United Nations A/CN.9/SER.C/ABSTRACTS/227

General Assembly

Distr.: General
23 September 2023

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

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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.

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.

Printed in Austria

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

1. Case 2091: MAL 34(2)(a)(i); 34(2)(a) (ii)

Hong Kong SAR: High Court (Court of First Instance)
HCCT 27/2020; [2021] HKCFI 327
AB v CD
18 February 2021
Original in English
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133749&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *arbitral awards; arbitral proceedings; arbitral tribunal; arbitration agreement; award – setting aside; courts; due process; notice; procedure; validity*]

This case highlights the importance of identifying the true parties to the arbitration proceedings, failing which will render the arbitral award liable to be set aside.

An arbitral award was made in favour of the defendant, in which the plaintiff was ordered to make payment to the defendant. The plaintiff sought to set aside the award on the grounds that:

(i) It was not a party to the arbitration agreement (section 81(1) of Hong Kong SAR Arbitration Ordinance (Cap. 609), herein referred as the Arbitration Ordinance; corresponding to article 34(2)(a)(i) of MAL);

(ii) The award deals with a dispute not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (section 81(1) of the Arbitration Ordinance; corresponding to article 34(2)(a)(iii) of MAL); and

(iii) It had never been notified of the arbitration (section 81(1) of the Arbitration Ordinance; corresponding to article 34(2)(a)(ii) of MAL).

In opposition, the defendant argued that the plaintiff is estopped and debarred from denying that the arbitral award is enforceable against it, on the basis that employees of the plaintiff had misled the defendant and the tribunal into believing that the plaintiff was a company that was renamed, and the plaintiff had failed to state its objection to any procedure in the arbitration proceedings.

The Court held that the named claimant company to the arbitration proceedings and the plaintiff were different legal entities and the wording of the arbitration agreement did not encompass the plaintiff as a party to the arbitration agreement. It further held that the notice(s) of arbitration sent by the defendant to the named claimant company to the arbitration did not constitute a sufficient notice of the proceedings to the plaintiff, even if both companies were situated at the same place, for "… the court and tribunal cannot expect either of them to take action and enquire into or respond to any notice directed at another, even affiliated, company. It would be totally unreasonable, onerous and unfair to do so."

The Court also rejected the submissions that the plaintiff had misled the defendant and the arbitral tribunal into believing that it was the same entity as the named claimant company in the arbitration proceedings. The Court held it was incumbent on the defendant to identify the proper party to the arbitration proceedings, and to verify its name, particularly after queries had been raised. It further held that the plaintiff had no obligation to participate in an arbitration of which it disputed to be a party, and its lack of participation did not give rise to estoppel.

The arbitral award was therefore set aside by the Court on the ground under article 34(2)(a)(i) MAL, that there being no valid arbitration agreement between the plaintiff and the defendant.

2. Case 2092: MAL 34(2)(a); 34(2)(b)(ii)

Hong Kong SAR: High Court (Court of First Instance)
HCCT 54/2018; [2019] HKCFI 1257
Weili Su & Flash Bright Power Ltd v Shengkang Fei and Others
15 May 2019
Original in English
Reported in [2019] 2 HKLRD 1214
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=121956&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

[**Keywords**: *arbitral awards; arbitral proceedings; arbitral tribunal; arbitration agreement; arbitration clause; award – setting aside; procedure; public policy; validity*]

This case concerns the defendant's application for security against the plaintiff's application for setting aside an arbitral award. The plaintiffs sought to set aside the arbitral tribunal's award of ordering the plaintiffs to make payments to the defendants for the breach of a shareholders' agreement. In opposition, the defendants applied for security and sought enforcement of the arbitral award.

The plaintiffs applied to the Court to set aside the arbitral award pursuant to section 81 of the Hong Kong SAR Arbitration Ordinance ((Cap. 609), herein referred as the Arbitration Ordinance) (corresponding to article 34 of MAL), while the defendants sought leave to enforce the award and security under section 86(4) of the Arbitration Ordinance as a condition for furthering the plaintiffs' setting aside application.

Insofar as the defendant's application for security is concerned, the Court examined the two well-known factors, namely (a) the strength of the argument that the award is invalid; and (b) the ease or difficulty of the enforcement of the award if the enforcement is delayed.

