United Nations A/CN.9/SER.C/ABSTRACTS/228

General Assembly

Distr.: General
31 October 2023

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.23-19168 (E) 101123 131123

Please recycle

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.

Copyright © United Nations 2023

Printed in Austria

All rights reserved. Applications for the right to reproduce this work or parts thereof are welcome and should be sent to the Secretary, United Nations Publications Board, United Nations Headquarters, New York, N.Y. 10017, United States of America. Governments and governmental institutions may reproduce this work or parts thereof without permission, but are requested to inform the United Nations of such reproduction.

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

1. Case 2099: MAL 13; 16; 34

Zambia: Supreme Court of Zambia
China Henan International Cooperation Group Company Ltd v G and G Nationwide(Z) Ltd
10 March 2017
Original in English
Available at: https://zambialii.org/judgments/

Abstract prepared by Bwalya Lumbwe

[**Keywords**: *arbitral tribunal; arbitrators; arbitrators – challenge of; arbitration agreement; arbitration clause; competence; jurisdiction; kompetenzkompetenz; procedure; arbitral awards; arbitral proceedings; award – setting aside*]

The case was on appeal to the Supreme Court against the High Court ruling, which dismissed the appellant's application to set aside three awards under section 17 of the Arbitration Act No. 19 of 2000 of Zambia ("Arbitration Act") (corresponding to article 34 MAL, except for article 34(2)(b) MAL). The three arbitral awards consist of an award on jurisdiction under which the arbitrator found that he had jurisdiction to decide on the dispute, and two other awards which were complementary to the award on jurisdiction. The three awards were dealt with as one by the courts. Dissatisfied with the arbitral awards on jurisdiction, the appellant commenced proceedings to have the awards set aside.

On appeal to the Supreme Court, the respondent's contention, amongst others, was that there was no remedy under section 17 (corresponding to article 34 MAL) for a jurisdiction matter. The remedy, however, was laid under sections 13 and 16 of the Arbitration Act (which reproduce articles 13 and 16 MAL[1]) respectively. It was further contended that even though the remedy existed under the two articles, the appellant had lost that right because the permitted time in which to make an application to the Court had lapsed. Conversely, the appellant contended that all awards, regardless of awards on jurisdiction or merits are amendable to setting aside, hence the High Court erred in finding that section 17 of the Arbitration Act is subject to sections 13 and 16 of the Arbitration Act/articles 13 and 16 MAL.

The Supreme Court found that section 13 Arbitration Act/article 13 MAL was not relevant in the determination of the present matter which challenges a decision on jurisdiction, as section 13 of the Arbitration Act/article 13 MAL provides for procedures for challenging an arbitrator's appointment on grounds of his independence, impartiality or the lack of qualifications. With regard to section 16 of the Arbitration Act/article 16 MAL, in particular paragraphs (2) and (3), the Court agreed that the said section 16/article 16 MAL was relevant for challenging an arbitrator in terms of jurisdiction. Section 16 of the Arbitration Act/article 16 MAL provides an arbitral tribunal with authority to rule on its own jurisdiction and additionally specifies the stage and period within which a party can make a challenge on the arbitrator's jurisdiction and the remedy open to the challenging party.

Moreover, as jurisdiction was determined as a preliminary question, the Supreme Court found that, the recourse for the appellant was to apply to a court to make a determination within 30 days of the receipt of the jurisdiction award under article 16 of MAL (agreeing with the Hong Kong, China, case of *Incorporated Owners of Tak Tai Building v Leung Yau Building Ltd (2005) HKCA 87*). The 30 days permitted had long lapsed by the time the appellant made their application to the High Court. The remedy for a jurisdiction challenge does not lie under section 17 of the Arbitration

[1] For ease of understanding, the Arbitration Act No. 19 of 2000 consist of a part with additions and modifications to the Model Law with provisions referred to as sections (e.g. section 17, as in the abstract). The other part is the Model Law in its entirety as the First Schedule.

