United Nations A/CN.9/SER.C/ABSTRACTS/209

General Assembly

Distr.: General
15 June 2021
English
Original: English/Spanish

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.21-04443 (E) 300621 010721

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, all Internet addresses contained in this document were functional as of the date of submission of this document, but websites do change frequently). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

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

Case 1914: NYC III

Argentina: Supreme Court of Justice
Argentine Legal Information System (SAIJ) case No.: FA19000141
Deutsche Rückversicherung AG v. Caja Nacional de Ahorro y Seguro (in liquidation) and others – enforcement proceedings
24 September 2019

Deutsche Rückversicherung AG, a German insurance company, requested the recognition and enforcement in Argentina of an arbitral award made on 26 April 2006 in New York City and of the judgment confirming the award. Under the arbitral award, the Caja Nacional de Ahorro y Seguro (in liquidation) and/or the Instituto Nacional de Reaseguros had been ordered to pay the insurance company certain sums of money.

The National Court of Appeal for Federal Civil and Commercial Matters reversed the decision of the court of first instance and granted recognition and enforcement of the arbitral award and of the foreign judgment, subject, however, to the applicable debt consolidation regime. The Court of Appeal found that the non-compliance of the award and confirmatory judgment with the rules on consolidation, as invoked by the State, conflicted with public policy in Argentina; however, that did not preclude partial recognition of the arbitral award and of the foreign judgment.

On appeal, the Supreme Court upheld that decision on the basis of article III of the New York Convention, which was approved through Act No. 23.619. The Supreme Court recognized the applicability of article III of the Convention, which provides that Contracting States shall not impose substantially more onerous conditions than are imposed on the recognition or enforcement of domestic arbitral awards.

If a domestic award is made in violation of the rules on debt consolidation, the solution is not to set aside the decision handed down but to bring it into line with those rules. Thus, a foreign arbitral award must be enforced in accordance with the public policy provisions of the debt consolidation regime, but failure by the arbitral tribunal to take that regime into account should not automatically preclude the recognition and enforcement of the award.

Case 1915: NYC V(1)(b), (d); V(2)(b)

China: Intermediate People's Court of Jiaxing, Zhejiang
Case No. (2019) Zhe 04 Xie Wai Ren No. 2
Shanghai Jiachuan Machinery Equipment Import & Export Co., Ltd. v. Meikesi Offshore Engineering Equipment Co., Ltd.
1 July 2020

This case concerns the grounds for refusal of recognition and enforcement of a foreign arbitral award in China.

The parties entered into a ship construction contract containing an arbitration clause that specified that the contract was governed by English law and all disputes related to the contract should be submitted to the London Maritime Arbitrators Association ("LMAA") in accordance with the LMAA Terms. Arbitral proceedings were initiated under that clause and, subsequent to the rendering of the arbitral award, the applicant applied to the Court for its recognition.

The respondent opposed the application on the grounds that, inter alia:

(i) The respondent was not able to adequately exercise the right to defend itself during the arbitral process (art. V(1)(b) NYC);

(ii) The composition of the arbitral tribunal and the arbitral procedure were not in accordance with the agreement of the parties given that the arbitration clause

provided that the arbitral tribunal should consist of three arbitrators, not a sole arbitrator, and that the sole arbitrator did not follow the arbitration procedure set out in the Second Schedule to the 2017 LMAA Terms (art. V(1)(d) NYC); and

(iii) The applicant and the sole arbitrator did not suspend the arbitral proceedings after being informed that the respondent had already initiated proceedings in front of the Shanghai Maritime Court challenging the validity of the arbitration clause in question, which allegedly infringed upon the judicial sovereignty of China thereby violating its public policy (art. V(2)(b) NYC).

Firstly, the Court held that the respondent had been given adequate time and opportunities to defend itself during the arbitral proceedings but decided not to actively exercise such right and therefore had not been deprived of the right to defend itself.

Secondly, the Court noted that, even though the arbitration clause was silent about the possibility to appoint a sole arbitrator when one party failed to nominate one arbitrator within the specified time frame, such possibility was envisaged in article 17 of the Arbitration Act 1996, which was applicable by operation of article 10 of the 2017 LMAA Terms.

The Court also found that pursuant to article 14 of the 2017 LMAA Terms the sole arbitrator had the power to vary the normal arbitral procedure as set out in the Second Schedule to the 2017 LMAA Terms.

