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(CLOUT)

Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to conventions and model laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.3). CLOUT documents are available on the UNCITRAL website 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 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York Convention" (NYC)

Case 1866: NYC II (1), (2)
Czechia: Nejvyšší soud České republiky
Case No. 23 Cdo 3439/2018-302; ECLI: CZ: NS: 2019: 23.CDO.3439.2018.2
ZEVETA Bojkovice v. FAGOR ARRASATE S. Coop.
16 May 2019
Original in Czech
Available at: http://www.nsoud.cz (Czech language text)

Abstract prepared by Petr Bříza and Markéta Polendová

The issue before the Nejvyšší soud České republiky (the Supreme Court of the Czech Republic) was whether an arbitration clause contained in an exchange of emails without a qualified electronic signature is valid pursuant to the New York Convention (NYC).

The dispute arose out of the contract for work ("smlouva o dílo" in Czech) between ZEVETA Bojkovice, a Czech company, (the "claimant") and FAGOR ARRASATE S. COOP, a Spanish company (the "respondent"). The exact subject matter of the contract was unclear, but it was undisputed that the parties had exchanged the draft contract by email. The contract contained an arbitration clause which read as follows: "All disputes, which may arise and cannot be settled amicably, will be submitted to a court of arbitration and settled according to European principles laid down for this field." The claimant did not commence arbitration but instead brought a claim before the Czech courts. Both the first instance court and the appellate court dismissed the action in favour of arbitration, holding that the clause was valid under the Czech law on arbitration [1] and the European Convention on International Commercial Arbitration, 1961 (the "Geneva Convention").[2] The claimant filed an extraordinary appeal ("dovolání" in Czech) relying on domestic case-law mandating the use of a qualified electronic signature to meet written form requirements.

On extraordinary appeal, the Court distinguished the issue in question from the case law relied upon by the claimant, stating that this is a cross-border question, so far unsettled in its case law. The Court then went on to determine the applicable law. It indicated that the Convention Concerning Judicial Assistance and Recognition and Enforcement of Judgements in Civil Matters [3] concluded between Spain and Czechoslovakia in 1987 was not relevant, as it contains only a conflict-of-law rule for the validity of arbitral agreements at the enforcement stage. Then it shifted its attention to the relationship between the Geneva Convention and the NYC. The Court concluded that the NYC took priority as lex posterior between Czechia and Spain, and that at the same time it was more "efficient" for the resolution of the case at hand.

On the substance of the dispute, the Court was asked to determine whether article II (1) read in conjunction with article II (2) NYC allowed for an arbitral clause to be concluded in the form of an exchange of emails without a qualified electronic signature.

Firstly, the Court held that the list of forms contained in article II (2) NYC was not exhaustive, thereby deeming other forms of communication, including emails, acceptable. In support of this conclusion, the Court endorsed the UNCITRAL recommendation regarding the interpretation of article II (2) NYC.[4]

[1] Act No. 216/1994 Coll., on arbitration proceedings and on enforcement of arbitration awards.
[2] United Nations, *Treaty Series*, vol. 484, p. 349.
[3] United Nations, *Treaty Series*, vol. 1524, p. 253.
[4] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006, at its thirty-ninth session, A/61/17, annex II.

Secondly, the Court established that the use of a simple email without any qualified electronic signature would suffice to meet form requirements. It emphasized that the New York Convention permits an exchange of telegrams that, similarly to simple emails, do not contain any qualified signatures. Further substantiating the argument, it referred to the court decisions from other contracting States which held that no signatures are necessary when it comes to the "exchange" of documents under article II (2) NYC.

Case 1867: NYC III; V
India: Supreme Court
Civil Appeal No. 1544 of 2020
Vijay Karia v. Prysmian Cavi e Sistemi S.r.l. & Others
13 February 2020
Original in English
Published in: 2020 SCC Online SC 177
Available at: https://main.sci.gov.in

Abstract prepared by Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

Respondents initiated arbitration proceedings alleging material breaches of a joint venture agreement, including loss of effective control over the joint venture company. Appellants filed counterclaims alleging that the respondents had breached non-compete obligations by acquiring competing businesses, interfering with the management of the joint venture company, breach of confidentiality etc.

