United Nations A/CN.9/SER.C/ABSTRACTS/201

General Assembly

Distr.: General
12 February 2020

Original: English/Spanish

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.20-01255 (E) 180220 190220

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: www.uncitral.un.org/uncitral/en/case_law.html?lf=899&lng=en.

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, 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 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York Convention" (NYC)

Case 1834: NYC I(1)
United States of America: U.S. Court of Appeals, Ninth Circuit
Case No. 17-35703
Castro v. Tri Marine Fish Co.
27 February 2019
Original in English
Available on the Internet: http://cdn.ca9.uscourts.gov/

Abstract prepared by S. I. Strong, National Correspondent

The plaintiff-appellant, a citizen of the Philippines, signed an employment agreement containing an arbitration agreement indicating that any disputes relating to the employment were to be decided by arbitration seated in American Samoa. A dispute did arise and was settled amicably. The settlement included a waiver of all future liability of, and claims against, the defendants-appellees. Although no arbitral case had been filed, defendant filed a motion with the National Conciliation and Mediation Board to formalize the settlement and received an order issued by an accredited maritime voluntary arbitrator indicating that the settlement was "not contrary to law, morals, good customs and public policy" and dismissing the arbitral "case" with prejudice.

Plaintiff later found his injuries were more extensive than was originally believed and brought suit in Washington state court. Defendant moved the case to the federal court and sought to confirm the order of the voluntary arbitrator as a foreign arbitral award. The district court confirmed the order and plaintiff appealed. The Court of Appeals reversed the decision of the district court in part and remanded the matter to be heard accordingly.

In reaching its decision, the Court of Appeals noted that article I(1) of the New York Convention refers to "recognition and enforcement of arbitral awards", although the term "arbitral award" is not defined in the Convention or in the Federal Arbitration Act implementing the Convention into domestic law. To determine the meaning of the term, the court relied on common meaning and common sense, supplemented by the Restatement (Third) United States Law of International Commercial Arbitration, which includes definitions of key terms such as "arbitral awards", "arbitral tribunal" and "arbitration".

When evaluating the claim at issue, the Court of Appeals looked past the form of the document in question, focusing instead on matters of substance. In particular, the court noted that (1) there was no dispute to arbitrate pending at the time the parties met with the voluntary arbitrator; (2) the purported "arbitration" did not adhere to the procedures outlined in the arbitration agreement or required as a matter of Philippine law; and (3) the waiver signed by the plaintiff did not include a waiver of the parties' various commitments to arbitrate in American Samoa. Thus, the Court of Appeals concluded that "the parties' free-floating settlement agreement and order did not transform into an arbitral award simply because the parties convened with an arbitrator". The court also noted that while the defendant was allowed to seek to enforce the document as a matter of contract, it could not do so under the New York Convention.

In its opinion, the Court of Appeals was careful to distinguish this particular fact pattern from cases where settlement is reached during an arbitration and reflected in a consent award. According to the court, the timing of the settlement was critical to whether the resulting document fell within the terms of the New York Convention.

Case 1835: NYC V(1)(a); V(1)(c); V(2)(b)
United States of America: U.S. District Court, District of Columbia
Case No. 17-cv-00584 (APM)
Balkan Energy Ltd. v. Republic of Ghana
22 March 2018
Original in English
Available on the Internet: https://www.italaw.com/

Abstract prepared by S. I. Strong, National Correspondent

Petitioners (a Texas-based company and its United Kingdom of Great Britain and Northern Ireland- and Ghana-based subsidiaries) contracted with the respondent Republic of Ghana to refurbish, equip, test and operate a power barge in Ghana. Ghana was to provide electricity and other services. The contract included an agreement to arbitrate any disputes before the Permanent Court of Arbitration (PCA) in the Hague. The contract was governed by the law of Ghana.

After a dispute arose under the contract, petitioners initiated arbitration at the PCA. Respondent sought to block the arbitration through litigation in the Ghanaian courts, but the arbitral tribunal nevertheless rendered an award in favour of petitioners, who sought to, and subsequently did, confirm the award in the U.S. District Court for the District of Columbia. In its decision, the District Court dismissed Ghana's claim that subject-matter jurisdiction did not exist, noting that the United States Foreign Sovereign Immunities Act (FSIA) permits suits against foreign sovereigns to go forward under 28 U.S.C. §1605(a)(6), known as the arbitration exception. According to that provision, actions to confirm arbitral awards under the New York Convention can be heard despite claims of foreign sovereign immunity.