Finally, in response to the public policy claim, the Court noted that the "public policy" of China in the context of article V(2)(b) NYC referred to circumstances that affected public interests, which may include the violation of the basic principles of Chinese law, infringement of sovereignty, threat to national and social public security, and violation of good customs. The Court found no violation of public policy on the basis of the parties' agreement to submit the dispute to the LMAA. Reference was also made to the fact that the respondent did not formally contest the jurisdiction of the sole arbitrator as well as to the decision of the Shanghai Maritime Court confirming the validity of the arbitration clause contained in the contract.

In light of the above, the Court concluded that there were no valid grounds for refusing recognition of the award.

Case 1916: NYC V(1)(a), (b), (d)
China: Tianjin No.1 Intermediate People's Court
Case No. (2018) Jin 01 Xie Wai Ren No. 2
IM Global LLC v. Tianjin North Film Corporation
18 May 2020

This case concerns the grounds for refusal of recognition and enforcement of a foreign arbitral award in China.

IM Global, a US company, alleged that it signed a film distribution contract with Tianjin North Film Corporation ("Tianjin Film"), a Chinese company, during the Cannes Film Festival held in May 2016, which IM Global had performed. Failing to receive any payment from Tianjin Film, IM Global initiated arbitration at the Independent Film & Television Alliance Arbitration Court in the US in accordance with the arbitration clause in the contract. Tianjin Film did not participate in the arbitral proceedings and an award was issued in 2017 in favour of IM Global, which applied to the Tianjin No.1 Intermediate People's Court for recognition and enforcement of the award. Tianjin Film resisted the application.

Firstly, Tianjin Film asked the Court to reject the application on the ground that it was not a party to the film distribution contract. IM Global responded that the contract had been signed by an authorized representative of Tianjin Film who was not under any "incapacity" when signing the contract, and that whether the signatory was the authorized representative of Tianjin Film was an issue for the arbitral tribunal to decide. The Court disagreed and interpreted the term "incapacity" in article V(1)(a) NYC as

"lacking the power to contract" which included the issue of unauthorized representation.

Given that the contract was signed in Cannes, the Court applied French law to decide on the issue of ostensible authority pursuant to the applicable Chinese private international law rules (i.e., Law on the Application of Law for Foreign-related Civil Relations). The Court found that IM Global was unable to prove the existence of either actual or ostensible authority between the signatory and Tianjin Film because, in a commercial negotiation between parties with no past transactional records, it was unreasonable to rely only on a business card and the search of a film database to conclude that a person had proper authority to represent the other party, especially in the absence of any word or conduct by the represented party. Accordingly, the Court held that there was no valid arbitration agreement between IM Global and Tianjin Film, which constituted a valid ground for refusing enforcement of the arbitral award under article V(1)(a) of NYC.

Secondly, Tianjin Film claimed that it had not been duly notified of the arbitral proceedings. In the view of the Court, since Tianjin Film had been found not to be a party to the contract, the stipulations in the contract as to notice and addresses might not be taken on their face and it was necessary for IM Global to prove Tianjin Film had actually received the notice of the arbitral proceedings. IM Global failed to provide sufficient evidence for such purpose. The Court held that Tianjin Film had not been properly notified of the arbitral proceedings and was unable to present their case, which constituted a valid ground for refusing enforcement of the arbitral award under article V(1)(b) NYC.

Lastly, Tianjin Film argued that IM Global failed to comply with its contractual obligation to send a notice for consultation at least 120 days prior to initiating arbitral proceedings. The Court found that such failure concerned neither the composition of the arbitral authority nor the arbitral procedure, and therefore article V(1)(d) NYC could not be invoked.

Case 1917: NYC I(1), (2), (3); II(2)
India: Delhi High Court
Suit No. 1440/90 and I.A. 5206/90
Gas Authority of India Ltd. v. SPIE Capag. S.A. & Others
15 October 1993
Published in English: 1993 SCC OnLine Del 561; (1993) 27 DRJ 562

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

Gas Authority of India Limited ("GAIL") issued worldwide tenders for the execution of a welled steel gas pipeline project. SPIE Capag (the "Consortium") submitted its bid, which was accepted. However, the project was not completed in accordance with the time specified in the contract.