In a London Court of International Arbitration (LCIA) arbitration, the sole arbitrator made four awards. He found that the appellants had committed several breaches. The counterclaims were dismissed. Prior to the delivery of the third partial final award, the appellants challenged his appointment on the alleged lack of impartiality. The LCIA Court dismissed the challenge as it was made out of time under the LCIA Rules. The arbitrator directed the appellants to sell their shareholding to the respondents at a discounted price, along with consequential reliefs.

The awards were not challenged in London under English law. When the awards were sought to be enforced in India, being New York Convention award, the appellants raised objections under section 48 of the Indian Arbitration and Conciliation Act 1996 (the "1996 Act"). A Single Judge of the Bombay High Court found no merit in the objections to enforcement. An appeal not being maintainable under section 50 of the 1996 Act, the appellants approached the Supreme Court under a special leave to appeal according to article 136 of the Constitution of India. The Supreme Court observed that the policy of the legislature was that there should be only one bite at the cherry in a case where objections made to a foreign award on the extremely narrow grounds contained in the 1996 Act had been rejected, and that the Supreme Court's jurisdiction under article 136 should not be used to circumvent the legislature's policy.

The Court first examined the scope of section 48. Relying on the celebrated judgment in Renusagar Power Plant Co. Ltd. (1994) Supp. (1) SCC 644, as referred to in Ssangyong (2019) 15 SCC 131, and Shri Lal Mahal Limited (2014) 2 SCC 433, and noticing the amendments made by the Arbitration and Conciliation Act 2015, it held that the public policy exception had to be narrowly viewed and that an award that shocked the conscience alone should be set aside. It did not entail a review on the merits of the dispute.

The Court then commented on the general approach to enforcement and recognition of foreign awards. Relying on the United States Court of Appeals decision in Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier 508 F.2d 969 (1974) and subsequent United States judgments, it held that, given the pro-enforcement bias of the NYC, the burden of proof had been placed on parties objecting to enforcement. Foreign awards could not be set aside by second-guessing the arbitrator's interpretation of the agreement in the guise of public policy.

The Court noted the discretion vested in it to enforce a foreign award despite the fact that one or more grounds may have been made out to resist enforcement. Citing various leading commentaries, Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 and other judgments, the Court concluded that discretion could be exercised in a case where grounds taken to resist enforcement could be linked to party interest alone, as opposed to grounds where the award was made without jurisdiction or where the subject matter of dispute was incapable of being settled by arbitration under the laws of India.

The appellants had contended that they were "otherwise unable to present their case". However, the Court held that the awards, if read as a whole, had addressed the basic issues raised by the parties. In doing so, the Court held that the expression could not be given an expansive meaning. It would only apply at the hearing stage and not after the award had been delivered. A good working test for determining whether a party had been unable to present its case was to see whether factors outside the parties' control had combined to deny the party a fair hearing.

The appellants argued that an award by which shares had to be purchased at a discounted value would violate the Foreign Exchange Management Act 1999 ("FEMA") and therefore would violate the fundamental policy of Indian law. The Court, approving the Delhi High Court's judgment in Cruz City 1 Mauritius Holdings (2017) 239 DLT 649, contrasted FEMA with the earlier legislation Foreign Exchange Regulation Act 1947 and held that under the present regime, transactions which violated FEMA could not held to be void. It held that such a violation, even if proved, would not breach the fundamental policy of Indian law.

The Supreme Court then examined each of the appellants' contention on the facts and rejected them. The appeal was dismissed with punitive costs of 5 million rupees.

Case 1868: NYC III; V
India: Supreme Court
Civil Appeal No. 667 of 2012
National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta S.A.
22 April 2020
Original in English
Available at: https://main.sci.gov.in

Abstract prepared by Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

Parties entered into an agreement for export of 5,000 metric tons of Indian hand-picked and selected groundnut by the National Agricultural Cooperative Marketing Federation of India (NAFED) to Alimenta for the 1979–1980 season. Clause 11 incorporated the terms and conditions of the Federation of Oil, Seeds and Fats Associations Ltd (FOSFA) in standard form. Due to cyclone damage, NAFED could only export 1,900 metric tons.

Parties entered into an addendum for NAFED to supply the balance amount in the subsequent year, i.e., 1980–1981, though NAFED had no permission under the Export Control Order to carry forward the export. NAFED approached the Government of India for grant of permission to carry forward the supply of the balance stock. The Government refused to grant permission due to restricted export policy and quota ceiling. NAFED informed Alimenta of the Government's refusal. Alimenta treated this as NAFED's default and invoked arbitration under FOSFA.