Ghana asserted several claims for non-enforcement under article V of the New York Convention. First, respondent claimed that the award could not be enforced pursuant to article V(1)(a) because the arbitration was invalid under the laws of Ghana. The court rejected that argument, distinguishing between the law governing the contract (Ghanaian law) and the law governing the interpretation of the arbitration agreement (Dutch law, which was the law of the seat).

Second, respondent argued that the award could not be enforced pursuant to article V(1)(c) because there was no clear evidence that Ghana had agreed to submit the question of the validity of the arbitration clause to the arbitrators. The court denied that argument based on the fact that, under the arbitration agreement, the UNCITRAL Arbitration Rules applied. Because the UNCITRAL Arbitration Rules indicate that the arbitral tribunal has the power to decide on the existence or validity of the arbitration clause as well as the existence or validity of the contract itself, the procedure adopted by the arbitral tribunal was correct.

Finally, respondent sought to resist enforcement of the award under article V(2)(b) arguing that, as the Ghanaian Supreme Court had held that the arbitration clause violated the Ghanaian Constitution, enforcement of the award would therefore violate United States policy to afford international comity to foreign courts. However, the District Court disagreed with respondent's reading of the opinion of the Ghanaian Supreme Court in question and noted that the public policy exception in the New York Convention was to be construed narrowly. As a result, the court rejected this argument as well.

Case 1836: NYC II
Italy: Corte di Cassazione, Sezione VI Civile (Supreme Court)
Case No. 21655/17
Kenobi International Ltd v. Comaco S.p.A.
19 September 2017
Original in Italian
Available at: www.italgiure.giustizia.it/

Kenobi International, an English company, concluded as a shipowner a charter-party for the carriage of bananas that included an arbitral clause. Comaco S.p.A, the consignee of the bananas, was not a party to the charter-party. A dispute arose between the charterer and the shipowner and an arbitral award was rendered in favour of the shipowner.

The shipowner sought recognition and enforcement of the award in Italy against the consignee on the basis of the bill of lading covering the bananas, which contained a reference to the charter-party. The bill of lading had been signed by the captain of the ship, but not by the shipper or by the consignee of the goods.

The Supreme Court, citing own precedents,[1] stated that the insertion in the bill of lading of a reference to the arbitral clause contained in the charter-party was insufficient to meet the requirements of the Convention with respect to expressing consent to be bound by the arbitral clause and to the written form of the arbitral clause.

Case 1837: NYC II
Italy: Corte di Cassazione, Sezioni Unite (Joint Chambers of the Supreme Court)
Case No. 23893/15
Government and Ministries of the Republic of Iraq v. Armamenti e Aerospazio SpA et al
24 November 2015
Original in Italian
Available at: www.italgiure.giustizia.it/

On 12 November 1983, an Italian company and the Ministry of Defense of Iraq (hereinafter “Iraq”) concluded a contract for the sale of military helicopters. The contract was governed by French law and contained a clause providing that disputes arising out of the contract should be resolved by arbitration.

On 11 November 1986, Iraq failed to pay an instalment. In August 1990, the Security Council of the United Nations and the European Union separately declared an embargo on trade with Iraq due to Iraq’s invasion of Kuwait.

The Italian company commenced an action against Iraq in an Italian court for payment of the outstanding balance. The court held that it lacked jurisdiction because of the arbitral clause. That decision was appealed.

The court of appeal reversed the decision stating that Italian courts had jurisdiction over the dispute on the grounds that the embargo rendered the arbitral clause inoperative.

The court of appeal decision was in turn appealed to the Supreme Court, which confirmed that the subject matter of the contract had become not capable of settlement by arbitration due to the embargo and that the arbitral clause was null and void.

[1] Corte di Cassazione, Sez. U, No. 1328 of 2000; Sez. I, No. 3362 of 1991.

Case 1838: NYC III; IV
Italy: Corte di Cassazione, Sezione I Civile (Supreme Court)
Case No. 24856/08
Globtrade Italiana srl v. East Point Trading Ltd
8 October 2008
Original in Italian
Available at: http://newyorkconvention1958.org/

An Italian company and a Cypriot company concluded a contract designating the Grain and Feed Trade Association (GAFTA) as the competent body to settle any dispute arising out of the contract. A dispute arose and a GAFTA arbitral tribunal decided it in favour of the Cypriot company. Enforcement of the award was sought in Italy and granted by a court of appeal on the basis of an uncertified copy of the award. The Italian company appealed that decision to the Supreme Court.

The Supreme Court noted that the New York Convention required the submission of the duly authenticated original award or a certified copy thereof in order to obtain the recognition and enforcement of a foreign arbitral award. It also noted that the formalities for the authentication of the award were to be determined according to the law of the place where enforcement was sought.