GAIL initiated proceedings for enforcing the performance guarantee furnished by the Consortium to recover liquidated damages. Meanwhile, GAIL received a notice of arbitration from the Consortium, which had initiated arbitration under the ICC Rules. GAIL filed an application under section 33 of the Arbitration Act, 1940 requesting the Court to declare that the request of the Consortium was meritless and that the dispute was not capable of being referred to arbitration. The Consortium contended that a valid arbitration agreement existed between the parties, and that the court was required to enforce the arbitration agreement under the provisions of the NYC.

The Court noted that the Indian Parliament had enacted the Foreign Awards (Recognition & Enforcement) Act, 1961 to give effect to the NYC. Further, it noted that article I(1) NYC dealt with awards made in any State other than the State where their recognition or enforcement was sought and that it did not require that parties be subject to the jurisdiction of different contracting States, and thus the area of operation

of the NYC was wider than that of the Geneva arbitration treaties. It also noted that article I(3) NYC permitted any contracting State to limit the field of application by declaring that it would apply the convention to arbitral awards rendered in the territory of other contracting States only. Further, the Court indicated that article I(2) NYC gave an inclusive definition to the expression "arbitral awards", which included arbitral awards made by both ad-hoc and institutional arbitration, and that per article II(2) NYC, unless the Court found the arbitration agreement to be null and void, inoperative or incapable of being performed, the matter must be referred to arbitration. The Court also discussed various other provisions of the NYC. As the Court did not find any infirmity in the arbitration agreement, the Court held that it was required to enforce the arbitration agreement under the terms of the NYC and therefore referred the dispute to arbitration.

Case 1918: NYC II
India: Supreme Court of India
Arbitration Petition No. 17 of 2007
Chloro Controls *v.* Severn Trent Water Purification
28 September 2012
Published: (2013) 1 SCC 641
Available at: https://main.sci.gov.in/jonew/judis/39605.pdf

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

The appellant, Chloro Controls, was a company run by the Kocha Group active in selling and manufacturing gas and other electrical chlorination equipment. The respondent, Severn Trent, had consented to appoint the appellant as its exclusive distributor in India, for which a joint venture company ("JV") was set up in India. There were seven interlinked agreements (such as managing directors' agreement, international distributor agreement, export sales agreement, technical know-how agreement etc.) which supplemented the core agreement, i.e., the shareholders agreement ("SHA") between the two parties and Mr. Kocha. The SHA stipulated that during its subsistence, Mr. Kocha could not deal with similar products manufactured by any company other than the respondent. An arbitration clause formed a part of the SHA. The SHA referred to the interlinked agreements. However, not all parties were a party to the interlinked agreements and some of these agreements did not contain an arbitration clause.

A dispute arose between the parties when the respondent sought to terminate the SHA. The appellant launched a derivative suit at the Bombay High Court against the respondent, the JV, the Kocha group and the directors of the JV. The respondent sought to refer the dispute to arbitration under section 45 of the Indian Arbitration and Conciliation Act, 1996 ("1996 Act"), which is akin to article II NYC. The Division Bench of the High Court agreed with the Respondent. This judgment was impugned before the Supreme Court of India.

The Supreme Court addressed three issues, (i) what was the scope of section 45 of the 1996 Act and, in the case of multiple agreements signed between different parties, with some having an arbitration agreement and others not, shall the dispute be referred in whole or in part to the arbitral tribunal, especially where the parties to an action are claiming under or through a party to an arbitration agreement; (ii) whether the case *Sukanya Holdings v Jayesh Pandya* was good law; and (iii) whether bifurcation or splitting of parties or causes of action is permissible under the 1996 Act.

The Supreme Court traced the history of section 45 of the 1996 Act and observed that it was enacted on the lines of article II NYC and that it should be read along with Schedule 1 of the 1996 Act (which incorporated the NYC). The Court then also examined the legislative intent and the difference in the language of sections 8 and 45 of the 1996 Act. While section 8 used the term "parties", section 45 used the terms "one of the parties or any person claiming through or under him". The Court observed

that from the objective of the intent of the legislature which was to promote arbitration, it would imply that a liberal meaning has to be given to the interpretation of the phrase "or any person claiming through or under him". Consequently, the term "any person" could refer to parties who may not be signatories to the arbitration agreement. Therefore, the Court held that arbitration is possible between a signatory to an arbitration agreement and a third party.