Act. This is because jurisdiction award challenges determined as a preliminary issue can only be dealt with under article 16 MAL, and sections 17 of the Arbitration Act and article 16 MAL are separate and distinct reliefs, there is no interplay between the two articles.

The Supreme Court also emphasized the provision under section 2(3) of the Arbitration Act, which compels the courts to take into account the international origins of the MAL and the desirability of achieving international uniformity in its interpretation and application. As an additional remark, the Supreme Court commented on what it considered a grave error and a serious misdirection by the High Court, where the High Court ordered a stay execution of an award or the arbitral proceedings. The Supreme Court clarified that courts are only permitted to play a statutory supervisory role in arbitration proceedings as prescribed by the Arbitration Act and the MAL, the court has no jurisdiction to stay an arbitral award or arbitral proceedings. Also, article 16 MAL clearly permits an arbitral process to proceed pending an application challenging a jurisdiction award and can proceed to make an award. Therefore, the Supreme Court upheld the High Court's decision, and dismissed all grounds of appeal, but discharged the stay of execution of the awards and arbitral proceedings which the High Court had earlier granted pending the hearing of the setting-aside applications.

2. Case 2100: MAL 4; 12; 13; 34(2)(a)(iii); 34(2)(b)(ii)

Zambia: High Court of Zambia
Mpulungu Harbour Management Ltd v Attorney General(1), Mpulungu Harbour Corporation Ltd(2)
10 October 2014
Original in English
Available at: https://old.zambialii.org/zm/judgment/2018//2018-hkc-0007-national-pension-scheme-authority-vs-sherwood-greene-ltd-justice-b-shonga.pdf

Abstract prepared by Bwalya Lumbwe

[**Keywords:** *estoppel; knowledge; procedure; waiver; appointment procedures; arbitrators; arbitrators – appointment of; arbitrators – duty of disclosure; arbitrators – independence of; challenge; conflicts of interest; disclosure; arbitral tribunal; arbitrators – withdrawal of; challenge; courts; arbitral awards; arbitral proceedings; arbitration agreement; arbitration clause; arbitrators – mandate; award – setting aside; public policy*]

The dispute arose from a concession agreement between the respondents and the applicant, under which the applicant was to operate the Mpulungu Harbour for a fixed period of 25 years. Five years after the conclusion of the agreement, the first respondent issued Articles of Requisition of the Harbour pursuant to article 21.1 of the concession agreement after which the port and assets were repossessed by the Government, before the expiry of the concession period.

The applicant subsequently commenced proceeding in the High Court challenging the legality of the Articles of Requisition. While the matter was before the Supreme Court of Zambia, the parties agreed to withdraw the case and entered into an ad hoc arbitration agreement.

The arbitral tribunal consisted of three members. However, the presiding arbitrator in the course of the arbitration withdrew. The parties then entered into a written agreement allowing one of the two party-appointed members to become the presiding arbitrator and a new third arbitrator was appointed. An award was eventually made by the reconstituted arbitral tribunal.

The applicant was seeking to have the award set aside under section 17(2)(a)(iii) of the Arbitration Act No. 19 of 2000 of Zambia ("Arbitration Act") (corresponding to article 34(2)(a)(iii) MAL), as it was contended that the award dealt with a dispute not falling within the terms of submission to the tribunal. Another ground contended was that the composition of the tribunal was not in accordance with the written agreement

of the parties as provided for under section 17(2)(a)(iv) of the Arbitration Act (corresponding to article 34(2)(a)(iv) MAL).

Regarding the issue on the composition of the reconstituted arbitral tribunal, the applicant argued that the withdrawal of the presiding arbitrator and the re-composition of the arbitral tribunal was not in accordance with the agreement of the parties (section 17(2)(a)(iv) of the Arbitration Act, corresponding to article 34(2)(a)(iv) MAL). However, the Court did not agree with the applicant's submissions and having examined the written agreement, found that the composition of the tribunal was in accordance with the agreement of the parties and thus dismissed the applicant's argument.