Since the copy of the award had not been certified, the Supreme Court concluded that the Court of Appeal erred in granting enforcement of the award.

Case 1839: NYC II; V
Italy: Corte di Cassazione Sezione I Civile (Supreme Court)
Case No. 13916/07
Rudston Products Limited v. Conceria F.lli Buongiorno
14 June 2007
Original in Italian

Published in: Yearbook Commercial Arbitration 2009 – volume XXXIV, pp. 639-643; Giustizia Civile, 2008, p. 1767.

An English company and an Italian company concluded a contract for the sale of sheep hides, which contained an arbitral clause. The English company sent the Italian company its standard contract form, which the Italian company signed and returned by fax. A dispute arose between parties and an arbitral tribunal rendered an award in favour of the English company. The English company sought enforcement of the award in Italy.

The Italian company opposed enforcement, arguing that the arbitral clause was invalid as the contract had been concluded by fax and therefore did not include the original signature of the parties. The Court of Appeal accepted that argument and refused enforcing the arbitral award. The decision was appealed to the Supreme Court.

The Supreme Court noted that the New York Convention recognized the valid conclusion of an arbitral clause through “an exchange of letters or telegrams” (art. II.2) and that it was undisputed that the contract containing the arbitral clause had been concluded by the parties by fax. It argued that, as only written documents can be transmitted by fax, transmission by fax was a form of written correspondence and as such could be used to conclude a valid arbitral clause under the Convention. In addition, the Supreme Court stated that the lack of original signature in the contract did not affect the validity of the arbitral clause as the Convention did not require the original signature for the validity of the arbitral clause.

Case 1840: NYC VI
Cyprus: Limassol District Court
Case No. 11/2017
Dr. Walter Höft v. Coraline Limited
15 December 2017
Original in Greek
Available at: http://www.cylaw.org/

This case deals with the procedure to be followed when a party seeks an adjournment of proceedings for the recognition and enforcement of a foreign arbitral award. The Limassol District Court ruled on whether the matter of an adjournment should be considered within the main petition, or on a separate interim application.

Dr. Walter Höft, an individual residing in Hamburg, Germany (the applicant), and Coraline Limited, a company registered in Cyprus (the respondent), entered into a loan agreement which included an arbitration clause. Following a dispute between the parties, the applicant filed a request for arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"). The arbitral tribunal issued an award against the respondent for the sum of €9,200,000 (excluding interest), against which the respondent filed an appeal at the Svea Court of Appeal, requesting that it be set aside on the ground of, inter alia, procedural irregularity.

The applicant subsequently applied to the Limassol District Court for an order of recognition and enforcement of the arbitral award against the respondent, under the New York Convention. The present judgment concerned an application by the respondent, under article VI NYC, for an interim order to adjourn the proceedings for recognition and enforcement in the Limassol District Court, until such time as the Svea Court of Appeal had issued a judgment.

The Limassol District Court questioned whether the decision to adjourn the proceedings should be considered within the main petition for recognition and enforcement of the arbitral award, or whether it could form the subject matter of an interim application, as the respondent had done in this case. In deliberating this, the Court referred to Soleh Boneh International Ltd v. Government of the Republic of Uganda (1993) 2 Lloyd's Rep 208 to illustrate the options available to the court when invited to determine whether to grant an adjournment: "If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security" [212].

The Court also considered the UNCITRAL Secretariat Guide on the New York Convention (the "Guide"), on article VI.

The Court then concluded that the courts have inherent jurisdiction to consider the matter of adjournment of an application for enforcement, either at the request of a party or at the court's own initiative, within the main proceedings. However, the Court clarified that this is contingent on the party seeking the adjournment having submitted evidence that would justify the stay.

The Court further noted that where an objection to the main petition has not been filed by the party seeking the adjournment, the court shall not consider an interim application for adjournment, nor make any order for adjournment, because this would contravene the spirit of the NYC. In an interim application, the options available to the court are limited: contrary to Soleh Boneh, it cannot order enforcement, but can only refuse the application and give instructions for the party to file an objection. Therefore, since the respondent had not filed an objection to the main petition, the Court dismissed the respondent's interim application for adjournment of the recognition and enforcement proceedings.

Case 1841: NYC V(1)(c); V(2)(b)
Cyprus: Limassol District Court
Case No. 2/2018
Great Station Properties SA and another v. UMS Holding Limited and others
18 July 2018
Original in Greek
Available at: http://www.cylaw.org/

This case mainly considered the notion of "public policy" as a ground for refusing recognition and enforcement of an award under article V(2)(b) NYC.

