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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Printed in Austria

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

Case 1963: [MAL 7 (1)]

Australia: Supreme Court of Queensland
Cheshire Contractors Pty Ltd. v. Civil Mining & Construction Pty Ltd.
1 October 2021
Original in English
Published: [2021] QCA 212

[**keywords**: arbitration agreement; arbitration clause]

The case concerns the interpretation of the phrase "in respect of a defined legal relationship" in a national provision which was modelled after article 7(1) MAL.

The respondent had entered into a subcontract with the appellant to carry out the roadworks of a construction project. A dispute arose between the parties in relation to a claim for payment made by the appellant in connection with the subcontracted works. The appellant filed a claim against the respondent seeking to recover the money said to be owed. The respondent contended that the matter was the subject of an arbitration agreement in the subcontract and applied for an order referring the parties to arbitration in accordance with section 8(1) of the Commercial Arbitration Act 2013 (modelled after article 8(1) MAL). The lower Court allowed the respondent's application, stayed the proceedings, and referred the parties to arbitration pursuant to section 8(1).

Upon appeal, the appellant contended that the conclusion reached by the lower Court was based on an erroneous interpretation of the phrase "in respect of a defined legal relationship" in section 7(1) of the Commercial Arbitration Act 2013 (modelled after article 7(1) MAL). The appellant submitted that the proper construction of section 7(1) required that, to be an "arbitration agreement" within the meaning and for the purposes of section 8(1), a clause in a contract which otherwise satisfies section 7(1) must itself define the legal relationship to which the clause is intended to apply. As the purported arbitration agreement did not itself define the legal relationship to which the clause was intended to apply, the appellant submitted that there was no "arbitration agreement" within the meaning of section 7(1).

The respondent submitted that the appellant's construction was too narrow and artificial. It was submitted that the appellant's reading changed the word "defined" in section 7(1) from an adjective, a word used to describe the type of legal relationship required, into a verb, requiring a definition of the relevant legal relationship to be included in the arbitration agreement. The respondent contended that all section 7(1) required is a defined legal relationship between the parties in respect of which certain disputes are to be referred to arbitration.

The Court dismissed the appeal. In its view, the construction of section 7(1) contended by the appellant was not supported on a textual analysis nor by reference to the context and purpose of the provision. It was found that it was not a requirement of section 7(1) that an arbitration agreement must "define" the legal relationship with respect to which it is intended to operate. The Court referred to authoritative case law from Australia and from New Zealand given the international context of the MAL and considered that it supported a broad interpretation of the phrase "defined legal relationship". The Court found that the reference in the relevant clause to "the disputes or differences" was, on orthodox contractual construction principles, a reference to the disputes or differences arising between the parties that was to be construed as a "defined legal relationship".

Case 1964: MAL 1(1)

Canada: Supreme Court of Canada
Case No. 2020 SCC 16
Uber Technologies Inc. v. Heller
26 June 2020
Original in English
Available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do

[**Keywords:** arbitrability, commercial]

This case primarily addresses the scope of application of the MAL in relation to the word "commercial" in article 1 MAL and the validity of the arbitration agreement.

In order to deliver food using Uber's software applications, a driver (respondent) signed Uber's standard form services agreement (the SA), which contained arbitration and choice of law clauses providing for the settlement of dispute through arbitration of which the seat was in Amsterdam, the Netherlands, under the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules").

When a dispute with Uber Technologies Inc. (claimant) arose, the respondent, who characterized himself as an employee of the claimant, initiated a class action before the Ontario first instance Court against the latter invoking violations of employment standards legislation.

The claimant brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in the SA. The respondent argued that the arbitration clause was unconscionable and therefore invalid. Both parties disagreed as to which arbitration legislation should govern the motion for a stay. The claimant submitted that the 2017 International Commercial Arbitration Act ("ICAA") which implements the MAL was the applicable law, while the respondent argued that the Arbitration Act, 1991 ("AA") applied. The motion judge held that the ICAA applied and stayed the proceeding holding that the issue of the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the competence-competence principle.

The respondent appealed the motion. The Ontario Court of Appeal held that the respondent's objections to the arbitration clause could be dealt with by a court in Ontario and set aside the order to stay proceedings. The Court of Appeal declined to resolve whether the AA or the ICAA applied, holding that the result would be the same under either statute. Also, applying the unconscionability doctrine, it found that the arbitration clause was null and void due to the inequality of bargaining power between the parties and the improvident cost of arbitration for the respondent. The claimant appealed to the Supreme Court of Canada (the Court).