The applicant also contended that the new presiding arbitrator failed to disclose the fact that during the course of the arbitration, he had been appointed Speaker of the National Assembly (Parliament of Zambia) and ceased to be a judge of the High Court. The presiding arbitrator should have disclosed that fact to the parties and withdrawn from the tribunal on account of a conflict of interest and a perception of bias which the appointment to become a speaker of the National Assembly projected, as he was part of the same Government which had an interest in the outcome of the case.

The respondent's opposing submission was that the applicant had waived the right to object under article 4 of the first schedule to the Arbitration Act (corresponding to article 4 MAL) as the applicant did not oppose the continuation of the presiding arbitrator during the arbitration proceedings despite the presiding arbitrator's new government appointment was obviously known to the applicant. It was a further contention by the respondent that the right to object exists under article 12(2) of the first schedule to the Arbitration Act (corresponding to article 12(2) MAL) providing for the grounds of challenge which includes justifiable doubts as to an arbitrator's impartiality or independence. In addition, the challenge procedure under article 13 of the first schedule to the Arbitration Act (corresponding to article 13 MAL) also provides for a mandatory period in which to exercise the right to make a challenge. As the appellant neglected to apply this provision in the time allocated the rules of estoppel must apply.

The Court asserted that there is a statutory and continuing obligation for arbitrators to disclose circumstances to parties when matters arise which in the arbitrator's opinion leads to a conclusion that he can longer be impartial in the arbitration, as per Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No.12 of 2007. Furthermore, the Court also stated that the burden of disclosure under the rules lies with the arbitrator. Once a disclosure is made, the arbitrator can continue to serve if the parties so desire. However, should the arbitrator believe that there is clear conflict of interest, he should step down regardless of the of the parties' view.

The Court, thus, found that the presiding arbitrator breached the Code of Conduct by his failure to disclose his appointment as Speaker of the National Assembly. And sitting as presiding arbitrator of the tribunal in a compensation claim in which the Government of Zambia was the Respondent, and with an interest in the outcome, would inevitably create the perception that there was bias in the award.

Pertaining to the issue of waiver, the court held that waiver cannot arise in the absence of disclosure. Furthermore, the respondent cannot rely on the doctrine of estoppel as the doctrine cannot operate to negate a duty imposed by statute and its regulations such as the those under the Code of Conduct which are imposed on the arbitrator.

With regard to submissions under section 17(2)(a)(iii), article 21.1 of the concession agreement provided that the Government had the right to the requisition of the harbour in the national interest, subject to payment of full compensation covering all expenses incurred, including loss of revenue, profits and consequential costs. The Court found that the arbitral tribunal erroneously awarded damages based on the notion that there was a breach of the concession agreement, when that was not the case, and the principles of damages for breach of contract, and mitigation of damages. Hence, the

Court concluded that the arbitral tribunal dealt with a dispute not falling withing the terms submitted to it and the award contained decisions on matters beyond the scope of issues submitted to the tribunal.

The Court therefore set aside the award based on sections 17(2)(a)(iii) and 17(2)(b)(ii) of the Arbitration Act, concluding that the presiding arbitrator's failure to disclose can easily be perceived as being contrary to public policy and the arbitral tribunal's error in considering beyond the concession agreement constitutes a palpable inequity contrary to public policy.

3. Case 2101: MAL 33; 34(3)

Zambia: Supreme Court of Zambia
Paolo Marandola and Ors v Gianpietro Milanese and Ors, ZMSC 140
29 January 2014
Original in English
Available at: https://zambialii.org/akn/zm/judgment/zmsc/2014/140/eng@2014-01-29

Abstract prepared by Bwalya Lumbwe

[**Keywords**: *additional award; arbitral awards; arbitral proceedings; arbitral tribunal; clerical errors; jurisdiction; notice; procedure; award – setting aside; courts; due process; public policy*]

The case centres on whether a court has authority to extend the time to apply for setting aside proceedings under section 17(3) of the Arbitration Act No. 19 of 2000 ("Arbitration Act") (corresponding to section 34(3) MAL).