The Court held that the award was manifestly valid for the following reasons: (1) the Court rejected the plaintiffs' submissions that the defendants were never intended to have an arbitrable dispute under the shareholders agreement against the plaintiffs. The fact that the defendants did not have a right to appoint an arbitrator was not material. In any event, it was provided in the agreement that the third arbitrator was to be appointed by the arbitration centre and it arguably protected the interest of the parties who had no right to appoint an arbitrator of their choice; (2) as to the complaint that the arbitral tribunal was not constituted in accordance with the parties' agreement, the fact that the plaintiffs had not raised this in the arbitration strongly indicated that the plaintiffs had waived any objection on that basis and in any event they had suffered no prejudice; (3) the complaint about that a defendant was not a party to the arbitration agreement was similarly rejected for want of objection raised in the arbitral proceedings; (4) insofar as the plaintiffs' complaint about the tribunal deciding the dispute on unpleaded and unparticularized claims is concerned, the Court held that any claims that an award being outside the terms of the submission to arbitration was narrowly construed and included only those decisions which were "clearly unrelated to or not reasonably required for the determination of the issues that had been submitted to arbitration", and that in the present case it had not been made out; and (5) the plaintiffs had had ample notice to meet in the arbitration with the reasonable opportunity to present their own case.

As to the public policy ground (article 34(2)(b)(ii) MAL), the Court rejected the plaintiffs' arguments in the light of the above. Further, the Court held that there were public policy interests in upholding parties' agreement to arbitrate their dispute, facilitating enforcement of arbitral awards, and observing obligations assumed under the New York Convention for enforcement of arbitral awards. It was against such public policy interests to delay the enforcement of an award in the absence of any substantial grounds.

Insofar as the ease or difficulty of the enforcement is concerned, the Court, on the evidence before it, found it impossible to believe that the plaintiff(s) had no assets within jurisdiction; and the Court believed that the plaintiffs would have no hesitation to dissipate and remove the assets in order to defeat the enforcement of the award.

In conclusion, the Court ordered the plaintiffs to provide security as a condition in order to further their application for setting aside the arbitral award, as such application lacked merits, and the plaintiffs failed to make frank disclosure of their assets.

3. Case 2093: MAL 28(1); 28(4); 34

Malaysia: High Court of Malaya at Kuala Lumpur (Commercial Division)
Originating Summons No.: Wa-24ncc (Arb)- 25-09/2020
Hindustan Oil Exploration Company Limited v. Hardy Exploration & Production (India) Inc.
10 April 2022
Original in English
Published: [2022] MLJU 617
Available at: https://efs.kehakiman.gov.my/EFSWeb/DocDownloader.aspx?DocumentID=4a1daa03-8151-45bc-ae49-e911f818ddd7&Inline=true

[**Keywords**: *applicable law; arbitral proceedings; procedure; substantive law; arbitral tribunal; arbitral awards; arbitration agreement; arbitration clause; arbitrators – mandate; award; award – setting aside; choice of law; courts; public policy*]

The plaintiff, the defendant and other parties entered into a Joint Operating Agreement (JOA) and a subsequent addendum agreement, to carry out petroleum exploratory operations in the offshore waters. The plaintiff and other parties collectively constituted the "contractor", and the defendant is the "operator" in the petroleum exploratory contract area. The contract area was shut down in 2011, nonetheless the defendant claimed for expenses that continued to incur after the shut down against the plaintiff and others as per their respective shares in the JOA. A dispute then arose with respect to the parties' liability for the expenses incurred. The dispute was submitted to arbitration and the arbitral tribunal found amounts due to the defendant and directed that the parties undertake a reconciliation of the expenditures.

The plaintiff was not satisfied with the arbitral award and filed a court case to set aside the award. In gist, the arbitral tribunal decided the award based on the Malaysian limitation laws but not the Indian limitation laws. The arbitral tribunal decided that defendant's claim was not time-barred. The plaintiff's claim was that the tribunal's award is contrary to the public policy of Malaysia and in breach of natural justice relying on section 37 of the Arbitration Act 2005, Laws of Malaysia, Act 646 (corresponding to article 34 MAL). The plaintiff's claimed that the applicable limitation law was not decided in accordance with Indian law while that was chosen by the parties as applicable law. The plaintiff referred to article 28 (1), (4) of MAL which says that the dispute in arbitration must be based on the rule of law chosen applicable to the substance of the dispute. And moreover, the dispute must be decided in accordance with the terms of the contract between the parties.

The defendant disagreed with the plaintiff's arguments and submitted that first, the procedural law was the law of the seat of arbitration but not the chosen law. Second, the plaintiff's public policy argument was without merit. While the concept of public policy of a State has not been defined in the MAL, the issue of contractual interpretation cannot amount to a breach of public policy. Furthermore, according to article 34 of MAL, the final decision in the arbitration cannot be appealed or set aside by the court.