Great Station Properties SA, a company registered in Panama, and Inter Growth Investments Limited, a company registered in Cyprus (the applicants), applied to the Limassol District Court for an order of recognition and enforcement of an arbitral award under the New York Convention. The award was issued by an arbitral tribunal under the rules of the London Court of International Arbitration against UMS Holding Limited and three other companies registered in Cyprus (the respondents). The dispute related to breaches of a Joint Venture Agreement and an Option Agreement.

The respondents filed an objection against the recognition and enforcement of the arbitral award. They firstly argued that the arbitral award was made in favour of a shareholder for losses incurred by a company, and thus contravened Cypriot public policy, which espouses a rule against the recovery of reflective loss. Therefore, pursuant to article V(2)(b) NYC, the Limassol District Court could refuse the application. The respondents additionally argued that, because the arbitral tribunal had referred to unjust enrichment in its award, which was an issue not contemplated by the parties in the terms of the submission to arbitration, the application could also be refused pursuant to article V(1)(c) of the New York Convention.

The Limassol District Court first considered the notion of "public policy" under article V(2)(b) NYC. Citing Attorney General of the Republic of Kenya v. Bank fur Arbeit und Wirtschaft AG ((1999) 1(a) AAD 58), the Court defined public policy as the "fundamental values that a society, at a given point in time, recognizes as governing transactions and the various manifestations of the life of its members, which are infused in its legal system". The Court noted that, in examining whether the arbitral award contravened public policy, it would not delve into the substance of the dispute (Beogradaska Banka D.D (1995) 1 AAD 737), nor "act as an appellate instance".

The Court cited various sources which supported a narrow application of the public policy ground for refusal. Quoting academic opinions, the Court noted that the public policy defence should be restricted to cases where recognition would be "at variance to an unacceptable degree with the [national] legal order", by "infring[ing] a fundamental principle" and that public policy is not infringed if the dispute would have been differently decided under Cypriot law.

In conducting an analysis of the case, the Court firstly concluded that the arbitral tribunal had not considered reflective loss. The tribunal had granted the award against the respondents on the basis of a breach of the contractual obligations arising under the Joint Venture and Option Agreements. Similarly, the Court also dismissed the applicability of article V(1)(c) NYC to the facts, since it found that the arbitral award had not relied on the principles of unjust enrichment, but on breach of contract, and that the arbitral tribunal's comments on unjust enrichment were made obiter.

The Court further noted that it would have permitted the recognition and enforcement of the award even if the tribunal had awarded damages on the principles of reflective loss. The respondents had failed to establish that the principle of reflective loss constituted a fundamental principle of Cypriot public policy, or that the recognition of an award addressing that matter amounted to a blatant infringement. Therefore, the respondents had failed to prove any grounds under article V of the New York Convention for refusing the application, and thus an order for recognition and enforcement of the arbitral award was granted.

Case 1842: NYC V; MAL 34
Paraguay: Supreme Court of Justice of Paraguay, Constitutional Chamber
Case No. 156
Yvu Poty S.A. v. PABENSA S.A. and Cárnicas Villacuenca S.A.
28 March 2019
Original in Spanish
Available at: https://www.alarb.org/

Summary prepared by Raúl Pereira and Veronica Dunlop

In the case of Yvu Poty S.A. v. PABENSA S.A. and Cárnicas Villacuenca S.A., the Court of Appeal of Asunción decided to set aside the arbitral award on the basis that it was defective because the arbitral tribunal had not made a ruling in respect of PABENSA S.A., the secondary respondent. The Court of Appeal also pointed out that the arbitral tribunal had failed to consider and decide on the request for compensation and payment of rent for the property concerned and the amount of compensation. Yvu Poty brought an action before the Supreme Court of Justice of Paraguay to challenge the constitutionality of the decision of the Court of Appeal, arguing that that decision was contrary to the provisions of the Arbitration Act (Act No. 1879/2002) because it deviated from the grounds expressly set out in article 40 of that Act.

In its reasoning, the Supreme Court first pointed out that, although it does not act as a body of third instance in order to review matters of substance and form considered by lower courts, it "does have the authority to rule on cases in which a court's decision clearly violates constitutional guarantees, principles or rights".

The Supreme Court went on to explain that the crux of the matter in the case in question was whether the grounds given by the Court of Appeal for setting aside the arbitral award fell within the scope of article 40 of the Arbitration Act, an article that was based on article 34 of the UNCITRAL Model Law and article V of the New York Convention. The Supreme Court highlighted the strict rules governing the setting aside of arbitral awards, article 40 of the Arbitration Act establishing a short, specific and exhaustive list of grounds for such setting aside, and noted that such awards were final and should be set aside only in the event of serious procedural errors, such as lack of consent or jurisdiction, or if the award was manifestly arbitrary or unfounded.