The Court addressed the issue of the law governing the dispute noting that the ICAA and AA are exclusive. It recalled that ICAA implements the MAL and applies to *international commercial arbitration agreements* (section 5(3) ICAA). It stated that the meaning of "commercial" must be the same as the meaning of "commercial" under article 1(1) MAL. The Court further referred to the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* that explains that "labour or employment disputes" are not covered by the term "commercial", "despite their relation to business". The Court concluded from the commentary that a court must determine whether the ICAA applies by examining the nature of the parties' dispute, not by making findings about their relationship. It also concluded that if an employment dispute is excluded from the application of the MAL, then a dispute over whether the respondent is an employee is similarly excluded. Hence, if the ICAA does not apply, the AA does and it directs courts, on motion of a party, to stay judicial proceedings when there is an applicable arbitration agreement. However, the Court found that arbitration agreement is invalid because it is unconscionable and therefore dismissed the appeal.

One judge of the Court had a dissenting opinion and would have allowed the appeal and ordered a conditional stay of proceedings. Referring to an interpretive footnote in the MAL (which explains that the term "'commercial' is to be given a wide interpretation so as to cover all matters arising from all relationships of a commercial nature), to its non-exhaustive list of covered transactions (including licensing agreements) and to the Canadian jurisprudence on the scope of the MAL, she concluded that the focus of the analysis is on the nature of the relationship created by the transaction and not on the dispute. In her understanding, the fact that labour and employment disputes are excluded from the scope of the term "commercial" does not shift the focus of the analysis from the nature of the relationship to the nature of the dispute. As she considered that the underlying transaction between the claimant and the respondent is commercial in nature, she concluded that the parties' relationship is both commercial and international within the meaning of the MAL and that ICCA should apply.

Case 1965: MAL 34; [36]

Mauritius: The Judicial Committee of the Privy Council (on appeal from the Supreme Court of Mauritius)
Privy Council Appeal No. 0109 of 2019
Betamax Ltd v. State Trading Corp.
14 June 2021
Original in English
Published: [2021] UKPC 14
Available at: https://www.jcpc.uk/

[**Keywords**: arbitrators – mandate; award – setting aside; validity; courts; public policy]

This case primarily deals with the extent of court intervention when seized pursuant to articles 34 and 36 of the Model Law on International Commercial Arbitration (the MAL).

STC (the respondent) is a public company responsible for the import of essential commodities to Mauritius. In 2009, it concluded with Betamax (the appellant), a Mauritian private company, a 15-year contract of affreightment (the COA) under which the appellant was to build and operate a tanker and make available its freight capacity to the respondent for the transport of petroleum products from India to Mauritius. In 2015, the Cabinet of the new Government of Mauritius announced it would terminate the COA due to "the unlawful procedure and processes regarding the allocation of the contract" referring to the 2006 Public Procurement Act (the "PP Act") and the 2008 Public Procurement Regulations (the "PP Regulations"). Subsequently, the respondent gave notice that it was unable to use the appellant's services under the COA and the appellant then terminated the COA. The COA contained an arbitration clause under which the appellant commenced arbitration.

While the appellant claimed damages for over USD150 million, the respondent advanced a number of objections to the arbitration. According to the respondent the dispute was not arbitrable because it concerned issues of public order and the contract had been illegally entered into without the approval of the appropriate body as required by the PP Act and the PP Regulations. It further claimed that the decision of the Cabinet was a force majeure event which discharged any obligations under the COA.

The arbitral tribunal ruled that it had jurisdiction over the dispute, that the appellant was entitled to terminate the COA following the respondent's intention not to perform the contract, and that the COA did not breach the PP Act or PP Regulations because it was exempted from them. It considered that there was no force majeure event and granted the appellant damages in the sum of USD115.3 million.

The respondent and the appellant submitted their application respectively to set aside and to enforce the award to the Supreme Court of Mauritius (the "Supreme Court") as the supervisory court for the arbitration. The Supreme Court held that the COA was

not exempted from the PP Act and PP Regulations and that the contract was thus illegal. It concluded that the award was in conflict with the public policy of Mauritius and set it aside under section 39(2)(b)(ii) of the Mauritius International Arbitration Act (IAA) (modelled after article 34 MAL). The Supreme Court decision was appealed to the Judicial Committee of the Privy Council (the "Board") under section 42(2) IAA.