Furthermore, the Court observed that, when interpreting the words "any person" it was important to refer back to article II(1) NYC and the expression "legal relationship", which implied that a person claiming through or under, must have a direct relation to the contract / cause of action / dispute at hand. Additionally, the Court indicated that a heavy burden rested with persons seeking to refer to arbitration a dispute between a signatory party and a third party (or persons legally related to the arbitration agreement or claiming through or under such parties). The Court also made a reference to the group of companies' doctrine, and the power to bind third parties to arbitration using this doctrine. Consequently, the Court indicated that, if an agreement had been entered into by the parent concern, it may bind the non-signatory affiliates or subsidiaries if there was "mutual intention" of all the parties involved to bind such non-signatories (cases such as that of non-signatory being an alter ego, estoppel, agency, third party beneficiary, etc. may have to be examined). The Court added that this intention could be gathered by looking at the intention of the multiple interlinked agreements and whether they together, envisioned a "composite performance". Nevertheless, the Court added, this would be the exception and not the rule and would only hold for composite transactions as there exists then a direct commonality of the subject matter and the various agreements. Consequently, with respect to the scope of section 45, the Court observed that courts must interpret this section with a view to refer parties to arbitration.

The Supreme Court observed that the *Sukanya Holdings* case was not relevant to the present case as while that case was decided under section 8 while the present case was being adjudicated under section 45 of the 1996 Act.

Finally, the Supreme Court referred to section 24 of the (Indian) Arbitration Act, 1940 under which the court had been vested with the power to refer certain matters to arbitration and retain the rest as the subject matter of the suit. The Court observed that the absence of such language within the 1996 Act (and within section 45) implied that the legislature never allowed for issues to be bifurcated or partially referred under the 1996 Act.

On the facts, the Court noted that the corporate structure of the respondent companies as well as the appellant showcased both an intra and inter legal relationship, and that while all the parties to the dispute had not signed all the agreements under question, the parties would be covered within the expression of "claiming through or under" the parties to the agreement. The Supreme Court therefore referred the matter to arbitration.

Case 1919: NYC II(1), (2), (3)
India: Supreme Court of India
Civil Appeal No. 895 of 2014
World Sport Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd.
24 January 2014
Published in: (2014) 11 SCC 639
Available at: https://main.sci.gov.in/jonew/bosir/orderpdf/1896483.pdf

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

World Sport Group (India) ('WSG') was the successful bidder in a tender invited by Board of Cricket Control India ('BCCI') for media rights of the Indian Premier League for the years 2008–2017. By a pre-bid arrangement, MSM Satellite (Singapore) Pte. Ltd ('MSM') was to get the media rights for the Indian sub-continent

for the years 2008–2010. Accordingly, BCCI and MSM Satellite entered into a Media Rights License Agreement for the years 2008–2012. However, BCCI terminated the agreement with MSM for the Indian sub-continent and commenced negotiations with WSG India.

MSM Satellite filed a petition in the Bombay High Court seeking an injunction against the BCCI from acting on the termination letter and for preventing BCCI from granting the rights under the agreement to any third party. Pursuant to negotiations between BCCI and WSG India, BCCI entered into an agreement with WSG by which the media rights for the Indian sub-continent for 2009 to 2017 was awarded to WSG India. To operate the media rights in India, WSG was required to seek a sub-licensee within seventy-two hours. Though this time period was extended twice, WSG was not able to get a sub-licensee. Consequently, a new Media Rights License Agreement for the Indian subcontinent was entered into between BCCI and MSM. WSG India continued to have the media rights for the rest of the world.

WSG and MSM also executed a Facilitation Deed, governed by English law, with ICC arbitration, by which MSM was to pay Rs. 4.250.000.000 to WSG as facilitation fees. MSM paid Rs. 1.250.000.000 to WSG but rescinded the Facilitation Deed alleging that it was voidable on account of misrepresentation and fraud.

MSM filed a suit for a declaration that the Facilitation Deed was void and for recovery of the amount already paid. WSG acting under clause 9 of the Facilitation Deed sent a request for arbitration to the ICC. MSM Satellite filed a second suit before the Bombay High Court against the WSG for a declaration that as the Facilitation Deed stood rescinded, it was not entitled to invoke the arbitration clause in the Facilitation Deed.