NAFED did not appoint an arbitrator and instead approached the Delhi High Court for a stay on the arbitration proceedings, contending that the agreement did not contain a specific provision for arbitration. Even though a stay was granted by the High Court, arbitration proceedings continued in London. FOSFA appointed an arbitrator on behalf of NAFED. Ultimately, the High Court held that the parties had

opted for arbitration by reference to FOSFA terms and conditions. The Supreme Court upheld this ruling in 1987.

FOSFA passed an award directing NAFED to pay damages of US$ 4,681,000 with interest at 10.5 per cent per annum. NAFED filed an appeal before the Board of Appeal and requested legal representation through a solicitor firm. The Board rejected the request for legal representation and upheld the award. The interest was enhanced to 11.25 per cent, in the absence of an appeal by Alimenta. The arbitrator nominee of Alimenta, who passed the award, represented Alimenta before the Board of Appeal.

Alimenta applied for enforcement of the award under Sections 5 and 6 of the Foreign Awards (Recognition and Enforcement) Act 1961 (then governing the enforcement of New York Convention awards). NAFED resisted enforcement on various grounds, including public policy and non-compliance of sections 7 (1) (a), 7 (1) (b) and 7 (1) (c) of the Foreign Awards Act. The High Court held that the award was enforceable. NAFED appealed to the Supreme Court.

The issues before the Supreme Court were: (i) whether NAFED was unable to comply with the contractual obligation to export groundnut due to the Government's refusal; (ii) whether NAFED could have been held liable in breach of contract to pay damages particularly in view of clause 14 of the agreement; and (iii) whether enforcement of the award was against the public policy of India.

The Supreme Court held that the contract came to an end in terms of clause 14 of the agreement in view of the Government's refusal to grant permission for export. Citing section 32 of the Indian Contract Act 1872, it was held that the contract became void on the happening of the contingency contained in clause 14, namely the Government's refusal to permit export.

The Supreme Court then considered the question of the award being unenforceable as contrary to public policy under section 7 (1) (b) (ii) of the Foreign Awards Act. The Court cited its earlier judgment in Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp. (1) SCC 644 (Renusagar) among other judgments. Under Clause 14 of the Agreement and Indian law, no export could have taken place without permission of the Government. The Court held that as per Renusagar, enforcement would have been against the fundamental policy of Indian law and the basic concept of justice.

NAFED had argued that the arbitrator was appointed in violation of the Delhi High Court's orders. The Supreme Court declined to consider this objection on the ground that it should have been raised earlier.

The objection regarding the lack of legal representation before the Board of Appeal was not accepted in the absence of proof of prejudice. Though the Court was critical of the practice of the nominee arbitrator of Alimenta appearing before the Board of Appeal, it did not decide that issue. Since the award was held to unenforceable, it also did not decide upon the objection that the Board of Appeal enhanced the interest rate, in the absence of an appeal by Alimenta.

The Supreme Court concluded that the award was in violation of public policy of India. The appeal was allowed, and the award was held to be unenforceable.

Case 1869: NYC V(1)(b)
India: Supreme Court
Civil Appeal No. 2564 of 2006
M/s Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.
2 June 2020
Published in English: 2020 SCC OnLine SC 479
Available at: https://main.sci.gov.in

Abstract prepared by Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents, and Ishita Mishra

Centrotrade Minerals & Metals Inc (Centrotrade), a United States corporation, entered into a contract to sell 15,500 dry metric tons of copper concentrate to Hindustan Copper Ltd. (HCL). A dispute arose about the quantity of dry weight of copper concentrate. The contract contained a two-tier arbitration clause, which provided for arbitration in India at the first stage and offered the parties an option to appeal against the award of the arbitration in India in a second arbitration which would be held in London in accordance with ICC rules.

In 1996, Centrotrade invoked the arbitration clause against HCL. A nil award[5] was passed by the arbitral tribunal in India on 15 June 1999. Thereafter a second arbitration was conducted in London and an award dated 29 September 2001 was passed in favour of Centrotrade (the "London Award"). Centrotrade sought to enforce this award in India. A single judge of the Calcutta High Court enforced this award, but on appeal the Division Bench held that the London Award was not a foreign award and because two arbitral awards had been delivered by arbitrators who had concurrent jurisdiction, these two awards were mutually destructive and consequently neither award could be enforced under Section 48 of the Arbitration and Conciliation Act, 1996.