Accordingly, the Supreme Court found that the Court of Appeal had justified the setting aside of the award on grounds other than those set forth in article 40 of the Arbitration Act and that the possible misinterpretation of the law by the arbitral tribunal was not a sufficient or valid ground for setting aside an arbitral award. The Supreme Court noted that appellate tribunals do not have the authority to question the legal opinion of arbitrators and may only consider whether the award has been made on one of the grounds set out in article 40 of the Arbitration Act. Thus, in the case in question, the Court of Appeal had clearly exceeded its authority.

The Supreme Court therefore ruled that the decision of the Court of Appeal was unconstitutional owing to its arbitrary nature.

Case 1843: NYC V(2)(b)
Ukraine: Supreme Court
Case No. 796/3/2018
POSCO Daewoo Corporation and Hyosung Corporation v. State enterprise Ukrenergo National Power Company
23 July 2018
Original in Ukrainian
Available at: http://reyestr.court.gov.ua/

Abstract prepared by Gennady Tsirat, National Correspondent

On 31 January 2012, a consortium made up of the company Daewoo International Corporation (the successor of which is the company POSCO Daewoo Corporation), the company Hyosung Corporation and the limited-liability company SPMK-32 Krymelektrovodmontazh concluded a contract with the State enterprise Ukrenergo

National Power Company whereby the consortium undertook to carry out the modernization of the Simferopol 330 kW substation on the Crimean Peninsula – including development of the project, manufacture, testing, delivery, assembly, installation and commissioning of specific power units – while the Ukrenergo National Power Company undertook to receive the equipment and services and to pay for these within the period established in the contract.

From August 2013 to February 2014, the consortium carried out eight deliveries consisting of equipment specified in the contract, the cost of which amounted to 73 per cent of the total contractual cost of the equipment. A further part of the equipment was manufactured by the consortium's subcontractors but was not delivered and no payment was made. On 12 November 2015, the parties, with a view to settling the disagreements that had arisen between them, signed an agreement to amend the contract, establishing the delivery terms for the remainder of the equipment and amending the arbitration clause by changing the arbitral institution specified.

Ultimately, the Ukrenergo National Power Company did not fulfil its contractual obligations properly: it failed to pay the sums of $1,795,731 for the supply of equipment and $156,867 for the equipment that was manufactured but not delivered. Accordingly, POSCO Daewoo Corporation and Hyosung Corporation brought a claim against the Ukrenergo National Power Company before an arbitral tribunal constituted under the rules of the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber, requesting that violation of the contract's terms and conditions be established and seeking damages.

Under the final award rendered on 19 September 2017, the Ukrenergo National Power Company was ordered to pay the claimants $1,795,731 for the equipment supplied, $156,867 for the equipment that was manufactured but not delivered, €57,985 in compensation for the arbitration costs and €48,100 in compensation for the legal expenses incurred by the claimants.

POSCO Daewoo Corporation and Hyosung Corporation submitted to the Kyiv Court of Appeal (as the court of first instance) an application for recognition and enforcement of the arbitral award, which was granted by the Court in a ruling issued on 17 April 2018.

The Ukrenergo National Power Company lodged an appeal with the Supreme Court, requesting that the aforesaid ruling be overturned and that a new judgment refusing recognition and enforcement of the arbitral award be issued.

The appeal was made on the grounds that most of the equipment had been delivered to the Autonomous Republic of Crimea, which had subsequently been annexed by the Russian Federation, as a result of which the Ukrenergo National Power Company as of March 2014 effectively no longer exercised control over the operations of its business units. It was argued that paying for the equipment delivered in compliance with the contract was tantamount to the financing of terrorism and would run contrary to the public policy of Ukraine. It was further argued that the Ukrenergo National Power Company was the only State enterprise that provided dispatch control for the integrated power system and that transmitted electricity via both trunk and inter-State power transmission lines. Writing funds off the accounts of such an enterprise constituted a threat to national security and the country's economy.