The Court held that the plaintiff's contentions are an appeal on the merits of the applicable limitation law in the arbitral award. The Court can only adjudicate on

section 37 of the Arbitration Act (corresponding to article 34 MAL), but not on the merits, as there cannot be an appeal from the arbitral tribunal's decision. The Court agreed with the defendant's claim. The applicable rule of limitation is for the arbitral tribunal to decide as per the JOA and the addendum agreement. Hence, the tribunal neither exceeded any of its jurisdictional limits nor had it affected the public policy of Malaysia. Lastly, even if the Court finds a serious breach, its decision would not be anything different from that of the arbitral award. The plaintiff's claim was dismissed with costs.

4. Case 2094: MAL 5; 9; 17(J)

Malaysia: High Court of Malaya at Kuala Lumpur in the Federal Territory of Wilayah Persekutuan (Commercial Division)
Case Nos.: WA-24NCC(ARB)-41-09/2021
Padda Gurtaj Singh et al. v. Axiata Group Berhad et al. (2022)
29 March 2022
Original in English
Available at: https://efs.kehakiman.gov.my/EFSWeb/DocDownloader.aspx?DocumentID=af1ec447-a7ad-4fde-8e48-566fbb9de06a&Inline=true

[**Keywords**: *courts; judicial assistance; judicial intervention; jurisdiction; procedure; arbitration agreement; injunctions; interim measures*]

The plaintiffs seek interim measures under sections 11 and 19J of the Arbitration Act 2005 (Laws of Malaysia, Act 646) ("AA 2005") (based on articles 9 and 17J MAL) to preserve the status quo of their shares pending the arbitration proceedings. One of the legal issues before the Court was whether the Court had jurisdiction to make an interim injunction against the 1st defendant, who was not a party to the ongoing arbitration proceeding, and prohibit its proposed sale of the shares.

The plaintiffs were the shareholders of a mobile virtual network operator which collectively hold around 30.02 per cent of shares in the 9th defendant. The arbitration disputes centred on the shareholders agreement between the plaintiffs, the 3rd defendant, and the 2nd defendant ("Shareholders Agreement"). The 2nd defendant transferred its shares to its wholly-owned subsidiary, the 1st defendant, who was a non-party to the shareholders agreement. Later on, the 1st defendant announced a proposed sale of its entire shareholding in the 2nd defendant to another company. The plaintiffs contended that such proposed sale resulted in a change in control of the 3rd defendant, and breached the Shareholders Agreement. Since the Shareholders Agreement had an arbitration clause, thus the dispute was brought before an arbitral tribunal.

The High Court held that the starting point in evaluating the Court's jurisdiction in matters of arbitration is section 8 of the Arbitration Act (corresponding to article 5 MAL), in which the principle of minimum intervention by courts in matters reserved for the arbitral tribunal was underscored. Insofar as powers of courts to order interim measures are concerned, section 11 of the Arbitration Act (based on article 9 MAL), permitted parties to the arbitration to apply to the High Court for interim measure before or during arbitral proceedings. Whereas section 19J of the Arbitration Act (based on article 17J MAL) provided courts with wider power, extending the courts power to grant interim measures against non-parties to the arbitration, as long as the interim measures are "in relation to arbitration proceedings". Reference was made to a commentary on article 9 MAL, suggesting that one of the reasons it may be appropriate for a court to be given powers to grant interim measures is "*where a measure needs to be granted against a third party over which the arbitral tribunal has no jurisdiction.*"

The Court also elucidated to the Arbitration Amendment (No. 2) Act 2018 stating that section 19J(1) of the Arbitration Act (2005) was inserted in the 2015 Arbitration Act to bring the Malaysian arbitration framework in line with the latest revision of the UNCITRAL Model Law and arbitration laws of leading jurisdictions. The Court

would not be considered as usurping the authority of the arbitral tribunal since the Court is not determining the merits of whether the proposed sale would constitute a breach on the shareholders agreement. Such interim measure merely serves the purpose of aiding and assisting the arbitral process by preserving the status quo of the shares pending determination of the disputes.

Therefore, the High Court granted an interim measure in the form of an injunction against the 1st defendant, refraining the sale of the relevant shares pending the arbitration proceedings.