The Board identified three issues, whereby the relevance of the two last issues would depend on the answer to the first one. First, it had to examine whether the Supreme Court was entitled to review the arbitrator's ruling that the COA was not subject to the provisions of the PP Act and PP Regulations. If the Supreme Court was entitled to such review, the Board was then to determine whether the COA had been entered into in breach of the PP Act and PP Regulations. The last determination was whether the award was in conflict with the public policy of Mauritius (in case it gave effect to an illegal contract).

The Board recalled the purpose of the IAA, that was based on the MAL, and a number of principles set out therein and relevant to the issue in the appeal (competence-competence, the separability of the arbitration agreement, the finality of awards and the limited scope for intervention by the court). It reviewed the relevant case law.

With respect to the first issue, i.e. the scope of the power of the Supreme Court under section 39(2)(b)(ii) IAA, the Board recalled that the list of grounds for setting aside an award is exclusive, as made clear in the MAL's Travaux préparatoires and the UNCITRAL Explanatory Note to the MAL. The Board examined whether section 39(2)(b)(ii) IAA permits a challenge to the award on the grounds that the Supreme Court is entitled to decide on the interpretation of legislative provisions which determine the legality of the COA, even though the issue of interpretation is within the jurisdiction of the arbitrator and has been decided in the award. That question, it noted, is distinct from the question as to the nature and scope of public policy in so far as it affects the consequences of any illegality.

The Board recalled that the MAL is premised on the principle that where a matter has been submitted to an arbitral tribunal and is within the jurisdiction of the arbitral tribunal, the arbitral tribunal's decision is final whether the issue is one of law or fact. It underlined that the court intervention is specifically limited to setting aside the award on the grounds set out in section 39(2) IAA. In relation to the issue of whether the award conflicts with public policy, the court's intervention proceeds on the court's application of public policy to the findings (whether of fact or law) made in the award. To read section 39(2)(b) more widely would be contrary to the clear provisions as to the finality of awards. The Board concluded that the effect of section 39(2)(b)(ii) is simply to reserve to the court this limited supervisory role which requires the court to respect the finality of the award. It cannot, under the guise of public policy, reopen issues relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme.

The Board therefore considered that the Supreme Court was in error in reviewing the decision of the Arbitrator that the COA was exempt from the provisions of the PP Act and PP Regulations. That decision was final and binding on the parties and therefore no issue arose under section 39(2)(b)(ii) IAA as to whether the award was in conflict with the public policy of Mauritius.

Even if, in view of the Board's conclusion on the first issue, the second issue was no longer to be determined, the Board provided the reasons for its view that the Arbitrator was correct in finding that the COA was not illegal. It considered unnecessary to address the third issue in the appeal, i.e. the scope and extent of public policy in relation to an illegal contract.

The Board therefore allowed the appeal, set aside the order of the Supreme Court and allowed the application to enforce the award.

Cases relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York Convention" (NYC)[1]

Case 1966: NYC II(1)(2); V(2)(b)

Brazil: Superior Tribunal de Justiça (Superior Court of Justice)
Case No. SEC 967
Plexus Cotton Limited v. Santana Têxtil S/A
15 February 2006
Original in Portuguese
Available at: http://www.stj.jus.br (Official website of the Superior Tribunal de Justiça)

Abstract published on www.newyorkconvention1958.org

Plexus Cotton Limited (Plexus) and Santana Têxtil S/A (Santana) entered into two contracts for the purchase and sale of cotton. One of the contracts had a clause for arbitration at the Liverpool Cotton Association in the United Kingdom of Great Britain and Northern Ireland. Santana did not sign either of the contracts. Santana rejected the goods, claiming that the delivery was late and that the quality was inferior to what was contracted for.

Plexus initiated arbitration proceedings after Santana rejected the goods and obtained an award ordering Santana to pay approximately two hundred and thirty thousand US dollars for breach of contract.

Plexus sought recognition and enforcement ("homologação") before the Superior Tribunal de Justiça (Superior Court of Justice). Santana raised objections arguing that (i) the issue of recognition and enforcement had already been previously decided by the Supremo Tribunal Federal (Federal Supreme Court) and it had become *res judicata*; and (ii) there was no valid arbitration agreement due to the absence of unequivocal consent in writing to arbitrate because the contract was not signed and, consequently, the arbitral award violated Article 39(II) of the Brazilian Arbitration Act (which mirrors Article V(2)(b) NYC).