The Supreme Court found that the ruling of 17 April 2018 of the Kyiv Court of Appeal, whereby enforcement of the arbitral award in Ukraine had been granted, was lawful and justified, and upheld it in its entirety. The Supreme Court rejected the appeal on the following grounds:

(a) Upon examination of the case it had been unable to identify any of the grounds for refusing recognition and enforcement of an international commercial arbitral award as set forth in article V of the New York Convention, article 478 of the Code of Civil Procedure of Ukraine and article 36 of the Act on International Commercial Arbitration of Ukraine;

(b) The arguments made in the appeal that, as of March 2014, the Ukrenergo National Power Company effectively no longer exercised control over the operations of its business units, and that it was not using any of the equipment delivered in compliance with the contract, did not constitute a valid reason for refusing recognition and enforcement of an international commercial arbitral award;

(c) The assertion by the Ukrenergo National Power Company that the recovery of money owed for equipment was tantamount to the financing of terrorism could not be regarded as justified, since no evidence had been provided that the activities of POSCO Daewoo Corporation and Hyosung Corporation had anything to do with terrorist financing. The fact that the equipment was located in the occupied territory of the Autonomous Republic of Crimea could not be invoked as grounds for non-compliance with contractual obligations;

(d) The argument made in the appeal that writing funds off the accounts of the Ukrenergo National Power Company constituted a threat to the national security and economy of Ukraine was not supported by proper and admissible evidence;

(e) The reasoning of the appeal that recognition and enforcement of the arbitral award would be contrary to the State's public policy did not merit serious consideration, since "public policy" was to be understood to mean a State's legal order, that is, certain principles constituting the bedrock of its legal system (and relating, inter alia, to its independence, integrity, autonomy and inviolability and to basic constitutional rights, freedoms and guarantees). The Supreme Court pointed out that the public policy of any State included fundamental principles and tenets of justice and ethics that a State would wish to uphold even in situations where the State itself was not directly concerned; rules that guaranteed the State's fundamental political, social and economic interests (rules of public policy); and the State's obligation to honour its commitments vis-à-vis other States and international organizations. These were the immutable principles that encapsulated the stability of the international system, including State sovereignty, non-interference in the internal affairs of States and the non-violation of territorial integrity. In its appeal, the Ukrenergo National Power Company had not provided any well-founded arguments or supporting evidence for regarding the recognition and enforcement of the arbitral award in Ukraine as contrary to Ukrainian public policy thus understood.

Case 1844: NYC I; III; IV; MAL 35 (2)
Ukraine: Supreme Court
Case No. 264/1297/17
Joint-stock company Lebedinsky Mining and Processing Plant v. public joint-stock company Ilyich Iron and Steel Works of Mariupol
24 October 2018
Original in Ukrainian
Available at: http://reyestr.court.gov.ua/

Abstract prepared by Gennady Tsirat, National Correspondent

On 13 October 2011, the joint-stock company Lebedinsky Mining and Processing Plant (Russian Federation) and the public joint-stock company Ilyich Iron and Steel Works of Mariupol concluded supply contract No. 111823/4022, whereby the Lebedinsky Mining and Processing Plant undertook to supply – and the Ilyich Iron and Steel Works of Mariupol to receive and pay for – iron ore pellets, the quantity, price and terms of delivery being specified in the contract and in monthly addenda thereto.

Under clause 11.1 of the contract, the parties agreed that any dispute, controversy or claim arising out of or relating to the contract or the execution, breach, termination or invalidity thereof was to be settled by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in accordance with its Rules. The Court's decision would be binding on both parties.

In an award dated 17 March 2014, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ordered the Ilyich Iron and Steel Works of Mariupol to pay the Lebedinsky Mining and Processing Plant a penalty of $36,765.49 dollars and legal costs amounting to $618.87.

The respondent did not voluntarily comply with the arbitral award. Consequently, the Lebedinsky Mining and Processing Plant filed a petition with a Ukrainian court, seeking recognition and enforcement of the award made on 17 March 2014 by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. Pursuant to a ruling issued on 12 September 2016 by the Ilyich District Court in Mariupol, Donetsk Province, the petition was returned to the Lebedinsky Mining and Processing Plant on the ground that no enforcement order had been submitted with the petition. When applying again to the same court, the Lebedinsky Mining and Processing Plant failed to rectify that omission. The court therefore decided to reject the petition and to return it to the applicant. The Ilyich District Court issued its ruling of 6 July 2017 on the grounds that, pursuant to article 8 of the Agreement on the Procedure for Settling Disputes Relating to Commercial Activities of 1992 (the Kyiv Agreement of 1992), an award was enforceable upon application by the interested party, which, among other things, was required to submit an enforcement order with the petition.

In a ruling of 11 October 2017, the Donetsk Province Court of Appeal upheld the ruling of the court of first instance in its entirety.

