in breach of respondent's rights. In other terms, the provision of grounds for refusal stems from a person's right to judicial protection, and their lawful application is an important premise for the exercise of the right to a fair trial.

In light of the above, and considering that the possibility of appeal is a principal component of the right to a fair trial pursuant to both domestic and international law, which enables to ensure the detection and correction of judicial errors, thus contributing to the practical implementation of the goals of justice, the Court of Cassation concluded that the decision regarding the recognition and enforcement of an arbitral award by the First Instance Court might be subject to appeal before the Court of Appeal. Accordingly, the Court of Cassation overturned the decision of the Court of Appeal and remanded the case to the First Instance Court of General Jurisdiction.

Case 2042: MAL 7; 8(1)
Hong Kong SAR: High Court (Court of First Instance)
OCBC Wing Hang Bank Limited v. Kai Sen Shipping Company Limited
HCAJ 5/2019; [2020] HKCFI 375
4 March 2020
Original in English
Reported in [2020] 1 HKLRD 1217
Available at:
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126965&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAY, National Correspondent

[**keywords**: *arbitration agreement; arbitration clause; incorporation by reference; documents*]

The central issues before the Court were whether specific words of reference were required to incorporate the arbitration agreement contained in the charterparty into the bills of lading and whether the commencement of arbitration by the plaintiff amounted to an unequivocal election to arbitration. This case highlights that in considering whether the arbitration clause has been incorporated by reference, the special principle applies to bills of lading and other negotiable instruments.

The plaintiff was the lawful holder of the bills of lading and entitled to immediate possession of the cargoes described in the bills of lading. The defendant, being the carrier of the cargoes under a charterparty containing an arbitration agreement, released the cargoes without presentation of the original bills of lading. The plaintiff commenced proceedings against the defendant for, inter alia, misdelivery of the cargoes.

The defendant sought to stay the proceedings in favour of arbitration on the grounds, inter alia, that the plaintiff's claim was subject to the arbitration agreement contained in the charterparty which was incorporated into the bills of lading by reference pursuant to sections 19 and 20 of the Hong Kong SAR Arbitration Ordinance (incorporating Articles 7 (Option 1) and 8 MAL) and the plaintiff has unequivocally submitted itself to arbitration by issuing a notice to commence arbitration. The plaintiff argued that the defendant's stay application be dismissed on the ground, inter

alia, that, the arbitration agreement was not incorporated into the bills of lading in the absence of any specific words of incorporation and its notice of commencement of arbitration was merely intended to circumvent the time limitation for instituting the claim in misdelivery of cargoes.

In construing Articles 7 (Option 1) and 8 MAL, the Court highlighted that for the purpose of Article 7(6) MAL, an explicit reference to the arbitration clause itself was not essential. Reference to a document, which contained the arbitration clause relied upon, may be sufficient, provided "the reference is such as to make that clause part of the contract". In particular, it was not required by the Hong Kong SAR Arbitration Ordinance that the contract in question itself must contain a specific reference to the arbitration clause. Instead, the Court explained that it was a question of construction, and its task was to ascertain with no preconceived notions what the parties' intention was expressed when they entered into the contract by reference to the words they used.

The Court also held that English law was the governing law of the arbitration agreement contained in the charterparty although the seat of arbitration was in Hong Kong. In determining whether the arbitration agreement was incorporated into the bills of lading under English law, the Court cited with approval the principle in the UK House of Lords case of *Thomas v. Portsea* (decided over 100 years ago) and other literatures which supported the proposition that specific words of incorporation were required to incorporate the arbitration agreement contained in the charterparty into the bills of lading. The Court acknowledged that *Thomas v. Portsea* remained good law under both English law and Hong Kong SAR law but the principle in *Thomas v. Portsea* should only be applied to bills of lading or other negotiable instruments and not to other contracts. Hence, specific words of incorporation were necessary to incorporate the arbitration agreement in the charterparty into the bills of lading if it was the intention of the parties to do so. The Court held it would come to the same decision even if the Hong Kong SAR law were to apply to the bills of lading. It further noted that this approach was consistent with other common law jurisdictions adopting MAL, and a consistent approach promoted certainty in interpretation of arbitration agreements in bills of lading.

Further, the Court decided that the commencement of arbitration by the plaintiff was plainly to preserve its claim pending resolution of the jurisdictional dispute rather than an unequivocal submission to arbitration as the plaintiff had expressly reserved its right to proceed with its claim by way of litigation. The Court therefore dismissed the stay application of the defendant.

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

Case 2043: NYC VI
Israel: Supreme Court
Application for Leave of Appeal No. 152-21
Gadi Bitan (applicant) v. Lite Venture Holding Ltd (respondent)
11 February 2021
Original in Hebrew
Available at:
https://supreme.court.gov.il/Pages/SearchJudgments.aspx?&OpenYearDate=2021&CaseNumber=152&DateType=1&SearchPeriod=8&COpenDate=null&CEndDate=null&freeText=null&Importance=null

Abstract prepared by Itai Apter, National Correspondent, and Noa Osher

The judgment discusses whether a court can compel a party to deposit a guarantee as a condition for hearing its case, where that party did not file a request to set aside an arbitration award at the seat of the arbitration, but only opposed the recognition of a foreign arbitration award in Israel.