The case was on appeal to the Supreme Court of Zambia from the High Court. The dispute concerned the purchase of company shares. The High Court had refused the appellants' application for special leave to set aside an arbitral award. The application before the High Court was made 2 years and 5 months after an additional arbitral award was made.

The High Court had ruled that the application was way out of time as section 17(3) of the Arbitration Act (corresponding to section 34(3) MAL) has set a mandatory time limit within which an application may be made. The Court stated that the application was not only way out of time but inordinately late. The Court went on to state that even if they had discretion this was not a proper case for a court to exercise such discretion.

On appeal to the Supreme Court of Zambia, the appellant argued that the delay in making the setting-aside application to the lower court was as a result of the problems surrounding the first award which contained mistakes, illegalities, misapprehensions, and misdirections which resulted in the additional award made under article 33 of MAL. It was further submitted that section 17(3) of the Arbitration Act (corresponding to section 34(3) MAL) is merely directive because of the use of the word "may" instead of "shall" in the provision, which states that "An application for setting aside may not be made after three months have elapsed from the date on which the party making the application had received the award(…)". Accordingly, the requirement to file an application within three months of the award is a matter of form and a procedural matter rather than a substantive matter, thus the matter should be determined on merits rather than throwing it out on a technicality.

In opposition, the respondents argued that section 17(3) of the Arbitration Act is not a procedural rule but substantive law. The respondents were highly prejudiced in the two years of waiting and a further application to extend time is vexatious.

The Supreme Court in its ruling stated that section 17(3) of the Arbitration Act "is couched in such a way that it gives the intending applicant discretion to make or not to make the application. The discretion does not relate to the Court having power to allow or not to allow the making of the application". The Court went on to state that the purpose of the time frame under section 17(3) of the Arbitration Act was to ensure

speedy disposition of matters. It added that if Parliament has intended to grant the courts power to extend the three-month period, it would have expressly provided for it. Furthermore, the Court stated that section 17 of the Arbitration Act is substantive law and not procedural as it has roots in the main Arbitration Act and not the rules.

The Court was thus emphatic that since section 17(3) of the Arbitration Act does not provide for an extension after the expiry of the three-month period, courts have no discretionary power to extend the time beyond three months whatever the reasons for the delayed application are.

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

1. Case 2102: NYC V; V(1); V(1)(a); V(1)(b); V(1)(c); V(2); V(2)(b)

Cayman Islands: Judicial Committee of the Privy Council
Appeal No. 0086 of 2020
Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v. Matlin Patterson Global Opportunities Partners (Cayman) II LP and others
19 May 2022
Original in English
Available at: www.jcpc.uk/cases/docs/jcpc-2020-0086-judgment.pdf

Abstract prepared by Pilar Alvarez and Marialena Komi

A dispute arose between the buyer, a Brazilian company owning and operating an airline group and the sellers, subsidiaries of a private equity investment fund (the "MP Funds") based in New York in relation to a Share Purchase and Sale Agreement (the "Agreement") by which the buyer purchased shares in a passenger airline operator from the sellers. The Agreement contained an arbitration clause providing for arbitration in Sao Paulo, in accordance with the Arbitration Rules of the International Chamber of Commerce. Although the MP Funds were not named as parties and did not sign the Agreement, they were involved in the transaction as signatories to an addendum which supplemented the terms of the Agreement. The buyer initiated arbitration proceedings under the Agreement against the sellers and the MP Funds. The arbitral tribunal issued an award favourable to the buyer, finding that the sellers and the MP Funds were jointly and severally liable for the purchase price adjustment owed under the Agreement. The MP Funds sought to set aside the award before the Brazilian courts, but their application and subsequent appeals were dismissed. In the meantime, the buyer applied for the enforcement of the award before the Grand Court of the Cayman Islands, obtaining a favourable ex parte order. The order was subsequently set aside, and later reinstated by the Cayman Court of Appeal. The matter was then brought by the MP Funds before the Judicial Committee of the Privy Council (the "JCPC"). The MP Funds argued that the recognition and enforcement of the award should be denied under article V(1)(a) NYC – as implemented in the Cayman Islands by the Foreign Arbitral Awards Enforcement Act ("FAAEA"), using identical language – on the basis that they had never consented to arbitration given that they had not signed the Agreement. In response, the buyer contended that the issue had already been decided by the Brazilian courts during the setting aside proceedings, and that the decision of the Brazilian courts had given rise to an issue estoppel. In rebuttal, the MP Funds argued that the Brazilian courts had not performed a de novo review of the matter, having rather deferred to the arbitral tribunal's decision. The MP Funds also relied on article V(1)(b) NYC, as provided in the FAAEA (with identical language), arguing that the arbitral tribunal had adopted a legal basis for the award that had not been raised by the buyer during the arbitration, amounting to a serious breach of due process, including the MP Funds' right to present their case. Further, the MP Funds argued that enforcement should be refused under article V(2)(b) NYC, since the alleged breach of their due process rights would also be contrary to the public policy of the Cayman Islands. Lastly, the MP Funds submitted that, under