The Lebedinsky Mining and Processing Plant lodged an appeal with the High Specialized Court of Ukraine for Civil and Criminal Cases, challenging the rulings of the court of first instance and of the appellate court.

As a result of the entry into force of a revised version of the Code of Civil Procedure of Ukraine, the case was referred to the Civil Cassation Court of the Supreme Court.

In a decision of 24 October 2018, the Supreme Court found that the lower courts had not been justified in rejecting the petition for recognition of the award made on 17 March 2014 by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation and that their rulings must therefore be set aside, and the case reconsidered.

The Supreme Court pointed out that international commercial arbitral awards made outside Ukraine were to be recognized and enforced in Ukraine, regardless of the country in which they had been made, if their recognition and enforcement were required under an international treaty or on the basis of reciprocity.

The international legal framework for the recognition and enforcement of foreign arbitral awards in Ukraine consisted of the New York Convention, the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993 and the Kyiv Agreement of 1992. The provisions of the New York Convention of 1958 were of special relevance because the Convention’s scope of application referred precisely to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards were sought (article I). The New York Convention was in force both in Ukraine (the State where the arbitral award was to be recognized and enforced) and in the Russian Federation (the State in whose territory the seat of arbitration at which the award had been made was located).

A State that had undertaken to be bound by the New York Convention was required by the Convention to recognize foreign arbitral awards as binding and to enforce them. Substantially more onerous conditions than were imposed on the recognition and enforcement of domestic arbitral awards must not be imposed on the recognition and enforcement of foreign arbitral awards (article III).

The New York Convention established exhaustive lists – lists that were the same for all Contracting States and that could not be interpreted freely – firstly of the documents that the party applying for recognition and enforcement of an arbitral

award must provide to the competent authority and secondly of the grounds that could be invoked by the competent court for refusing the recognition and enforcement of an arbitral award.

Article 35 of the Act on International Commercial Arbitration enumerated, in a list analogous to the one in the New York Convention (article IV), the documents that must be submitted to the competent court by the party applying for recognition and enforcement of an arbitral award, namely: (1) the duly authenticated original award or a duly certified copy thereof; (2) the original arbitration agreement or a duly certified copy thereof. If the arbitral award and/or the arbitration agreement were in a foreign language, the applicant was required to provide duly certified translations of those documents into Ukrainian.

The imposition of any additional requirements with respect to the documents specified in the New York Convention, or the requesting of additional documents, constituted an outright violation of the Convention. Moreover, the provisions governing the recognition and enforcement of foreign arbitral awards did not require an arbitral award made in a given State to be enforceable (i.e. to have the effect of an enforcement order) in that State as a prerequisite for the award to be recognized and enforced in the territory of other States.

Case 1845: NYC III
Canada: Superior Court of Quebec
Case No. 500-17-093234-162
Société générale de Banque au Liban SAL c. Itani
11 December 2019
Original in French
Published in French: 2019 QCCS 5266
Available at: http://canlii.ca/t/j3x1n

This case primarily deals with time limits on the recognition and enforcement of foreign arbitral awards in light of article III in the New York Convention (as referred to in article 652 of the Code of Civil Procedure of Quebec).[2]

The Court received an application to recognize and enforce an arbitral award made in Lebanon, which resolved a contractual dispute over a bank loan made to the respondent. In its application, the claimant relied on article 652 of the Code of Civil Procedure of Quebec which provides that: “An arbitration award made outside Québec […] may be recognized and declared to have the same force and effect as a judgment of the court if the subject matter of the dispute is one which could be submitted to arbitration in Québec and if recognition and enforcement of the award are not contrary to public order.” In interpreting this provision, article 652 explains that consideration may be given to the New York Convention.

The respondent disputed the application of article 652 on the basis that the claimant’s application was time-barred as it was subject to a now-expired three-year prescription period. In particular, the respondent argued that article 2924 of Civil Code of Quebec (the “CCQ”)[3] was not applicable because it specified that: “A right resulting from a judgment is prescribed by 10 years if it is not exercised.” Thereby excluding decisions other than judgments such as arbitral awards.

The Court noted that article 652 stipulates no prescription period but prompts consideration of the New York Convention, namely its article III. In this respect, reference was made to the opinion of the Supreme Court of Canada in Yugraneft Corp. v. Rexx Management Corp.,[4] which stated that the phrase “in accordance with the rules of procedure of the territory where the award is relied upon” in article III should

[2] *Code of Civil Procedure*, *CQLR c C-25.01*, available at http://legisquebec.gouv.qc.ca/en/showdoc/cs/c-25.01.
[3] *Civil Code of Quebec, CQLR c CCQ-1991*, available at http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991.
[4] Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19 (CanLII), [2010] 1 SCR 649.

be understood as indicating application of domestic law on such matters. The Supreme Court held that article III NYC was intended to allow Contracting States to impose time limits on the recognition and enforcement of foreign arbitral awards if they so wished.