5. Case 2095: MAL 5; 7(2); 8(1); 16

Malaysia: High Court of Malaya at Kuala Lumpur
Case No. WA-22NCC-109-03/2021
Lysaght Corrugated Pipe SDN BHD., Lysaght Galvanized Steel Berhad v. Popeye Resources SDN BHD, Macsteel International Far East Limited
10 February 2022
Original in English
Available at: https://efs.kehakiman.gov.my/EFSWeb/DocDownloader.aspx?DocumentID=e5cdd62c-3a7a-4b1b-bde6-b1cebe5aac4e&Inline=true

[**Keywords**: *arbitration agreement; validity; courts; judicial intervention; jurisdiction, competence, injunctions; interim measures; judicial assistance*]

This case deals with three questions: (1) whether the courts have jurisdiction over concluding the existence or validity of an arbitration agreement, (2) the proper test to be applied in a stay of court proceedings application where the existence of an arbitration agreement is at issue, and (3) the pre-requisites of interim anti-arbitration injunction.

The 2nd defendant alleged to have entered into contracts with the plaintiffs for the sale and purchase of steel products. The plaintiffs contend that they did not have any contract or agreement with the 2nd defendant, including an arbitration agreement, and that evidence produced by the 2nd defendant was forged. Despite allegations of forgery and fraud, the 2nd defendant initiated arbitral proceedings to collect outstanding amounts from the plaintiffs. Subsequently, the plaintiffs applied for an "anti-arbitration injunction" to restrain the arbitral proceedings, whereas the 2nd defendant asked for a grant of stay of court proceedings pending the full and final determination of the arbitration proceedings pursuant to section 10(1) of the Arbitration Act 2005 (corresponding to article 8(1) MAL).

(1) The Court agrees with the legal principle that where the dispute is within the arbitral tribunal's purview, the Court should not interfere with the arbitral tribunal's jurisdiction as stipulated in sections 8 and 18 of the Arbitration Act 2005 (corresponding to articles 5, 16 MAL). Nonetheless, the Court declared that it is not precluded from determining the question of whether an arbitration agreement exists when the existence of an arbitration agreement is in question.

(2) The Court contends that there must be a valid and enforceable arbitration agreement for the stay of court proceedings application under section 10(1) Arbitration Act 2005 (corresponding to article 8(1) MAL) to succeed. In determining an application for stay of court proceedings, the proper test to be applied, in particular to cases where the existence of arbitration agreement is questioned is the "full merits" test instead of the *prima facie* test. Therefore, while it is trite that the Court should be cautious about interfering with the jurisdiction of an arbitral tribunal, in cases where the existence of the arbitration agreement is in question, the Court should nonetheless evaluate the facts and evidence based on the "full merits test" before granting a stay application.

(3) Moreover, the Court has jurisdiction to grant the anti-arbitration injunction when the tests set out in American Cyanamid Co. v. Ethicon Ltd [1975] 1 All ER 504 and J Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd [2007] EWHC 1262 are satisfied. The Court found that both tests were satisfied on the basis that the

issue of forgery and fraud were deemed to be serious questions to be tried, the balance of convenience lies in favour of granting an injunction to prevent parallel proceedings, and the injunction does not cause injustice to the defendants as they can still proceed with arbitration if the Court determines the alleged contracts are valid and enforceable.

In conclusion, the Court granted the plaintiff's interim anti-arbitration injunction (until the Court's finding on whether the contracts are forged), and the 2nd defendant's request for a stay of court proceedings was dismissed.

B. Cases relating to the United Nations 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)

1. Case 2096: MAL 34; NYC III; V

The Philippines: Supreme Court
G.R. No. 204197 (800 Phil. 721)
Fruehauf Electronics Philippines Corporation vs. Technology Electronics Assembly and Management Pacific Corporation
23 November 2016
Original in English
Available at: https://elibrary.judiciary.gov.ph/assets/pdf/philrep/2016/G.R.%20No.%20204197.pdf (English language text)

[**Keywords**: *arbitral awards; arbitral proceedings; arbitral tribunal; award; award – setting aside*]

The respondent requested the Regional Trial Court to partially vacate or modify an unfavourable arbitral award. As the petition was denied and the subsequent appeal not given due course, the respondent filed a petition with the Court of Appeals. The Court of Appeals held that the aggrieved party to an arbitration is not precluded from resorting to judicial remedies. Furthermore, the Court of Appeals revisited the merits of the arbitral award and found several errors in both fact and law. Thus, the Court of Appeals reversed and set aside the arbitral award, prompting the petitioner to file a petition for review with the Supreme Court.