article V(1)(c) NYC, the subject matter of the award was beyond the scope of the submission to arbitration, which was restricted to disputes regarding breaches of the parties' non-compete obligations.

The JCPC rejected the MP Funds' appeal. Regarding the MP Funds' argument under article V(1)(a) NYC, the JCPC found that the decision of the Brazilian courts regarding the MP Funds' consent to arbitrate had given rise to an issue estoppel, since this decision arose from a de novo determination by the Brazilian courts of the same issue that the JCPC had been called to decide. As regards article V(1)(b) NYC, the JCPC found that the standard of due process was to be determined by reference to the FAAEA. However, the JCPC noted that this did not entail the application of purely local standards of fair procedure. To the contrary, according to the JCPC, the statutory language should be interpreted considering that it had its origin "in an international instrument intended to have an international currency", such as the NYC. Thus, the JCPC concluded that the applicable standard of due process was a standard "capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants" and ruled that that standard was restricted to guaranteeing "basic minimum requirements which would generally, even it not universally, be regarded throughout the international legal order as essential to a fair hearing." According to the JCPC, this would be in line with the pro-enforcement object and purpose of the NYC, as well as with the NYC's language (particularly, the requirement that a party must have been "unable" to present its case, and not "merely impeded or curtailed"). Ultimately, the JCPC concluded that it would have been "prudent" for the arbitral tribunal to allow the parties to brief the tribunal on the novel legal basis for the award. However, the JCPC was unconvinced that this amounted to a denial of procedural fairness grave enough to justify a refusal to enforce the award under article V(1)(b) NYC. Regarding the MP Funds' argument on the basis of article V(2)(b) NYC, the JCPC concluded that it would be "a very strong thing" for an English or Cayman court to find that an award that had been confirmed by the courts "with primary responsibility" over the arbitral process (i.e., Brazilian courts) was contrary to public policy, thus also dismissing the MP Funds' argument. Lastly, the JCPC rejected the MP Funds' argument under article V(1)(c) NYC, finding that the arbitral tribunal had not exceeded its authority under the arbitration agreement. The JCPC first noted, without deciding, that it would be possible for an issue estoppel to exist with regards to this matter, given that it was also governed by Brazilian law. In any event, the JCPC was not satisfied that the MP Funds had met the standard required to prove "the kind of excess of authority which would justify refusal to enforce the award".

2. Case 2103: NYC VII; VII(1)

France: Cour de Cassation (French Court of Cassation)
Case Nos.: 19-22.932
Société Egyptian General Petroleum Corporation (EGPC) v. Société National Gas Company (NATGAS)
13 January 2021
Original in French
Available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=396&opac_view=6