The judgment of the Division Bench was challenged before the Supreme Court where it was further referred to a larger bench of three judges as two separate dissenting judgments were delivered by a two-judge bench in Centrotrade Minerals & Metals Inc v. HCL (2006) 11 SCC 245.

Two main issues arose before the three-judge bench: (i) whether a two-tier arbitration clause was permissible under Indian law; and (ii) if yes, whether the award rendered being a "foreign award" was enforceable under Section 48 of the Indian Arbitration Act. Issue (i) was answered in the affirmative by the Supreme Court on 9 May 2006.[6] Issue (ii) was decided by the present judgment.

HCL argued that the award must be refused enforcement under section 48 (1) (b) as it had not been given an opportunity to present its case before the London arbitration. The Court reiterated that the context of Section 48 was the NYC and therefore the expression "otherwise" in section 48 (1) (b), i.e., "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case" has to be attributed a narrower meaning in consonance with the pro-enforcement bias (spoken of in a large number of judgments) and as observed by it in Vijay Karia v. Prysmian Cavi.[7] The Court also observed that an arbitrator's "misconduct" (as defined under the Arbitration Act of 1940) was a broader ground for setting aside an award than a party being unable to present its case before the arbitrator under section 48 (1) (b).

The Court then examined what would amount to a party being "unable to present its case". The Court took note of judgments from the United Kingdom of Great Britain and Northern Ireland, the United States of America, Hong Kong, China, and Italy, which interpreted this phrase within their national arbitration legislations and under article V (1) (b) NYC and then analysed the facts in the present case. The Court noted that HCL had chosen to not participate in the arbitral proceedings until August 2001 and in spite of this, the arbitrator had granted several time extensions (as requested by HCL) and even reviewed legal submissions submitted by HCL beyond agreed timelines and taken the same into account before passing his award. The Court held that there was no fault in the conduct of the London arbitration. The Court further held that an enforcing court under section 48 did not have the power to remand the matter to the ICC arbitrator to pass a fresh award and enforced the foreign award dated 29 September 2001 by allowing Centrotrade's appeal.

[5] A nil arbitral award is an award that discusses the merits of a case without awarding monetary compensation.

[6] Centrotrade Minerals & Metals Inc v. HCL (2017) 2 SCC 228.

[7] CLOUT case 1867.

Case 1870: NYC II (2)(3)
Switzerland: Bundesgericht
Case No. 4A_646/2018
A. d.d. v. B. Suisse S.A.
17 April 2019
Original in German
Available at: https://www.bger.ch

This case deals with the form requirement of article II (2) NYC, the extension of an arbitration agreement to non-signatories in case of an implied substitution of parties to the main contract and the implied extension of the arbitration agreement after the expiration of the main contract.

The claimant, a corporation under Slovenian law with its seat in Slovenia, signed on 9 October 2009 an agreement for the distribution of food products (the "distribution agreement"). The distribution agreement contained an arbitration clause. The representative signing the agreement represented the defendant, a corporation under Swiss law with its seat in Switzerland, as well as a sister company of the defendant. It was subsequently disputed who became party to the distribution agreement as "distributor". It was however undisputed that the defendant had been distributing food products for the claimant in Switzerland since 2006. The distribution agreement's terms ended on 31 December 2014. However, the parties continued their business relationship until 2015 without concluding an extension of the distribution agreement in writing.

With its claim of May 2016, the claimant requested the Commercial Court of Aargau to order the defendant to pay 613,000 euros owed under the distribution agreement with interest. The defendant invoked the arbitration clause and requested the Court to dismiss the claim for lack of jurisdiction.

The Commercial Court of Aargau dismissed the claim. It noted that, by performing the distribution agreement for several years, the defendant had implicitly committed to the agreement, including the arbitration clause. It also noted that, as such, it did need to resolve the question of whether the defendant was already party to the distribution agreement at the time it was signed. The Court indicated that, after expiring in 2014, the distribution agreement, including the arbitration clause, had been implicitly extended by its continued performance.