A Single Judge dismissed MSM's application for temporary injunction stating that it would be for the arbitrator to consider whether the Facilitation Deed was void on account of fraud and misrepresentation and that the arbitration must, therefore, proceed and the Court could not intervene in matters governed by the arbitration clause. MSM challenged the order of the Single Judge before a Division Bench, which allowed the appeal and passed an order of temporary injunction restraining the arbitration by ICC. WSG appealed to the Supreme Court of India.

The Supreme Court observed that any civil court in India which entertains a suit has to follow the mandate of sections 44 and 45 of the Arbitration Act, 1996 ('Act'). It held that, even if the Bombay High Court had jurisdiction to entertain the suit, when a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, the Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in section 44 of the Act was null and void, inoperative or incapable of being performed. It also observed that section 45 of the Act made it clear that even where such request was made by a party, it would not refer the parties to arbitration, if it found that the agreement is null and void, inoperative or incapable of being performed.

Relying upon articles I, II and III NYC as set out in the First Schedule of the Act, it was noted that that the agreement referred to in section 44 of the Act was an agreement in writing under which the parties undertook to submit to arbitration all or any differences which have arisen or which may arise between them. Thus, a court was empowered to decline to refer the parties to arbitration only if it found that the arbitration agreement was null and void, inoperative or incapable of being performed.

The Supreme Court held that an arbitration agreement did not become "inoperative or incapable of being performed" merely because allegations of fraud had to be inquired into and that a court could not refuse to refer the parties to arbitration on the ground that allegations of fraud made by a party could be inquired into only by a court and not by an arbitrator. The Court also indicated that, in the case of arbitrations covered by the NYC, a court could decline to make a reference of a dispute covered by the arbitration agreement only if it came to the conclusion that the arbitration agreement was null and void, inoperative or incapable of being performed, and not on the ground

that allegations of fraud or misrepresentation had to be inquired into while deciding the disputes between the parties.

The Supreme Court did not express any opinion as to whether the Facilitation Deed was voidable or not on account of fraud and held that the arbitration agreement contained in Clause 9 of the facilitation deed was wide enough to bring the dispute into arbitration. Accordingly, it set aside the Division Bench order and upheld the Single Judge's order, stating that the arbitration must proceed.

Case 1920: NYC II; III; IV; V
India: Supreme Court of India
Civil Appeal No. 4834 of 2007
P.E.C. Ltd. v. Austbulk Shipping SDN
14 November 2018
Published: (2019) 11 SCC 620; 2018 SCC OnLine SC 2549
Available at:
https://main.sci.gov.in/supremecourt/2005/7070/7070_2005_Judgement_14-Nov-2018.pdf

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

The appellant (a state-owned enterprise) chartered a vessel from the respondent (a Malaysian shipping services company) to transport a consignment from Australia to India. A dispute arose between the parties regarding the quantum of the final demurrage charges payable. The dispute was referred to arbitration by a sole arbitrator seated in London under the rules of the London Maritime Arbitrators Association. The appellant submitted a brief response before the arbitrator but did not participate further in the proceedings. An award was passed in favour of the respondent. Enforcement proceedings were subsequently initiated before the Delhi High Court.

In its objections to the enforcement petition, the appellant submitted that it had not signed the charterparty and consequently there was no arbitration agreement, and the award sought to be enforced was not a valid foreign award as defined under section 44 of the Indian Arbitration Act (the "Act") as the respondent had not filed an authenticated copy of the original agreement at the time of filing the enforcement application. Rejecting the appellant's objections, the High Court ordered enforcement of the award. The appellant challenged the order of the High Court before the Supreme Court.

The points that arose for the consideration were: a) whether an application for enforcement under section 47 of the Act is liable to be dismissed if it is not accompanied by the arbitration agreement?, and b) the legal effect of a party not signing the charterparty and whether there existed a valid arbitration agreement between the parties.

On the first point, the Court first examined the provisions of section 47 of the Indian Arbitration Act (which is based on article IV NYC) which deals with the procedural and evidentiary requirements relating to the enforcement of foreign awards in India. This section provides that the party applying for enforcement of a foreign award "shall" produce before the Court at the time of application the original arbitration agreement or a duly certified copy. The Court also referred to Section 48 of the Indian Arbitration Act (based on article V NYC) in terms of which a court may refuse the enforcement of a foreign award only on the grounds specifically mentioned in the section.