In 2010, the parties signed an agreement concerning a 3.5 million USD loan. The respondent provided the applicant with the loan, but the applicant failed to repay it. The respondent filed a claim for arbitration in Vienna in order to force the repayment of the loan plus interest, as per the arbitration clause in the loan agreement. The applicant did not answer the statement of claim and did not cooperate with the arbitration procedure. The arbitral tribunal awarded the applicant to pay 8.7 million USD to the respondent.

The respondent sought recognition of the award by the Tel-Aviv District Court (first instance court), in accordance with Israeli law and the New York Convention (NYC) to which Israel and Austria are parties. The first instance court ordered the applicant to deposit a bond of 2 million USD as a precondition to hear his objections to the recognition of the award. The applicant sought leave to appeal the decision to the Supreme Court (the Court).

The applicant claimed that the first instance decision raises fundamental questions regarding proceedings on recognition of foreign arbitration awards in Israel. Its main argument was that the first instance court could not order the deposit of a bond as a condition for hearing an objection to the enforcement of a foreign arbitration award to which the New York Convention applies. The applicant argued that Article 6 NYC explicitly provides that a party can be ordered to deposit a guarantee in proceedings for recognition of foreign arbitration awards in Israel only when that party sought to set aside the award in the place where it was issued.

The Court granted leave to appeal but upheld the first instance Court's decision. In its judgment, the Court agreed with the applicant that the language of Article 6 NYC allows imposing a bond on a party seeking to set aside the award at the seat of the arbitration. However, the Court also noted that a party objecting to the recognition of the foreign arbitration award in Israel is no different than seeking to set aside the award in the seat of the arbitration. Accordingly, Article 6 NYC does not preclude the first instance court from imposing a bond when a party objects to the recognition of the foreign arbitration award in Israel.

The Court added that it is also possible to compel a party to deposit a bond when it requests recognition or enforcement of a foreign arbitration award. This is because the New York Convention does not regulate domestic procedures of recognition and enforcement but subjects such procedures to the domestic legal systems of the States Parties. Based on this reasoning as well, the New York Convention does not prevent Israeli courts from imposing bonds on a party objecting to the recognition and enforcement of a foreign arbitration award, even if the party did not seek to set aside the award at the seat of the arbitration.

Case 2044: NYC V(1)(a); NYC V(1)(c); NYC V(2)(b)
United States of America: United States Court of Appeals for the Second Circuit
Case No. 20-4248
Commodities & Minerals Enter v. CVG Ferrominera Orinoco, C.A.
3 October 2022
Original in English
Available at: www.ca2.uscourts.gov/decisions/isysquery/157e166a-971b-49e5-8579-928ced4d0c82/1/doc/20-4248_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/157e166a-971b-49e5-8579-928ced4d0c82/1/hilite/

Abstract prepared by Charles T. Kotuby Jr, National correspondent

The Appellant CVG Ferrominera, a Venezuelan, state-owned company, entered into a contractual relationship with the Appellee CME, a British Virgin Islands company, for the shipment of iron ore. Once the parties' commercial relationship had deteriorated, the Appellee commenced an arbitration proceeding in New York City pursuant to the broad arbitration clause contained in the contract. The arbitration agreement provided, in relevant part, that the agreement was to be governed by and construed in accordance with U.S. maritime law. The panel returned an award for the Appellee.

In 2019, the Appellee brought an action to confirm the arbitral award in a U.S. district court (first instance court), and the Appellant resisted. The district court confirmed the award and entered a judgment against the Appellant, who later appealed to the U.S. Court of Appeals for the Second Circuit (the Court) on four different grounds.

First, the Appellant argued that because it was an instrumentality of a foreign State, the Foreign Sovereign Immunity Act (28 U.S.C. § 1608) requires the delivery of a summons to properly effect service and confirm the award. The Court held that the New York Convention and the Federal Arbitration Act "require only service of notice of the application to confirm a foreign arbitral award, and not also a summons."

The Appellant raised three subsequent challenges to the first instance court's confirmation of the award under Article V of the New York Convention. Namely, that: (1) the panel lacked jurisdiction and thus rendered an award which was invalid within the meaning of Article V(1)(a) of the NYC; (2) the panel exceeded the scope of its jurisdiction under the arbitration agreement, thus making the award unenforceable under Article V(1)(c) of the NYC; and (3) the confirmation of the award would violate U.S. public policy under Article V(2)(b) of the NYC. The Court rejected all of the Appellant's arguments after reiterating that, under the NYC, U.S. district courts must enforce an arbitral award unless a litigant is able to prove that at least one of the seven enumerated defences in the NYC is established.