Abstract prepared by Pilar Alvarez and Marialena Komi

The claimant, the Egyptian National Gas Company, entered into a contract for the supply of natural gas to eastern Egypt with the respondent, an Egyptian public entity. A dispute arose following a request by the claimant to adjust the financial conditions of the contract, leading the claimant to commence arbitration proceedings in Egypt under the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration ("CRCICA"), as provided for in the contract. The arbitral tribunal issued its award on 12 September 2009, finding in favour of the claimant (the "CRCICA Award"). The respondent sought to annul the CRCICA Award in Egypt. On 27 May 2010, the Cairo Court of Appeal granted the annulment, finding that the arbitration

agreement was null and void given the parties' failure to obtain the ministerial approval for public entities to conclude arbitration agreements, as required under Egyptian law. In turn, the claimant sought to enforce the CRCICA Award in France. On 19 May 2010, the Tribunal de Grande Instance de Paris (Paris Court of First Instance) granted the enforcement application, which was affirmed by the Cour d'appel de Paris (Paris Court of Appeal) on 24 November 2011. On 26 June 2013, the Cour de Cassation (Court of Cassation) annulled the appellate decision on the grounds that the Cour d'appel de Paris had failed to adequately consider that the arbitral tribunal had breached the adversarial principle and remanded the case to the Cour d'appel de Versailles (Versailles Court of Appeal). On 29 October 2015, the Cour d'appel de Versailles again granted the recognition and enforcement of the CRCICA Award. The Cour de Cassation annulled the enforcement decision on the basis that the Cour d'appel de Versailles had not adequately assessed the arbitral tribunal's decision on its own jurisdiction and remanded the case to be re-heard by the Cour d'appel de Paris. Before the Cour d'appel de Paris, the respondent argued that the CRCICA Award had been issued in domestic arbitration proceedings seated in Egypt and, hence, had to comply with Egyptian public policy, including the rule of Egyptian law requiring the ministerial approval of arbitration agreements made by public entities. On the contrary, the claimant held that the failure to obtain ministerial approval pursuant to Egyptian law did not contravene the French conception of international public policy. The Cour d'appel de Paris rejected the respondent's arguments and granted the recognition and enforcement of the CRCICA Award. As part of its decision, the Cour d'appel de Paris recalled, inter alia, that article VII(1) NYC mandated the application of French law as the regime most favourable to enforcement, since it did not provide for the non-recognition of foreign awards that had been set aside at the seat of the arbitration.

Following a cassation appeal filed by the respondent, the matter was finally heard by the Cour de Cassation. The respondent argued, inter alia, that the CRCICA Award could not be enforced because the rule of French law by which a foreign public entity cannot rely on provisions of its domestic law affecting the validity of an arbitration agreement to which it had previously consented did not apply to a foreign arbitral award issued in a domestic arbitration, such as the CRCICA Award. The Cour de Cassation rejected the respondent's appeal and granted the enforcement of the CRCICA Award. In doing so, the Cour de Cassation noted that the provisions of the French Code of Civil Procedure governing the recognition and enforcement of international and foreign arbitral awards applied regardless of the domestic or international nature of an award rendered abroad. Hence, the requirements for a public entity to enter into a valid and binding arbitration agreement under Egyptian law were immaterial to the analysis made by the French courts.

3. Case 2104: NYC V(2)(b)

Hong Kong, China: High Court (Court of First Instance)
HCCT 53/2017; [2018] HKCFI 1147
Paloma Company Limited v Capxon Electronic Industrial Company Limited
25 May 2018
Original in English
Reported in [2018] 2 HKLRD 1424
Available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115514&QS=%2B&TP=JU

Abstract prepared by Yat Hin LAI, National Correspondent

This case deals with the issue of whether it would be contrary to the public policy of Hong Kong, China, to enforce a Japanese arbitral award made in favour of the applicant.

The applicant and respondent engaged in the sale and purchase of electrolytic capacitors. Disputes arose between them in respect of certain capacitors. The

applicant commenced arbitration at the Japan Commercial Arbitration Association against the respondent. Japan is a contracting state of the New York Convention.