The Court held that the word "shall" appearing in section 47 of the Indian Arbitration Act would have to be read as "may". According to the Court, although the word "shall" prima facie gives an impression of the requirement being mandatory in nature, it was required to be considered in light of the intention of the legislature. The Court observed that the preamble to the Indian Arbitration Act specifically referred to

intention of the legislature to take into account the MAL when legislating on arbitration matters. It also observed that article 35(2) MAL was amended in 2006 to liberalise formal requirements for recognition and enforcement of awards, insofar as presentation of a copy of the arbitration agreement was no longer required. The Court also referred to the provisions of articles III, IV and V NYC, and sought inspiration from the object and purpose of the NYC as summarized by the Guide to Interpretation of the New York Convention issued by the International Council for Commercial Arbitration (ICCA). Based on these considerations and the object of ensuring "smooth and swift enforcement of foreign awards" which underpinned the NYC, the Court held that the word "shall" in section 47 of the Indian Arbitration Act would have to be read as "may".

On the second issue, the Court noted that the contract was governed by English law under which there was no requirement for the charterparty to be signed by the parties to make it binding. Referring to article II NYC, the Court observed that the term "agreement in writing" was very wide, and it was not necessary for such an agreement to be in a contract or an arbitral agreement, as it could also be discerned from the correspondence between parties. The Court decided the issue by affirming the findings of the arbitrator and of the High Court that the arbitration agreement was found in the charterparty and that this could also be discerned from the correspondence between the parties.

Case **1921: NYC V(2)(b)**
Netherlands: Gerechtshof Amsterdam
Case No. 200.234.175/01; ECLI:NL:GHAMS:2019:192
X v. Y
29 January 2019
Available in Dutch at:
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2019:192

Abstract prepared by Heather Clark

This case concerns a refusal to enforce three arbitral awards pursuant to article V(2)(b) NYC and article 1076(1)(B) of the Dutch Code of Civil Procedure. The awards in question were issued pursuant to an agreement that provided for, inter alia, the automatic referral of disputes to arbitration upon the expiry of a time limit and which required the respondent to notify its intention to contest the claim via an electronic communication (i.e., email).

Y provided three loans to X through an online platform (www.btcjam.com), totalling approximately 0.5 bitcoins, with an interest rate of five percent per month. In order to obtain a loan through this platform, X was required to enter into a Borrower and Member Registration Agreement ("Agreement"). This Agreement contained an arbitration clause stating that "All claims and disputes arising under or relating to this agreement are to be settled by binding arbitration in the state of California or another location mutually agreeable to the parties." It also stated that the Borrower would be considered in default if it failed to pay "the principal and/or interest on the date on which the loan falls due" and that 90 days from such default, the matter would be referred to arbitration. According to the Agreement, the arbitration would be conducted by "Dhami Law Firm ("Arbitrator"), an independent, international arbitration firm whose awards are recognized internationally under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards." The Agreement further provided that, in the event of a referral to arbitration, the Borrower was required to notify its intent "to contest the potential issuance of an award in favour of the lenders" by submitting "a written request to support@btcjam.com and pay[ing] a $ 99.00 fee … within 7 calendar days from the date of the Notice of Default."

Three arbitral awards were rendered pursuant to the above Agreement on 12 February 2014 ordering Y to pay 0.42000000, 0.09555000 and 0.00556500 bitcoins, respectively, to X. The awards were signed by the CEO of net-ARB, Inc., a company

incorporated in the state of Georgia. The awards do not specify the place of arbitration or where the award was rendered.

X applied to the Court of Appeal of Amsterdam ("the Court") to enforce these awards. Originals of the awards were shown by X to the Court, and copies thereof were filed. As the residence or domicile of Y was unknown, Y was summoned via the publication of an extract of the writ of summons in the Staatscourant (Government Gazette). Y did not respond to the summons or appear at the hearing.

The Court refused to enforce the awards on the basis that their enforcement would be contrary to the public policy of the Netherlands and specifically because the awards had been rendered in violation of the "beginsel van hoor en wederhoor" (i.e., the principle that both parties should be heard). The Court found that it had the power to refuse enforcement of the awards on this basis pursuant to the public policy exception at article V(2)(b) NYC and article 1076(1)(B) of the Dutch Code of Civil Procedure, and that it could do so on its own initiative. The Court also confirmed that this fundamental principal was applicable in the context of proceedings that were intended to be conducted electronically.