The Superior Tribunal de Justiça rejected the request for recognition and enforcement based on the Brazilian Arbitration Act (the Arbitration Act).

The majority of the Superior Tribunal de Justiça rejected the objection that the decision had become res judicata, which, if so, would have led to the dismissal of the claim without prejudice. It first took note of Article 4(1) of the Arbitration Act, which has similar but not identical language to Article II(1)(2) NYC (it provides: "Article 4- An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise with respect to that contract. (1) The arbitration clause shall be in writing and it can be inserted in the main contract or in a document to which it refers").

Based on this provision, the Superior Tribunal de Justiça found that there was no agreement to arbitrate because there was no consent in writing, as the contract containing the arbitration agreement was unsigned.

The Superior Tribunal de Justiça also added that under Brazilian law there is no equivalent to the English rule which recognizes an arbitration agreement in an unsigned contract. It also held that the lack of explicit consent to the arbitration agreement violated Brazilian public policy under Article 39(II) of the Arbitration Act.

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

Case 1967: NYC V(2)(b)

Brazil: Superior Tribunal de Justiça (Superior Court of Justice)
Case No. SEC 885
Kanematsu USA Inc. v. ATS – Advanced Telecommunications Systems do Brasil Ltda.
18 April 2012
Original in Portuguese
Available at: http://www.stj.jus.br (Official website of the Superior Tribunal de Justiça)

Abstract published on www.newyorkconvention1958.org

An American company, Kanematsu Usa Inc. (Kanematsu), entered into a contract with a Brazilian company, Advanced Telecommunications Systems do Brasil Ltda. (ATS), for the purchase and sale of telecommunications equipment. The contract included an arbitration clause providing for arbitration under the auspices of the American Arbitration Association (AAA).

An award was rendered and the Claimant sought recognition and enforcement ("homologação") before the Superior Tribunal de Justiça (Superior Court of Justice). ATS raised objections to the recognition and enforcement on two different grounds. It argued that the arbitral tribunal did not have jurisdiction over the claim because the contract containing the arbitration clause was unsigned, which demonstrated a lack of consent to arbitration. Granting recognition and enforcement would constitute a violation of the principle of the parties' autonomy ("autonomia da vontade") and consequently, a breach of Article 39(II) of the Brazilian Arbitration Act (this article mirrors Article V(2)(b) NYC). The Respondent also argued that the award should not be granted recognition and enforcement because it failed to state reasons, which constitutes a violation of a Brazilian constitutional provision.

The Superior Tribunal de Justiça refused to grant recognition and enforcement based, for the most part, on the Brazilian Arbitration Act. The Superior Tribunal de Justiça considered that the contract was not signed and that the Respondent had repeatedly objected to the tribunal's jurisdiction. Thus, it was not possible to establish that the parties had agreed to arbitration in writing. It did not review the objection based on the failure to state reasons.

Case 1968: NYC V; V(2); V(2)(b)

Lithuania: Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania)
Case No. 3K-3-411/2011
K.M. v. UAB "A. Sabonio Žalgirio krepšinio centras"
4 November 2011
Original in Lithuanian
Available at: https://www.lat.lt (website of the Supreme Court of Lithuania)

Abstract published on www.newyorkconvention1958.org

K.M., a basketball player, entered into a contract with UAB "A. Sabonio Žalgirio krepšinio centras" ("Sabonio centras"), a basketball club, which contained an arbitration clause. A dispute arose concerning termination of the contract and K.M. initiated arbitration proceedings against Sabonio centras, obtaining a favourable award, which it then sought to have recognized and enforced in Lithuania before the Lietuvos Apeliacinis Teismas (Court of Appeals of Lithuania).