The arbitral tribunal decided the award in favour of the applicant. The Court in Hong Kong, China, gave leave to enforce the arbitral award in Hong Kong, China. A charging order *nisi* was granted in respect of shares held by the respondent. To oppose the charging order, the respondent alleged that the service of the charging order *nisi* was ineffective and illegal. And the respondent sought to set aside the Court's order to enforce the arbitral award, alleging that the arbitral award was in conflict with public policy. It was alleged that the arbitral tribunal reversed the burden of proof as it relied upon certain alleged admissions made by the respondent in its expert reports that it had made and formed a presumption against the respondent for its rebuttal. The arbitral tribunal also ignored a lot of contrary evidence in the respondent's favour.

Regarding the applicable legal principles of refusing enforcement based on public policy, the Court cited and discussed the Court of final appeal case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (Case no. (1999) 2 HKCFAR 111) in which the Court held that "[b]efore a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection."

Applying the above elucidations by the Court of final appeal, the Court concluded that there was no evidential basis to justify the setting aside of the enforcement order on the public policy ground. Since the respondent had been afforded opportunities to challenge any unfavourable evidence made against it. Further, the Court did not accept the respondent's submissions that there has been any impermissible reversal of burden of proof. The Court also reminded itself that it is not the Court's role to look further into the merits of the award or explore the reasoning of the arbitral tribunal.

The respondent's application to set aside the enforcement of the arbitral award was accordingly dismissed.

4. Case 2105: NYC V; V(1); V(1)(b); V(2); V(2)(b)

Mauritius: Supreme Court of Mauritius
Case Nos.: 116299
Essar Steel Minnesota LLC v. Arcelormittal USA LLC
23 July 2021
Original in English
Available at: https://jusmundi.com/en/document/decision/en-arcelormittal-usa-llc-v-essar-steel-ltd-judgment-of-the-supreme-court-of-mauritius-friday-23rd-july-2021#decision_17357

Abstract prepared by Pilar Alvarez and Marialena Komi

Two U.S. companies entered into an agreement for the supply and purchase of iron ore pellets. The agreement included an arbitration clause providing for arbitration under the Rules of the International Chamber of Commerce ("ICC"). In accordance with the arbitration agreement, the evidentiary hearings would be completed "within six (6) months from the execution of the Terms of Reference, from the issuance of the Terms of Reference by the Arbitral Tribunal and the parties, or, if a party refuses to execute the Terms of Reference by the ICC Court". Subsequently, the parties concluded an amendment pursuant to which the respondent, a Mauritian holding company assumed joint and several liability before the claimant. A dispute arose between the parties, leading the claimant to terminate the agreement for anticipatory and repudiatory breach on 27 May 2016. On 9 August 2016, the claimant initiated arbitration proceedings against the respondent. On 9 August 2017, the respondent informed the arbitral tribunal that it was not in a position to take part in the proceedings. The arbitration continued without the respondent's participation, with the evidentiary hearings taking place on 10 and 11 October 2017. The arbitral tribunal issued its

award on 19 December 2017 in favour of the claimant. The claimant subsequently sought to enforce the award against the respondent in Mauritius. The Supreme Court of Mauritius issued a provisional order granting the recognition and enforcement of the arbitral award, which the respondent later sought to set aside. In the setting aside proceedings in Mauritius, the respondent argued that the Supreme Court should deny the enforcement of the award under article V(1)(b) NYC, since the respondent had been unable to present its case before the arbitral tribunal. The respondent indeed contended that (i) the six-month period provided in the arbitration agreement to complete the evidentiary hearings was insufficient given the complexity of the case, (ii) it had been unable to present its case since it did not have access to certain documents, which were crucial to the dispute, and (iii) it had been unable to review certain documents filed by the claimant in the arbitration, which had only been disclosed to counsel following a Confidentiality Order issued by the arbitral tribunal. Finally, the respondent held that those fundamental breaches of its due process rights in the arbitration amounted to a breach of Mauritian public policy under article V(2)(b) NYC. The claimant argued, inter alia, that the respondent had failed to make a compelling argument regarding the grounds set forth in articles V(1)(b) and V(2)(b) NYC, which are to be construed and applied restrictively by the enforcement court. According to the claimant, the respondent was estopped from arguing that it had been treated unfairly since, firstly, it had failed to diligently pursue its case and was engaging in dilatory tactics. Further, the claimant argued that the respondent chose not to implement the mechanisms in the Confidentiality Order that would have allowed the respondent to review the claimant's documents.