In its reasons, the Court took into account the fact that, pursuant to the Agreement, the arbitration proceedings would be initiated automatically after a period of 90 days following the Borrower's default, and that the Borrower was required to notify, of its own initiative, its intent to put forward a defence by email to an address that appeared to be associated with the online platform within seven days of receiving a Notice of Default. The Court also considered the fact that X had informed the Court that it did not need to take any action in connection with the proceedings and "automatically" received the arbitral awards. The Court concluded that Y had thus not been notified of the proceedings either by the tribunal that rendered the award or by any third party that may have supervised the arbitrations, and as a result had been denied the opportunity to put forward a defence. The Court also observed that while X had confirmed that Y did not participate in the proceedings, this fact had not been mentioned in the awards.

The Court further stated that it did not find it necessary to consider whether the composition of the arbitral tribunal complied with the Agreement, or the implications of the fact that the awards failed to establish that the arbitrations had been conducted "in the state of California or another location mutually agreeable to the parties", as required by the Agreement.

Case 1922: NYC V(2)(b); MAL 34(2)(b)(ii)
Spain: Constitutional Court (First Division)
Judgment No. 46/2020
Alberto Ordóñez Martín and Nuria Casado Barrio
15 June 2020
Available at: https://www.boe.es/boe/dias/2020/07/18/pdfs/BOE-A-2020-8130.pdf

Summary prepared by Maria del Pilar Perales Viscasillas

The judgment relates to an application for *amparo* filed before the Constitutional Court in relation to judgment no. 33/2017 of 4 May 2017 of the Civil and Criminal Division of the High Court of Justice of Madrid, which was handed down in proceedings for the setting aside of an arbitral award, and in relation to various rulings of the same court whereby motions for annulment of the judgment and of other rulings of the court were declared inadmissible.

During the proceedings for the setting aside of the award, the two parties submitted a joint statement indicating that they had agreed to settle their dispute, the substance of which related to a residential lease, and, on the basis of that extrajudicial settlement, requested that the proceedings for the setting aside of the award be terminated and the time limit for the scheduled hearing be suspended.

The Court refused to dismiss the case on the grounds that, without prejudice to parties' general powers of disposition in civil proceedings, the subject matter of the

proceedings for the setting aside of awards was such that termination was not possible given the general interest in eliminating awards that are contrary to public policy. That ruling was upheld when the parties filed further motions for termination of the proceedings in response to the Court's decision. In short, the Court found that once proceedings for the setting aside of an arbitral award had been initiated on grounds that could be raised by the Court on its own motion, the parties could not terminate those proceedings because in so doing they would prevent the Court from exercising an essential function, such as safeguarding the public interest and public policy. The presiding judge dissented from that ruling, deeming that the case should have been dismissed.

Subsequently, the Court handed down a judgment upholding the claim for the setting aside of the arbitral award on the grounds that it had been made with a manifest lack of impartiality and neutrality on the part of the Court of Arbitration and that the arbitration agreement was manifestly invalid.

In applying for the remedy of *amparo*, the appellants alleged that various constitutional provisions had been violated, summarized as the infringement of their right to effective judicial protection (art. 24 (1) of the Constitution) as represented by the right to a substantiated decision that is free of unreasonableness, arbitrariness or patent error. The appellants claimed that the Civil and Criminal Division of the High Court of Justice of Madrid had interpreted the concept of public policy as set out in article 41 (2) (f) of the Arbitration Act (Act No. 60/2003 of 23 December), which corresponds to article 34 (2) (b) (ii) of the Model Arbitration Law, in an overly broad and unjustified manner, which prevented the appellants from exercising their right to termination as concerned the subject matter of the proceedings for the setting aside of the arbitral award.

In the opinion of the Constitutional Court, the contested decision was, at the very least, unreasonable and violated the right to effective judicial protection and proper defence (art. 24 (1) of the Constitution). The Constitutional Court found that there was no rule in Spanish law that prohibited the parties from terminating the proceedings by settling the matter; therefore, the subjective nature of the rights exercised during proceedings for the setting aside of an arbitral award, and thus the right of the parties to determine the course of such proceedings, must be recognized.