The main issue before the Supreme Court was whether aggrieved parties to an arbitration may avail of remedies or modes of appeal against the unfavourable arbitral award.

The Supreme Court held in favour of the petitioner. The errors of an arbitral tribunal are not subject to correction by the judiciary. An arbitral award is final and binding on the parties by reason of their arbitration agreement. Moreover, the right to an appeal is a mere statutory privilege that cannot be invoked in the absence of an enabling statute. Neither Republic Act No. 9876, the Arbitration Law nor Republic Act No. 9285, Alternative Dispute Resolution Act of 2004 (2004 ADR Act)[1] allows a losing party to appeal against the arbitral award. This reflects the "State's policy of upholding the autonomy of arbitral awards" as stated by the Supreme Court.

Nonetheless, arbitral awards are not absolute. The Implementing Rules and Regulations of the 2004 ADR Act provides that regional trial courts can set aside arbitral awards based on the grounds provided in article 34 of the MAL. And while the 2004 ADR Act applies specifically to international commercial arbitration, the Special ADR Rules which were issued by the Supreme Court in 2009 extended their applicability to domestic arbitration. And notably, these grounds are not concerned with the correctness of the award; rather, they go into the validity of the arbitration agreement or the regularity of the arbitration proceedings. And these grounds are

[1] This law adopted in its entirety the Model Law on International Commercial Arbitration (MAL).

exclusive. Courts are obliged to disregard any other grounds invoked to set aside an award.

The Supreme Court granted the petition, i.e. the Court of Appeals' decision is set aside and the Regional Trial Court's order confirming the arbitral award is reinstated.

2. Case 2097: MAL 36; NYC V

The Philippines: Supreme Court, Special Second Division
G.R. No. 185582 (683 Phil. 276)
Tuna Processing, Inc., Petitioner, vs. Philippine Kingford, Inc., Respondent
29 February 2012
Original in English
Available at: https://elibrary.judiciary.gov.ph/assets/dtSearch/dtSearch_system_files/dtisapi6.dll?cmd=getdoc&DocId=57675&Index=%2a4aeb4dbdcceeda9b59b85ae3fb22cec0&HitCount=3&hits=8+9+a+&SearchForm=C%3a%5celibrev2%5csearch%5csearch%5fform

[**Keywords**: *arbitral awards; courts; enforcement; procedure, recognition – of award*]

A licensor and five Philippine tuna processors ("licensees"), including the respondent, entered into a contract which established a company, the petitioner. The petitioner, established in the State of California, was a foreign corporation not licensed to do business in the Philippines. Due to a series of events not mentioned in the petition, the licensees, including the respondent, withdrew from the petitioner and correspondingly reneged on their obligations. The petitioner submitted the dispute for arbitration in the State of California, United States, and won the case against the respondent. To enforce the award, the petitioner filed a petition for confirmation, recognition, and enforcement of foreign arbitral award before a regional trial court of the Philippines. The Trial Court dismissed the petition on the ground that the petitioner lacked legal capacity to sue in the Philippines.

The petitioner hence filed a petition to the Supreme Court for review of the order of the trial court dismissing its petition for confirmation, recognition, and enforcement of foreign arbitral award, and requested that the Trial Court's decision be declared void and the case be remanded to the Trial Court for further proceedings. The petitioner argued that it was entitled to seek for the recognition and enforcement of the subject foreign arbitral award in accordance with Republic Act No. 9285 (the Alternative Dispute Resolution Act of 2004), the New York Convention, and the MAL, as none of these specifically required that the party seeking for the enforcement should have legal capacity to sue.

The Supreme Court approved the petition, and allowed the petitioner, a foreign corporation doing business in the Philippines without a licence, to file a petition to enforce a foreign arbitral award before a Philippine court.

The Supreme Court reconciled section 133 of the Corporation Code of the Philippines, which disallowed foreign corporations transacting business in the Philippines without a licence from suing before Philippine courts, and the Alternative Dispute Resolution Act of 2004, which allowed foreign corporations to enforce foreign arbitral awards in the Philippines. The Supreme Court held, although the petitioner was doing business in the Philippines by collecting royalties from five licensees without a licence to do so issued by the Philippine government, it could still bring a suit before the Philippine courts to enforce a foreign arbitral award since the Alternative Dispute Resolution Act of 2004, a special law, shall prevail over the Corporation Code, a general law. The Supreme Court noted that the Philippines had already incorporated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and MAL in the Alternative Dispute Resolution Act of 2004 (sections 42 and 45 concerning the New York Convention and section 19 concerning MAL).