Sabonio centras objected to the request based on Article V(2)(b) NYC, arguing that the award was contrary to public policy. The Lietuvos Apeliacinis Teismas dismissed the objection and granted recognition and enforcement of the award. Sabonio centras appealed to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

The Lietuvos Aukščiausiasis Teismas affirmed the decision of the Lietuvos Apeliacinis Teismas, holding that the award did not violate Article V(2)(b) NYC. It noted that the concept of "public policy" should not be interpreted to mean "national public policy" as such an interpretation would contradict the purpose of the NYC. It further noted that the concept of "public policy" had to be interpreted in an international context

otherwise the concept of public policy in international commercial arbitration would depend on the jurisdiction before which recognition and enforcement of the award is sought. Lastly, it found that parties who opted for arbitration have reasonable expectations of the factors that may affect the recognition and enforcement of an arbitral award pursuant to the NYC.

Case 1969: NYC II; II(3)

Switzerland: Federal Tribunal
Fondation M v. Banque X
29 April 1996
Original in French
Available at: http://www.bger.ch (website of Swiss Federal Tribunal)

Abstract published on www.newyorkconvention1958.org

A contract was concluded between a Foundation and a Bank on 25 January 1990. The contract contained an arbitration agreement providing for the settlement of disputes by a sole arbitrator seated in Geneva. A dispute arose and the Foundation sued the Bank before the Swiss courts.

The Bank objected to the jurisdiction of the Swiss courts based on the existence of an arbitration agreement. Both the Tribunal de première instance (Court of First Instance) and the Cour de Justice of Geneva (Geneva Court of Justice) accepted this argument and found that they lacked jurisdiction.

The Tribunal Fédéral (Federal Tribunal) confirmed and held that a state court shall refuse jurisdiction where an arbitration agreement exists between the parties, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The Tribunal Fédéral found that the NYC did not apply in the present case as the arbitration agreement provided for the arbitration to be seated in Switzerland. The Tribunal Fédéral applied Article 7(b) of the Swiss Private International Law and held that when a court is asked to refer a dispute to arbitration, it shall carry out only a prima facie analysis of the validity of an arbitration agreement. It added that Article II(3) NYC adopted the same approach. In the present case, the Tribunal Fédéral held that the arbitration agreement was *prima facie* valid and the parties were to be referred to arbitration.

Case 1970: NYC IV; IV(1); IV(1)(a)

Switzerland: Cour de Justice de Genève (Geneva Court of Justice)
R S.A. v. A Ltd.
15 April 1999
Original in French

Abstract published on www.newyorkconvention1958.org

On 5 June 1996, A and R entered into a sales contract providing for arbitration pursuant to the rules of CIETAC of the China Council for the Promotion of International Trade (the “Chinese Commission for Arbitration” or “CCA”). A dispute arose between the parties and the CCA rendered an award in A’s favour.

A sought to enforce the award in Switzerland by providing to the Tribunal de Première Instance of Geneva (Geneva Tribunal of First Instance) a copy of the contract, the original award in Chinese with a complete translation in French, of which the first and the last pages were sworn to be in conformity with the original. The Tribunal de Grande Instance granted enforcement of the award.

R appealed and challenged enforcement on the grounds that A had not complied with Article IV NYC. It argued that A had only supplied the Tribunal de Première Instance with a non-certified copy of the main contract (containing the arbitration agreement), the original award in Chinese and a French translation of the award that was certified on the first and last pages only.

The Cour de Justice de Genève (Court of Justice of Geneva) dismissed the appeal. It held that pursuant to Article 194 of the Swiss Private International Law, the NYC was applicable to the recognition and enforcement of awards rendered abroad, regardless of whether the State where the award had been rendered was a party to the NYC. The Cour de Justice stated that the formal requirements of Article IV NYC should be construed in a flexible manner. It recalled that the NYC was meant to improve recognition and enforcement of arbitral awards, and in particular, the party seeking enforcement only needed to comply with Article IV NYC, after which the burden shifts to the party opposing enforcement to prove a ground for denial of enforcement. The Cour de Justice held that the party seeking enforcement must at least provide the arbitration agreement and the arbitral award. It noted that R had admitted that A had submitted the original copy of the award and that although the translation the first and last pages of the award were certified, these were the most crucial pages since they established the identity of the parties and contained the final decision of the arbitral tribunal.

Case 1971: NYC V; V(1); V(1)(d); V(2); V(2)(b)

Switzerland: Federal Tribunal
Case No. 4A_233/2010
X. SA. c. Y.
28 July 2010
Original in French
Available at: http://www.bger.ch (website of Swiss Federal Tribunal)

Abstract published on www.newyorkconvention1958.org

Y, a company incorporated in the United States of America, contracted to maintain and service three aircrafts of X, a Swiss company. The contract provided for arbitration before a panel of three arbitrators.