Turning to the question whether the claimant's application was time-barred under the applicable domestic law in Québec, the Court reasoned that a coherent reading of the CCQ justified extending the meaning of "judgment" to include arbitral awards, thereby applying article 2924 CCQ's ten-year prescription period to arbitral awards. Moreover, the Court considered it reasonable to: (i) understand that arbitral awards could be executed in the same time frame as could judgments given the extent to which a notice to arbitrate can interrupt prescription; and (ii) believe that the legislature would have wanted parties to benefit from the same rules for judgments and arbitral awards.

In applying the ten-year prescription period under article 2924 CCQ, the Court concluded that the claimant's application filed in April 2016 was not time-barred because the arbitral award was issued in August 2006.

Case 1846: NYC V(1)(b); MAL 35, 36
Azerbaijan: Constitutional Court of the Republic of Azerbaijan
Case No. M-239
POSCO Daewoo v. Grand Motors
15 April 2019
Published in Azerbaijani: "Respublika"
Available at: http://constcourt.gov.az/

Abstract prepared by Azar Aliyev and Turkhan Ismayilzada

The case deals with the review by the Constitutional Court of Azerbaijan of a decision of the Supreme Court of Azerbaijan to refuse the recognition and enforcement of an arbitral award on the ground of improper notice of arbitral proceedings to the party against whom the award had been rendered.

POSCO Daewoo (the "seller"), a company with place of business in the Republic of Korea, and Grand Motors (the "buyer"), a company with place of business in Azerbaijan, entered into a contract for the sale of construction machinery worth 4,545,456 USD. The contract stated that the payment was to be made in several instalments before and after the delivery of the machinery. A clause in the contract provided that all disputes arising out of the contract were to be resolved by arbitration under the rules of the Korean Commercial Arbitration Board. The buyer did not pay the full price and the seller commenced arbitral proceedings for breach of contract, seeking recovery of outstanding sums and compensation for losses incurred. The arbitral tribunal issued an award in favour of the seller, which sought enforcement of the award in Azerbaijan before the Supreme Court.

In response, the buyer asked the Supreme Court to refuse enforcement of the award on the ground that it had not been duly notified of the arbitral proceedings. To support its case, the buyer alleged that: (1) the seller did not prove that the person signing postal slips for the registered letter containing the notice of the proceedings was in fact an employee of the buyer; and (2) the postal slips did not contain any information as to the content of the letter. The Supreme Court refused the recognition and enforcement of the arbitral award[5] based on article 466.0.1 of the Civil Procedure Code of Azerbaijan (CPC),[6] which lists the requirements for the enforcement of foreign court decisions. According to that provision, the party requesting the enforcement of a foreign court decision must provide evidence of proper notification.

[5] Decision of the Supreme Court of the Republic of Azerbaijan No. 10-1(102)-08/2018 of 16 August 2018 (unpublished).

[6] Law of the Republic of Azerbaijan "On approval and entry into force of the Civil Procedural Code", No. 780-IQ of 28 December 1999.

The seller appealed the decision of the Supreme Court before the Constitutional Court, challenging its constitutionality and legality in accordance with article 130(V) of the Constitution of Azerbaijan. In support of its claim, the seller referred to article V(1)(b) New York Convention (NYC) and articles 35 and 36 of the law on international arbitration (the "Arbitration Law").[7]

The Constitutional Court indicated that the grounds for refusing enforcement of a foreign arbitral award were provided in the NYC, in the Arbitration Law and in the CPC, and that the provisions of the NYC were directly applicable and prevailed over those of the Arbitration Law and CPC. The Constitutional Court noted that the Supreme Court had erred in relying on article 466.0.1 CPC and that article 476.0.1.2 CPC was the relevant provision with respect to notification requirements for arbitral proceedings. The Constitutional Court also noted that article 476.0.1.2 CPC, which repeats article V(1)(b) NYC, shifted the burden of proof from the party seeking enforcement to the party opposing enforcement.

In conclusion, the Constitutional Court referred the case back to the Supreme Court for reconsideration in light of the Constitutional Court's decision.

[7] Law of the Republic of Azerbaijan "On International Commercial Arbitration", No. 757-IQ of 18 November 1999. This law is an enactment of the UNCITRAL Model Law on International Commercial Arbitration (1985) and follows the numbering of the articles of the Model Law.