With respect to the compliance of the arbitration clause with the written form requirement of article II NYC, the Court observed that, since the claimant had performed the distribution agreement for several years, it could not invoke that lack of compliance under the doctrine of "venire contra factum proprium". In conclusion, the Court referred the case to arbitration pursuant to article II (3) NYC. That decision was appealed by the claimant.

On appeal, the Federal Supreme Court confirmed that the form requirement of article II (2) NYC was only concerned with the arbitration clause contained in the original agreement, and that extension of the arbitration clause to non-signatories as well as extension of the term of the agreement were a matter of domestic law.

The Federal Supreme Court found that it was undisputed that the arbitration clause as contained in the original agreement complied with the form requirement of article II (2) NYC and decided that both parties were bound by the arbitration clause even in case the distribution agreement had not originally been concluded with the defendant.

The Federal Supreme Court added that the principle developed in Swiss judicial decisions, according to which a non-signatory can be bound by an arbitration clause if it performs a contract containing the clause, was also applicable within the scope of application of the NYC. The Federal Supreme Court noted that French case law

cited in the UNCITRAL secretariat's Guide on the Convention also accepted the extension of an arbitration clause to non-signatories under certain circumstances.[8]

The Federal Supreme Court further indicated that the notion of "signed by the parties" in article II (2) NYC did not prevent an extension of the arbitration agreement to a non-signatory. Rather, it noted that this provision was to be understood as requiring the signing of the arbitration agreement by the original parties at the time of the conclusion of the contract containing the arbitration agreement. It also noted that in the case of assignment of rights or obligations to a non-signatory, no further form requirements applied with regard to that party's commitment under the arbitration agreement. It further noted that, since the extension to non-signatories was a matter of domestic law, the question whether the definition in article II (2) NYC was exhaustive did not have to be resolved.

Regarding the implicit extension of the agreement after the formal expiry of the distribution agreement in 2014, the Federal Supreme Court confirmed that the extension, which did not otherwise amend the terms of the agreement, did not need to comply with the form requirement of article II (2) NYC. Consequently, even if the defendant was not a party to the arbitration clause at the time that the distribution agreement was signed, both parties were bound by it.

Against this background, the Federal Supreme Court confirmed the decision of the Commercial Court of Aargau to refer the case to arbitration pursuant to article II (3) NYC.

Case 1871: NYC V (2) (b)
Switzerland: Second Civil Appeal Court of the Cantonal Court of Fribourg
Judgments No. 102 2019 282 and No. 102 2019 283
A. SA v. B. Limited
20 December 2019
Original in French
Available at: https://publicationtc.fr.ch

Arbitration proceedings between the company B. Limited and the company A. SA before the International Court of Arbitration of the International Chamber of Commerce resulted in an arbitral award being made on 25 February 2018. Through a decision of 16 October 2019, the President of the Civil Court of Sarine District declared the arbitral award enforceable and ordered that the objection lodged by A. SA to the payment order served to it under the award be definitively set aside. A. SA filed an appeal against that decision before the Cantonal Court of Fribourg. It argued that the sole purpose of the contract ("endorsement agreement") that had given rise to the arbitration proceedings had been to avoid the payment of taxable income to the Spanish tax authorities, which was contrary to Swiss public policy. That argument was based on article V (2) (b) of the NYC.

In its judgment, the Court recalled the conditions relating to the monitoring by the Swiss courts of compliance with public policy. The Court pointed out that "as an exception clause, the public policy provision is interpreted narrowly, especially in relation to the recognition and enforcement of foreign judgments, where its scope is more limited than in the context of the direct application of foreign law (attenuated effect of public policy).[9] The assessment of compliance with public policy should not lead to re-examination of the merits of the award but to an assessment of the outcome by comparison. The exception should be applied with even greater caution if the link

[8] UNCITRAL secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Vienna, 2016, article II, para. 18.
[9] Judgment TF 4A_233/2010 of 28 July 2010, recital 3.2.1.

with Switzerland in the case in question is tenuous or incidental.[10] In other words, recognition is the rule, which should not be deviated from without good reason."[11]

The Court went on to note that Swiss case law and the general principles of law reflect the precedence of the Convention (art. V (2) (b) of the NYC) over the Swiss public policy consideration "insofar as the NYC contains specific provisions on the concrete grounds for recognition or refusal of enforcement". The New York Convention is the yardstick against which due process must be assessed, especially in the case of a foreign award.