Y initiated arbitral proceedings and, with X's consent, submitted the dispute to a sole arbitrator. The arbitrator ordered an award for damages in favour of Y.

Y sought to enforce the award in Switzerland. X argued that the award had been improperly procured because: (i) it was determined by a sole arbitrator, contrary to the provisions of the contract; (ii) the arbitrator's daughter had been a trainee in Y's counsel's law firm and Y's counsel had met the arbitrator once; and, (iii) Y's counsel and the arbitrator were qualified to practice before the same Circuit of Court of Appeals in the United States. Matter (ii) had been put to X's counsel, who had answered that it had no objection to the continuance of arbitral proceedings.

X's arguments were rejected by the Tribunal of First Instance of Geneva and the Court of Justice of the Canton of Geneva. X appealed.

The Swiss Federal Tribunal dismissed the appeal. With respect to (i), X had consented to a sole arbitrator; (ii), even X's counsel had not considered that matter to have been prejudicial; and, (iii) did not cast doubt on the arbitrator's impartiality. The Federal Tribunal held that Article V NYC is exhaustive (3.2.1). It further held that the party opposing recognition and enforcement bears the burden of proof under Article V(1) NYC (3.2.1). Finally, a party must raise any grounds for challenge as soon as it becomes aware of them (3.2.1). For the recognition of an award to violate Swiss public policy, such recognition must offend Swiss concepts of justice in an intolerable manner (3.2.1).

Case 1972: NYC IV; IV(1); IV(1)(a); V; V(1); V(1)(b); V(1)(d); V(2); V(2)(b)

Switzerland: Bundesgericht
Case No. 4A_124/2010
4 October 2010
Original in German
Available at: http://www.bger.ch (website of Swiss Federal Tribunal)

Abstract published on www.newyorkconvention1958.org

The Applicant entered into a sale purchase agreement for sheet steel with the Respondent's Czechoslovak predecessor company. The parties agreed that disputes under the contract should be resolved by the arbitration court at the Czechoslovak Chamber of Commerce and Industry and that Czech substantive law should apply.

After the dissolution of Czechoslovakia, the Respondent initiated arbitration proceedings at the arbitration court of the Chamber of Commerce of the Czech Republic and the Czech Agriculture Chamber.

Dismissing the Applicant's objection to jurisdiction, the arbitral tribunal confirmed its jurisdiction in an interim award followed by a final award in favour of the Respondent.

Upon the Respondent's application, the Bezirksgericht (Regional Court) Zurich recognized the award and declared it to be enforceable. The Applicant appealed to the Obergericht (Higher Cantonal Court) Zurich, which rejected the appeal, except in relation to nominal sums. Thereafter, the Applicant filed a complaint (Beschwerde) before the Bundesgericht (Swiss Federal Tribunal), requesting it to annul the Obergericht's decision and not to declare the award enforceable.

The Applicant alleged that the Obergericht's decision was incorrect because (i) the Respondent had not submitted all relevant documentation, as required under Article IV(1) NYC, at the time of submission of its original enforcement application and could not submit such documentation later, (ii) the arbitral award of which the Respondent had submitted a certified copy had been signed only by the tribunal chairman, but not by the other two tribunal members, (iii) the enforcement of the award violated Swiss public policy, (iv) the recognition and enforcement violated Article V(1)(d) and (b) NYC because it was issued by a tribunal of the Chamber of Commerce of the Czech Republic and the Czech Agriculture Chamber under the arbitration rules of the same, both of which the parties had not previously agreed to, (v) the arbitrators' nomination violated Article V(1)(d) NYC since the arbitrators were not appointed by the Czechoslovak Chamber of Commerce and Industry, and (vi) the award violated Article V(1)(d) NYC since the chairman of the tribunal participated both in the decision regarding the Applicant's jurisdictional defence and the final award, which was not permitted by the applicable arbitral rules.

The Bundesgericht upheld the Obergericht's decision. It found that Article IV(1) NYC did not prevent an enforcement creditor from resubmitting an enforcement application, noting that both international case law and academic literature showed that a subsequent submission of improved documentation in the same proceedings, or the resubmission of an enforcement application together with improved documentation, was permitted. It found that it would contradict the exhaustive enumeration of grounds for refusal of enforcement under Article V NYC, and the required narrow interpretation of such grounds in light of the recognition and enforcement friendly spirit of the NYC, by not permitting the resubmission of a recognition and enforcement application solely on the ground that the possibility of resubmission was not foreseen by the text of the NYC. According to the Bundesgericht, not allowing a resubmission would be equivalent to creating a procedural ground for refusing recognition and enforcement that was not foreseen in the NYC.