The Supreme Court stated, according to section 45 of the Alternative Dispute Resolution Act of 2004, the opposing party in an application for recognition and enforcement of the arbitral award may raise only those grounds that were enumerated under Article V of the New York Convention, which do not include the legal capacity to sue of the party seeking the recognition and enforcement of the award. The Supreme Court also mentioned that article 36 of MAL prescribed substantially identical exclusive grounds for refusing recognition or enforcement of an arbitral award. The Supreme Court held that a foreign arbitral award should be respected not because it is favoured over domestic laws and procedures, but because the Alternative Dispute Resolution Act of 2004 has certainly erased any conflict of law question.

Therefore, the Supreme Court concluded that the petitioner, despite being a foreign corporation not licensed to do business in the Philippines, was not, for that reason alone, precluded from filing a petition for confirmation, recognition, and enforcement of foreign arbitral award before a Philippine court since the New York Convention and MAL did not include the legal capacity to sue of parties as grounds for dismissal of such petition.

C. Case relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York Convention" (NYC)

Case 2098: NYC V; V(1); V(1)(b)
India: Supreme Court of India
Case Nos.: Civil Appeal No. 2562 of 2006 and No. 2564 of 2006
Centrotrade Minerals & Metal Inc v. Hindustan Copper Ltd
2 June 2020
Original in English
Available at: https://main.sci.gov.in/supremecourt/2004/19375/19375_2004_34_1501_22350_Judgement_02-Jun-2020.pdf

Abstract prepared by Pilar Alvarez and Marialena Komi

The claimant, a United States corporation and the respondent, an Indian company entered into a contract for the sale and purchase of copper concentrate. The contract contained a two-tier arbitration agreement whereby disputes would be referred to arbitration in India under the Arbitration Rules of the Indian Council of Arbitration ("ICA"), and the ensuing award could be appealed by either party in a second arbitration in London under the Rules of the International Chamber of Commerce ("ICC"). A dispute arose between the parties leading the claimant to invoke the arbitration agreement. A first award was issued by an ICA sole arbitrator, with no order for damages (the "ICA Award"). The claimant later commenced ICC proceedings in London, which resulted in an award granting damages to the claimant (the "ICC Award").

The claimant sought to enforce the ICC Award in India, which enforcement was granted in the first instance by a Single Judge of the Calcutta High Court. The Single Judge's order was subsequently vacated on appeal by a Division Bench of the Calcutta High Court, on the basis that the ICA Award and the ICC Award could not coexist, given their conflicting content. Following an appeal by the claimant, the matter was considered by a Division Bench of the Supreme Court, leading to differing opinions as to the validity under Indian law of two-tier arbitration clauses (such as that contained in the arbitration agreement).

The question was then referred to a three-Judge Bench of the Supreme Court of India, which issued a judgment in favour of the validity of two-tier arbitration agreements under Indian law, deferring the question on the enforceability of the ICC Award for a second judgment. Subsequently, the matter of the enforceability of the ICC Award was again brought before a three-Judge Bench of the Supreme Court of

India. The respondent argued, inter alia, that it had been unable to present its case during the ICC arbitration, since the sole arbitrator had not provided a sufficient term for the respondent to file documents in support of its case. On this basis, the respondent argued that, under Section 48(1)(b) of the Indian Arbitration and Conciliation Act of 1996 (corresponding to article V(1)(b) NYC), the Court should deny enforcement of the ICC Award in India given that the respondent had been unable to present its case. On the other hand, the claimant argued that the respondent had been given ample opportunity by the ICC sole arbitrator to fully present its case, but that the respondent had willingly chosen not to do so for strategic considerations.

The Supreme Court of India found in favour of the claimant, dismissing the respondent's objections to the enforcement of the ICC Award. Among other grounds, the Court analysed the meaning of the word "otherwise" under section 48(1)(b) of the Indian Arbitration and Conciliation Act of 1996, finding that the term is to be construed narrowly in light of the pro-enforcement bias in the NYC. Consequently, the Court ruled that a party is "otherwise unable to present his case" in accordance with section 48(1)(b) of the Indian Arbitration and Conciliation Act and article V(1)(b) NYC only if it is not given an opportunity to present its case through circumstances outside that party's control. In this sense, despite having been given several opportunities to present its case, the respondent had voluntarily chosen not to take part in the proceedings in a timely manner. The Court thus rejected the respondent's arguments and granted the enforcement of the ICC Award.