After reviewing the award, the Court found that the arguments presented by A. SA had been considered thoroughly by the arbitral tribunal and that, moreover, the possible conflict with Spanish public policy did not necessarily mean that Swiss public policy had been contravened. The Court therefore dismissed the appeal lodged by A. SA, which was ordered to pay the costs of the proceedings.

Case 1872: NYC VI
United Kingdom: High Court of Justice, Queen's Bench Division, Commercial Court
National Joint Stock Company Naftogaz of Ukraine v. Public Joint Stock Company Gazprom
15 March 2019
Original in English
Published: [2019] EWHC 658 (Comm)

The claimant, Naftogaz, a company with its place of business in Ukraine, and the defendant, Gazprom, a company with its place of business in the Russian Federation, entered into two contracts in 2009 for the sale and transport of natural gas through Ukraine. Each contract was disputed and referred to arbitration. For the sale contract, Gazprom was awarded approximately US$ 2.1 billion while for the transit contract, Naftogaz was awarded US$ 4.67 billion. Thus, according to the arbitral awards, Gazprom owed Naftogaz a net amount over US$ 2.5 billion plus interest.

Gazprom applied in this case for the adjournment of an enforcement order requiring it to pay the net amount, as it had made a separate application to a Swedish court to set aside the award against it. The Swedish case was to be heard 12–14 months after this matter, with interest accruing at US$ 526,000 daily. While an initial freezing order was granted in England relating to the award, this was discharged on condition of Gazprom making certain undertakings not to dispose of certain assets pending the conclusion of the Swedish proceedings. Moreover, an attachment order was made in the Netherlands relating to nearly US$ 400 million in assets.

The Court determined that it was permitted under section 103 (5) of the English Arbitration Act 1996 to adjourn the enforcement order "if it considers proper". This power is derived from article VI NYC. Both article VI and section 103 (5) provide for broad discretion on such an application to order "suitable security", yet this discretion is further guided by English case law.

Quoting Soleh Boneh Intl v. Uganda [1993] 2 Lloyd's Rep 208, the Court noted that in matters relating to the enforcement of awards pending their review, two factors must be considered.

The first factor to be considered is "the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere".

Based on a detailed analysis of the grounds to be relied upon for setting aside the award, the Court indicated that the prospects of success for the challenge in Sweden were "towards the lower end of the sliding scale". Moreover, the Court referred to the

[10] ATF 126 III 101 recital 3b; judgment TF 4A_8/2008 of 5 June 2008, recital 3.1; judgment TF 5A_409/2014 of 15 September 2014, recital 7.2.1
[11] ATF 116 II 625, recital 4a.

overarching objectives of arbitration and the NYC to allow matters to be dealt with efficiently, citing the general presumption in favour of immediate enforcement and avoidance of jurisdictional and other complexities.

The second factor to be considered, per Soleh Boneh, is "the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed". The Court determined that the enforcement would not necessarily be rendered difficult should the adjournment be permitted.

Ultimately, considering the low prospects of success per the first factor, alongside the competing ease of future enforcement per the second factor, the Court determined that it was appropriate to grant an adjournment of enforcement and that security should be provided to protect Naftogaz from deterioration in its position before the Swedish appeal had been heard.

Case 1873: NYC II (3)
United States of America: Supreme Court of the United States
Case No. 18-1048
GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC
1 June 2020
Original in English
Available at: https://www.supremecourt.gov

Abstract prepared by S.I. Strong, National Correspondent

Plaintiff-respondent's predecessor entity entered into three construction contracts with a company known as F.L. Industries, Inc. All three contracts contained identical arbitration clauses. F.L. Industries subsequently entered into a subcontractor agreement with defendant-appellant. When defendant's products allegedly failed, plaintiff filed suit in Alabama state court. Defendant removed the matter to federal court under the Federal Arbitration Act (9 U.S.C. §205), then moved to dismiss the matter and compel arbitration, relying on the arbitration agreements between plaintiff's predecessor entity and F.L. Industries. Although the federal district court granted the motion to dismiss and compel arbitration, the Court of Appeal for the Eleventh Circuit reversed that decision on the grounds that the New York Convention required the parties to "actually sign an agreement to arbitrate their disputes in order to compel arbitration." Because the defendant had not signed the arbitration agreements in question, the Court of Appeal believed that it was impossible to compel arbitration. The Court of Appeal further held that, as a non-signatory, defendant could not rely on domestic principles of equitable estoppel to enforce the arbitration agreement because those principles conflicted with the New York Convention's requirement for an actual signature. Defendant appealed, and the Supreme Court of the United States granted certiorari to resolve a conflict among the circuit courts of appeal regarding the ability of non-signatories to rely on arbitration agreements pursuant to principles of domestic state law.