The Bundesgericht further found that, in the present case, the fact that the award submitted by the Respondent was a duly certified copy which had been signed only by the tribunal chairman did not affect its enforceability. It held that the form requirements under Article IV NYC were not to be interpreted restrictively since it

was the purpose of the NYC to facilitate the enforcement of arbitral awards. It moreover held that certification under Article IV(1)(a) NYC meant a confirmation of the authenticity of the award and that such certification was not necessary if the authenticity of the award was not contested at all, as in the present case.

Regarding the public policy defense, the Bundesgericht noted that Article V(2)(b) NYC was an exception provision, which was to be interpreted restrictively both generally and even more so in the context of proceedings for recognition and enforcement of foreign decisions in relation to which the public policy defense was more limited compared to the direct application of foreign law. The Bundesgericht stated that the recognition of a foreign award would violate Swiss public policy if it violated the local sense of justice in an unacceptable manner so as to disrespect fundamental provisions of the Swiss legal order. It further clarified that a foreign decision could be incompatible with the Swiss legal order either due to its substantive content or due to a violation of fundamental procedural principles, such as the right to a fair proceeding or the right to be heard. The Bundesgericht found that the Applicant had not shown that the recognition and enforcement of the award would intolerably violate the Swiss sense of justice.

As regards the alleged violation of Article V(1)(d) NYC, the Bundesgericht found that it was not a violation of Article V(1)(d) and V(1)(b) NYC, or of party autonomy that the award had been issued by the Chamber of Commerce of the Czech Republic and the Czech Agriculture Chamber, since the Czechoslovak institution originally agreed upon by the parties no longer existed after the dissolution of Czechoslovakia and the acting institution had been determined under a particular Czech law to be its legal successor and that the arbitration rules of the successor institution could indeed be applied given that they did not substantially differ from the old rules and did not reduce the rights of the parties. Based on the same reasoning the Bundesgericht also rejected the alleged violation of Article V(1)(d) NYC in relation to the fact that the arbitrators were not appointed by the Czechoslovak Chamber of Commerce and Industry.

Finally, the Bundesgericht rejected the alleged violation of Article V(1)(d) NYC in relation to the chairman's participation in both the decision about the Applicant's jurisdictional defense and the final award, finding that the parties had been given an opportunity to object to this but had failed to do so.

Case 1973: NYC V; V(2); V(2)(b); IV; IV(1); IV(1)(b)

Switzerland: Federal Tribunal
Case No. 5A_427/2011
10 October 2011
Original in French
Available at: http://www.bger.ch (website of Swiss Federal Tribunal)

Abstract published on www.newyorkconvention1958.org

A and B concluded a contract for the delivery of goods from A to B. The bank acted as guarantor for B, agreeing to pay the price of goods upon the presentation of certain documents by A. These were presented and payment was made. Subsequently, B entertained doubts as to the authenticity of the documents and alleged that it had not received the agreed goods.

B commenced an arbitration before the Syrian Council of State, relying on a pro forma invoice dated 22 February 2001 which provided for arbitration. The Council of State found that A had used a falsified inspection certificate in the documents submitted to the bank and that A did not participate in the proceedings.

B's bank also initiated criminal proceedings against A in France; the French court found there had been no fraud.

B applied to the Tribunal of First Instance in Geneva, seeking to freeze A's assets held by D's bank in Geneva and enforce the award. In its application it submitted faxed copies of the invoice containing the arbitration agreement.

The Tribunal of First Instance found for B; its decision was upheld on appeal. A appealed again.

The Swiss Federal Tribunal dismissed A's appeal. The Federal Tribunal held that Article IV(1)(b) NYC, which requires the original arbitration agreement to be submitted for an award to be enforceable, should not be interpreted in an excessively formalistic manner. It held that although the document submitted was not the original invoice but a faxed copy, the authenticity of the document had not been challenged by A. Arguments by A that it had not been notified to participate in the proceedings (pursuant to Article V(1)(b) NYC) and that enforcement of the award would be contrary to Swiss public policy (Article V(2)(b) NYC) were unsuccessful on the facts.