Furthermore, the Constitutional Court analysed the concept of public policy, which is established in article 41 (1) (f) of the Arbitration Act as a ground for setting aside and in article V (2) (b) of the New York Convention as a ground for refusal to recognize a foreign award, in the context of the judicial practice of the Constitutional Court. According to the Court, material public policy was to be understood as the set of legal, public, private, political, moral and economic principles that are absolutely necessary for the protection of society in a given place and at a given time, and procedural public policy as the set of necessary principles and formalities under procedural law; only arbitration proceedings that conflicted with any of those principles could be invalidated on the grounds that they conflicted with public policy. Public policy could be regarded as comprising the fundamental rights and freedoms guaranteed by the Constitution, as well as other essential principles that the legislator must uphold as required by the Constitution or in application of internationally accepted principles.

The Constitutional Court found that the High Court of Justice of Madrid had "stretched" the concept of public policy in order to be able to review the substance of the dispute – a task that should essentially fall only to arbitrators – and had thus gone beyond the scope of the proceedings for setting aside and disregarded the parties' right of disposition, and their right to be granted only what they sought, in such a way that the interpretation of "public policy" had been arbitrary and unreasonable, violating the parties' right to judicial decisions based on reasonable grounds.

Consequently, the Constitutional Court granted the remedy of *amparo* and declared all the contested judicial decisions to be invalid.

Case 1923: NYC V(1)(b)
Ukraine: Supreme Court of Ukraine
Cases No. 1423/2012 and 15646/2012
Sea Emerald S.A. v. State Enterprise Shipbuilding Yard named after 61 Kommunars
21 January 2017; 5 October 2017
Original in Ukrainian

Abstract prepared by Sergei Voitovich, National Correspondent, and Anastasiia Shymon

In August 2012, the claimant requested the Ukrainian courts to enforce the arbitral award issued by a sole arbitrator in London (hereinafter, the "Award") on recovery of interest in favour of the claimant in the amount of 35.725.689,93 USD and accrued interest on the tribunal's expenses.

The key issue in dispute was whether the respondent had been given proper notice of date and place of the arbitration proceeding and, accordingly, whether the dispute had been resolved by a competent forum. The respondent was informed of the date and place of arbitration via electronic mail, a method which had not been specified in the parties' contract.

The request for enforcement of the award was heard several times in the first instance, appellate and cassation courts. These courts took various judgments with respect to enforcement sought by the claimant.

By its decision the Court of First Instance satisfied the request of the claimant as to recognition and enforcement of the award. The Court found that the claimant provided evidence of proper notice to the respondent regarding time and place of arbitration proceeding, in particular, the affidavit of the sole arbitrator and the correspondence attached to it.

That decision was appealed, and, in turn, the Court of Appeal refused the enforcement of the award. The Court of Appeal noted that there was no evidence that the parties agreed to using electronic documents and exchanged electronic addresses, and that therefore, no evidence of an agreement of the parties on using electronic notifications in the arbitration proceedings.

In a further appeal to the High Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter, the "High Specialized Court"), the claimant indicated that the case files contained proper and admissible evidence indicating the notification of the respondent regarding the arbitration proceeding. In agreeing with the claimant's statement, the High Specialized Court decided that the exchange of correspondence for sending notifications to the parties by e-mail, which had been a usual practice of the London arbitration, was a valid and admissible proof of the debtor's notification regarding arbitration proceeding.

Subsequently, the respondent appealed to the Supreme Court of Ukraine (hereinafter, the "SCU"). The SCU referred the case for a new consideration to the Cassation Court to review the decision of the High Specialized Court referring to a different interpretation and application of Article V(1)(b) NYC.

By its second decision of 20 January 2016 the High Specialized Court referred the case back to the Court of Appeal for new consideration.

In turn, in its second decision the Court of Appeal again refused again the enforcement of the award stating that, since the parties had not provided for the use of electronic documents in the contract, that method of notification could not be considered appropriate.

The claimant appealed again to the High Specialized Court to set aside the decision of the Court of Appeal and to uphold the decision of the Court of First Instance. However, the High Specialized Court dismissed this appeal stating that: "The Court of Appeal, reversing the decision of the first instance court and rendering a new decision that refused to satisfy the request, rightly based its holding on the fact that

the method of notification could not be considered appropriate as it was not agreed upon by the parties in the contract and therefore could not be taken into account as proof of proper notification …”.

In 2017 the claimant appealed to the SCU with a request for review of the judgment of the High Specialized Court, as well as a request for renewal of the term for its submission. However, the SCU refused to satisfy these requests and enforcement of the award was ultimately not allowed.