The Supreme Court reversed the opinion of the Eleventh Circuit, holding that while article II (3) NYC requires contracting States to refer parties to arbitration when a written arbitration agreement exists, that article does not restrict contracting States from applying domestic law to refer parties to arbitration in other circumstances. In reaching that conclusion, the Supreme Court looked at article II more broadly and concluded that the language of that article does not displace domestic law but instead contemplates the use of domestic law to fill gaps in the Convention. For example, the Supreme Court noted that domestic law was implicated by language in article II (1) involving the definition of disputes "capable of settlement by arbitration" and by language in article II (3) involving the definition of arbitration agreements that are "null and void, inoperative or incapable of being performed". The Supreme Court also considered its approach to be consistent with the negotiation and drafting history of the New York Convention as well as the post-ratification understanding of contracting States.

The matter was subsequently remanded to the Eleventh Circuit to determine whether defendant could enforce the arbitration clauses pursuant to the principle of equitable estoppel and which body of law governs that determination.

Cases relating to the United Nations Convention on the Carriage of Goods by Sea – The "Hamburg Rules" (HR)

Case 1874: HR 2(1); 4; 20
Austria: Oberster Gerichtshof
Case No. 8 Ob 74/04x
*Hermine G** v. S***
26 August 2004
Original in German
Published: ecolex 2005, 114; RdW 2005, 93
Available at: https://www.ris.bka.gv.at

This case deals primarily with the period of responsibility of the carrier for the goods under the Hamburg Rules (HR) in order to determine the carrier's responsibility. The plaintiff (shipper) and the defendant (carrier) entered into a contract for the carriage by sea of eight pallets of wine from Vienna to Manila. The shipment was to be made via Hamburg and the defendant did not undertake to clear the goods through customs in Manila. Upon arrival in Manila, the defendant was expressly instructed by the plaintiff not to carry out any delivery, but to store the goods in a duty-free warehouse, which the defendant did. Subsequently, the plaintiff requested the defendant to return the goods to Vienna. The defendant accepted but informed the plaintiff that the customs authorities in Manila had confiscated the goods and sold some of them at a public auction. The defendant then informed the plaintiff that the customs authorities had released the remaining goods, which could be returned.

The plaintiff sought action in court alleging that the defendant should be responsible for the damages incurred from the confiscation and auction of the goods, which resulted in a loss of 80 per cent of their value. The plaintiff argued that the defendant had failed to carry out the return transport and to take appropriate measures to prevent the loss after storage. The plaintiff further argued that the defendant also failed to inform the plaintiff in reasonable time of any measures necessary to prevent seizure and loss of the goods. The defendant sought dismissal of the claim and objected that the claim was in any event time barred under section 64 of the General Austrian Forwarders' Terms and Conditions ("AÖSp").

The Court observed that the plaintiff did not invoke the application of the Hamburg Rules. It further observed that the port of loading and the port of discharge were located in States not parties to the Hamburg Rules. The Court noted that the issuance of the bill of lading by a company based in Germany was not disputed by the plaintiff. The Court continued by noting that the responsibility of the carrier for the goods under article 4 HR covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. It further observed that when the consignee does not receive the goods from the carrier, the carrier is deemed to be in charge of the goods until the time the goods are placed at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade applicable at the port of discharge; or are handed over to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over (article 4 (2) (b) (ii) and (iii) HR).

The Court found that the Hamburg Rules were not applicable in the case at hand because the preconditions for their application were not met and the responsibility of the defendant for the goods had ended when the defendant was instructed by the claimant to store the wines in a duty-free warehouse. Accordingly, the two-year limitation period provided for in article 20 HR was not applicable and instead the six-month limitation period of section 64 of the AÖSp applied. The Court remanded the case to the court of first instance to identify when the limitation period began to run.