The Supreme Court of Mauritius confirmed the provisional order granting the enforcement of the award, finding that the respondent had been given a reasonable opportunity to present its case before the arbitral tribunal, despite having unreasonably failed to avail itself of that opportunity. The Court further noted that the respondent consciously chose not to play an active part in the arbitration and that it "[could not] prevent the enforcement and recognition of the arbitral award when it was never put in a position where it was unable to present its case". Accordingly, since there had been no breach of the respondent's due process rights, the arbitral tribunal also found that the respondent had failed to show that there had been a "flagrant or specific breach of [Mauritius] 'most basic notions of morality and justice'" to justify an objection based on article V(2)(b) NYC.

5. Case 2106: NYC I; I (3)

United States of America: District Court for the District of Columbia
Civil Action No. 2022-0170 *Zhongshan Fucheng Industrial Investment Co. v. Federal Republic of Nigeria*
26 January 2023
Original in English
Available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2022cv0170-29

Abstract prepared by Pilar Alvarez and Marialena Komi

A Chinese corporation made an investment to develop and operate a free-trade zone in the southwestern region of the Federal Republic of Nigeria ("Nigeria"). The company operated in Nigeria through its wholly owned Nigerian subsidiary. A dispute arose in 2016, causing the company's main executives to flee the country. In 2018, the company commenced ad hoc arbitration proceedings against Nigeria in London, pursuant to the Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (the "BIT"). On 26 March 2021, the arbitral tribunal found that Nigeria had violated the BIT and issued an award in favour of the company. Nigeria moved to set aside the award before the English High Court on the basis that the tribunal lacked jurisdiction. Nigeria ultimately discontinued the setting aside proceedings before the English courts had reached a decision. On 8 December 2021, the company commenced enforcement proceedings in the United Kingdom, leading to the issuance by the English courts of an order recognizing the award. The company

subsequently brought an action in the United States of America, applying to the District Court for the District of Columbia for it to confirm the award under the Federal Arbitration Act (the "FAA") and the NYC. Nigeria moved to dismiss the company's petition before the District Court for the District of Columbia by arguing, on the one hand, that the Court lacked subject matter jurisdiction in light of the United States' commercial reservation under article I(3) NYC: according to Nigeria, the award was not commercial in nature since it had not arisen from the business relationship between Nigeria and the company but rather from an international agreement, such as the BIT. Nigeria further based its objection on the argument that the arbitration pertained only to treaty-based claims. In addition, Nigeria argued that there had been no "contractual or other business relationship" between the parties. On the other hand, Nigeria argued that the Court lacked personal jurisdiction over Nigeria on grounds of sovereign immunity.

The District Court for the District of Columbia denied Nigeria's motion to dismiss and enforced the award, finding that the matter was covered by the NYC. According to the Court, the United States' commercial reservation under article I(3) NYC excluded only those controversies arising out of international agreements that were "of a public international law character", i.e., those relating to inter-State arbitration. Since the award was the result of a dispute between Nigeria and the company, a private actor, it was enforceable in the United States under the NYC. Regarding Nigeria's second argument, as to the distinction between treaty-based and commercial claims, the Court found that "[t]he flaw in this argument stems from a predication on a false dichotomy between sovereign and commercial conduct in the context of the New York Convention." Rather, the Court found that the relevant question was whether the dispute had "a connection to commerce", which it undoubtedly did. Lastly, the Court noted that the FAA provides that "a legal relationship need not arise from contract to be commercial", but that this should be determined, once again, by considering whether the subject matter of the arbitration is commercial. In the Court's reasoning, the company's investment had an "obvious connection to commerce". Further, the Court dismissed Nigeria's sovereign immunity arguments on the basis that Nigeria had validly given its consent to arbitrate under the BIT.