As to the validity of the arbitral award under Article V(1)(a) of the NYC, the Appellant argued that the arbitration agreement with the Appellee was not valid because the requirements laid out by the Venezuelan law with respect to state-owned businesses had been violated. the Appellant also argued that the choice-of-law provision in the arbitration agreement was inapplicable because the entire contract was invalid in the first place. However, the Court pointed out that Article V(1)(a) of the NYC requires that the arbitration agreement be valid under the law to which the parties have subjected it. Since a choice-of-law clause is separable when the contract's validity is disputed, the validity of an arbitration agreement is governed by the chosen law unless the validity of that clause is specifically challenged. Since the Appellant had not specifically challenged the validity of the choice-of-law clause, the Court concluded that it was the U.S. maritime law, as opposed to the Venezuelan law, was the relevant law to determine its validity. Because the Appellant had not met its burden of showing that the arbitration agreement was invalid under Venezuelan law, the court rejected the Appellant's challenge. Nevertheless, the Court found that the district court had erred in giving deference to the arbitral panel as to the law governing the validity of the arbitration agreement.

As to the scope of the arbitration agreement, the Appellant invoked Article V(1)(c) of the NYC to claim that the panel exceeded its authority in calculating the damages. Specifically, the Appellant contended that the panel incorrectly allocated past payments made to the Appellee to contracts other than the one at issue. The Court rejected this argument by holding that this was a question of the correct calculation of damages, thus proper for the arbitrators to decide. Therefore, the Court concluded that it fell outside of Article V(1)(c).

Finally, the Appellant relied on Article V(2)(b) to argue that the confirmation of the award would violate U.S. public policy because the contract containing the arbitration agreement had been obtained through corruption. The Court held that the public policy defence must be construed very narrowly because it is limited to situations where the award itself or its enforcement clearly violates an identifiable public policy. Since the Appellant's claim was that the underlying contract was invalid for violating public policy, thus attacking the contract rather than the award itself, its claim had to be determined exclusively by the arbitrators. Accordingly, the Court concluded that the Appellant's challenge fell outside of Article V(2)(b)'s narrow public policy exception and affirmed the first instance court's judgment that had recognized the award in favour of the Appellee.

Case 2045: NYC V(1)(e)
United States of America: United States Court of Appeals for the First Circuit
Case No. 21-1558
University of Notre Dame (USA) in England v. TJAC Waterloo, LLC
13 September 2022
Original in English
Available at: http://media.ca1.uscourts.gov/pdf.opinions/21-1558P-01A.pdf

Abstract prepared by Charles T. Kotuby Jr, National correspondent

The University of Notre Dame (the Claimant) commenced arbitration proceedings against two English companies (the Respondents) for alleged defects in the building of a dormitory. The parties agreed to bifurcate the proceedings to first try the liability issue, and subsequently litigate the quantum of damages. Once the liability had been established in the first phase, the arbitrator moved on to consider the quantum and issued 5 different damages awards addressing different costs flowing from the single breach found. While the first damages award (No. 3) was issued in 2016, the arbitrator handed down the last award (No. 7) in 2020. The Claimant (as the creditor of the sums awarded) sought confirmation, at once, of the whole series of awards before a U.S. district court (the first instance court) once the last award had been issued.

The Respondents (as the debtors of the sums awarded) opposed the confirmation of Award No. 4, dated April 2017, on the grounds that it was time-barred by the three-year limitation provided by section 9 U.S.C. § 207. They argued that the award No. 4 became final when the arbitrator issued it in 2017 because the parties had entered into a "unique agreement" to break the damages phase down in a series of "discrete, final, and confirmable interim awards." The first instance court rejected this argument and confirmed Award No. 4. The Respondents appealed to the U.S. First Circuit (the Court).

The Court highlighted that an award is made within the meaning of section 9 U.S.C. § 207 only when it is final, and it is final only when it is binding on the parties. It follows that it is not sufficient for the statute of limitation to run that the award was issued by the arbitrator because, if it is not binding, the exception to recognition and enforcement provided by Article V(1)(e) of the New York Convention (NYC) would prevent the party in favour of which the award was issued from "securing judicial confirmation of the issued award." At this point, the Court held that an award is final and binding within the meaning of both the NYC and the U.S. Federal Arbitration Act only when there is evidence that the arbitrators intended to resolve all the claims submitted in the demand for arbitration by virtue of the issued award. In this case, a plain reading of the damages awards made it clear that Award No. 4 was not intended

to resolve every claim submitted to arbitration. However, the Court also acknowledged that the parties' agreement to fracture proceedings so as to produce separate, immediately confirmable interim awards constitutes an exception to the general finality rule. Notwithstanding, the Court did not find the exception met on the facts of the case because, absent express, mutual consent, the mere fact that damages were adjudicated in a "piecemeal fashion" is not evidence of such an agreement. Accordingly, the Court applied the general rule of finality and concluded that all the interim awards became final and binding only upon issuance of the last award, thus making the Claimant's motion to confirm the awards comport with the three-year statute of limitations.