Case 1875: HR 2(1); 18
Austria: Oberster Gerichtshof
Case No. 7 Ob 212/10t
*P** GmbH v. W** AG*
29 June 2011
Original in German
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Available at: https://www.ris.bka.gv.at

This case deals primarily with the question of whether a contract concluded via email can constitute a "document evidencing the contract of carriage by sea" within the meaning of article 2(1) HR.

The defendant regularly arranged transport of steel construction parts and air preheaters for a steel plant construction company. Both the defendant and the construction company had their place of business in Austria. The construction company usually made written transport enquiries with details of the goods, desired dates and places of collection and unloading, on the basis of which the defendant then submitted an offer. In the present case, the construction company and the defendant concluded by email a contract for the carriage of air preheaters from Shanghai in China to Durban in South Africa. In China, where the bill of lading was issued, the cargo was adequately secured on deck with wire ropes and turnbuckles but one of the air preheaters was lost in transport due to strong winds and heavy seas.

The plaintiff as transport insurer for the construction company compensated the assured and sought recourse against the defendant alleging that the defendant was responsible for the damages incurred under the Hamburg Rules. The plaintiff alleged that the Hamburg Rules, including its liability regime, applied because an email exchange constituted in its entirety "another document proving the contract of carriage by sea" within the meaning of article 2 (1) (d) HR.

The defendant objected that the requirements for the application of the Hamburg Rules were not met and that therefore any liability was limited pursuant to section 660 of the Austrian Commercial Code ("UGB").

With respect to the conditions for the application of the Hamburg Rules under its article 2, the Supreme Court observed that a bill of lading had not been issued in a State party to the Hamburg Rules and that neither the email correspondence nor the bill of lading contained a reference to the Hamburg Rules. The Court, quoting the Explanatory Note to the Hamburg Rules, further noted that the Hamburg Rules were intended to be applicable only if the carrier did not issue a "bill of lading" but another "transport document".[12] The Court indicated that the issuance of a bill of lading, albeit in a State not party to the Hamburg Rules, prevented the application of article 2 (1) (d) HR by virtue of the issuance of another transport document. Citing a document prepared for the thirty-ninth session of UNCITRAL Working Group IV, the Court also indicated that the "the reference in article 18 to the issuance of a 'document' other than a bill of lading suggests that the Convention contemplates the use of paper-based documents".[13]

On that basis, the court concluded that in the present case there was no such paper-based "other document evidencing the contract of carriage by sea is issued in a Contracting State" and that the emails containing the offer and acceptance of the contract of carriage by sea did not justify the application of the Hamburg Rules. Accordingly, the Court confirmed that the defendant was liable for the loss of the transported goods pursuant to section 660 UGB.

[12] The Supreme Court referred to the Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), United Nations, 1994, United Nations publication, Sales No. E.95.V.14, paras. 11, 13, 34, 40 and 41.
[13] A/CN.9/WG.IV/WP.94, para. 127.

Case 1876: HR 1(6); 2
Austria: Oberster Gerichtshof
Case No. 7Ob173/17t
*I** Handelsges.m.b.H. v. S** S.A., **, Panama, 2. C** Ltd., **, USA, 3. D** LTD, **, Ukraine*
22 June 2018
Original in German
Published in ecolex 2018, 907; SZ 2018/50
Available at: https://www.ris.bka.gv.at

This case deals primarily with the question whether contracts for the carriage of goods in inland waterways without a sea leg may be included in the definition of "contract of carriage by sea" in article 1 (6) HR.

The plaintiff (shipper) and the defendant (carrier) entered into a contract for the carriage of organic wheat in two floating containers from Ukraine to Vienna via the Danube River waterway. The shipment arrived late after running aground on a sandbank, heavily soaked and infested with rats. The plaintiff sought compensation in court under the Hamburg Rules for the damages incurred.

The Court noted that the Hamburg Rules apply under the conditions specified in article 2 to "contracts of carriage by sea" between two different States. The Court, citing a report of the UNCTAD secretariat[14] among other sources, indicated that the use of the term "by sea" supported reference to maritime transport only. The Court concluded that in order for the Hamburg Rules to be applicable by virtue of its article 2, there must be at least a link with maritime transport and found that such a link was missing in the case at hand due to the transport via the Danube River waterway.

[14] UNCTAD, The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention, New York, 1991, Document TD/B/C.4/315/Rev.1, p. 98.