Case 1974: NYC V; V(1); V(1)(e); VI

United Kingdom: England and Wales, High Court
Case No. 2004 1031
IPCO v. Nigeria (NNPC)
27 April 2005
Original in English
Published: [2005] EWHC 726 (Comm)

Available at: http://www.bailii.org/ (British and Irish Legal Information Institute)

Abstract published on www.newyorkconvention1958.org

IPCO (Nigeria) Ltd ("IPCO") was the Nigerian subsidiary of a Hong Kong company. It agreed to construct a petroleum export terminal for the State-owned Nigerian National Petroleum Corp. ("NNPC"). The contract contained a clause providing for arbitration in Nigeria under Nigerian law. Disputes arose under the contract and were referred to arbitration.

The tribunal made an award in favour of IPCO. NNPC applied to the Nigerian courts to have the award set aside. Meanwhile, IPCO sought enforcement of the award in the English High Court.

The Court ordered enforcement under section 101(2) of the Arbitration Act 1996 (U.K.) ("the Act") (providing for enforcement as a judgment or order of the court of an NYC award, as defined by the Act).

NNPC then applied to the Court to set aside the enforcement order pursuant to section 103(2)(f) of the Act (incorporating Article V(1)(e) NYC regarding refusal to recognize or enforce an award where, inter alia, the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made) and section 103(3) of the Act (incorporating Article V(2) NYC regarding refusal to recognize or enforce an award where, inter alia, it would be contrary to public policy to do so). In the alternative, NNPC sought to adjourn enforcement pursuant to section 103(5) of the Act (incorporating Article VI NYC regarding adjournment of the decision on the recognition or enforcement of the award where an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, it was made). IPCO applied for security in the event that enforcement be adjourned.

The Court dismissed NNPC's application to have the enforcement order set aside, but agreed to adjourn enforcement on condition that NNPC pay a sum indisputably due to IPCO under the contract, in addition to U.S. $50 million by way of security. In so ruling, the Court expounded six broad principles.

First, it noted that section 103 of the Act was pro-enforcement, reflecting the purpose of the NYC itself. It remarked that even where a ground for refusing enforcement was made out, the Court retained discretion to enforce the award.

Second, it stated that section 103(2)(f) was only applicable where the award had been set aside or suspended by a court in the country of origin; its application was not triggered automatically by a challenge being brought before a court in the country of origin.

Third, it reasoned that considerations of public policy, if relied on to resist enforcement, should be approached with extreme caution. In its view, the public policy exception in section 103(3) was not intended to furnish an open-ended escape route for refusing enforcement of NYC awards, but was confined to the public policy of England.

Fourth, it considered that section 103(5) achieved a compromise between, on the one hand, ensuring that enforcement was not frustrated by proceedings being brought in the country of origin and, on the other hand, ensuring that proceedings in the country of origin not be pre-empted by rapid enforcement of the award in another jurisdiction. In the Court's view, pro-enforcement assumptions were sometimes outweighed by respect due to the courts in the country of origin.

Fifth, the Court noted that the Act did not furnish a threshold test in respect of the exercise of the court's wide discretion pursuant to section 103(5) (which reflected Article VI NYC). The Court identified a number of factors which were relevant to the exercise of that discretion, including, inter alia, whether the proceedings in the country of origin had a realistic prospect of success.

Sixth, the Court emphasized that the NYC contained no nationality condition and was thus applicable where, as in the present case, an award was made abroad in an arbitration between two parties of the same nationality. It noted that, while the NYC was primarily intended to facilitate international arbitration, its benefits were equally available to a party seeking enforcement in a foreign country of a domestic arbitration award. As such, the Court reasoned that it would be wrong to introduce a nationality condition into the NYC "by the backdoor", by imposing such a condition for the purpose of an application for enforcement (or non-enforcement) under the Act.

In light of all the above, the Court decided against proceeding with immediate enforcement of the award, thereby pre-empting the decision of the Nigerian court on the challenge of the award (which, in the Court's view, was bona fide and had a realistic prospect of success in certain respects). Nor was it minded to merely adjourn the order, thus giving too little weight to the importance of enforcement. Instead, it was satisfied that justice would be done by adjourning enforcement of the order on the terms outlined above.