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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

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Introduction

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

Each CLOUT issue includes a table of contents on the first page that lists the full citations to 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 the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (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 Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, 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 through 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, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases Relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention (NYC)

Case 1610: [NYC I]
Egypt: Cairo Court of Appeal
Case nr. 43/122
Cimenco Egypt v. Nickelson Industrial Co.
27 February 2007
Original in Arabic

Abstract published on www.newyorkconvention1958.org[1]

On 4 August 1994, Cimenco Egypt ("Cimenco") and Nickelson Industrial Co. ("Nickelson") concluded a contract by which the latter undertook to supply an integrated system for unloading cement from ships. Article 9 of the contract provided for the application of English law and for the settlement of disputes arising from the contract by arbitration in London in accordance with the Rules of the International Chamber of Commerce (the "ICC Rules"). Nickelson initiated arbitration proceedings, claiming that Cimenco breached the provisions of the contract. Cimenco challenged the arbitral tribunal's jurisdiction on the ground that the arbitration agreement was signed by an unauthorized person and was thus null and void for violation of rules of public policy in the Egyptian Commercial and Civil Codes. The arbitral tribunal rejected Cimenco's jurisdictional objection in a partial award dated 23 March 2004. On 10 November 2004, a final award was rendered in Nickelson's favour. By order dated 24 October 2005, the Chairman of the 7th Commercial Circuit at the Cairo Court of Appeal granted enforcement to the arbitral award. Cimenco challenged this order and requested that the enforcement of the arbitral award be suspended and the order be overruled, arguing that the order breached Article 58 of the Egyptian Arbitration Law by granting enforcement to an arbitral award which is in contradiction with Egyptian public policy.

The Cairo Court of Appeal rejected Cimenco's challenge on grounds unrelated to the NYC, holding that Cimenco did not follow the proper procedures mandated by Egyptian law. It began by explaining that requests for enforcement of decisions issued abroad are made before the Courts of First Instance pursuant to the provisions of the Code of Civil and Commercial Procedure ("Code of Procedure"), subject to the exception contained in Article 301 of said Code that international conventions apply even when they are in contradiction with the Code. Given that Egypt acceded to the NYC by Presidential Decree No. 171/1959, the NYC is applicable as is any other law of the Egyptian State. The term "rules of procedure" mentioned in the NYC is not limited to the Code of Procedure but includes all laws organizing proceedings such as the Arbitration Law which is a procedural law

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falling under the term “rules of procedure”. Given that the provisions of the Arbitration Law provide for less onerous conditions than those provided by the provisions of the Code of Procedure, the former should apply to the enforcement of foreign arbitral awards and requests for enforcement of foreign arbitral awards should be made before the Cairo Court of Appeal.

Case 1611: NYC III; IV
Egypt: Cairo Court of Appeal
Case nr. 10/122
Omnipol v. Samiran
30 May 2005
Original in Arabic

Abstract published on www.newyorkconvention1958.org[2]

On 29 September 1995, Omnipol and Samiran concluded a contract which provided in its Article 3 for the settlement of disputes between the parties by arbitration administered by the Arbitration Court attached to the Economic Chamber and Agricultural Chamber in Prague. On 16 September 1999, an arbitral award was issued in Case No. 9/1995 in favour of Omnipol. Omnipol requested the enforcement of the award before the Cairo Court of Appeal but the Chairman of the 75th Commercial Circuit of the Court rejected its request on 18 January 2005 on the basis that the Cairo Court of Appeal lacked jurisdiction to order the enforcement of foreign arbitral awards. The Chairman considered that the NYC provides that each contracting State commits to enforce foreign arbitral awards according to its applicable rules of procedure and that, accordingly, the Code of Civil and Commercial Procedure (“Code of Procedure”) is applicable, not the Arbitration Law, and the Code of Procedure provides that the Courts of First Instance, not the Cairo Court of Appeal have jurisdiction to enforce foreign awards.

Omnipol challenged the Chairman’s decision before the Cairo Court of Appeal, requesting that it be overruled and that enforcement of the arbitral award be ordered. The 91st Commercial Circuit of the Cairo Court of Appeal began by determining whether the rules applicable to the request for enforcement of the arbitral award should be Articles 296 to 301 of the Code of Procedure or Articles 56 to 58 of the Arbitration Law. Since Egypt acceded to the NYC by Presidential Decree No. 171/1959, the Court reasoned that the NYC is applicable as is any other law of the Egyptian State and it requires Egyptian Courts to enforce foreign arbitral awards according to its rules of procedure and pursuant to the conditions contained in Article IV NYC and the following Articles. Article III NYC provides that the contracting States shall not impose substantially more onerous conditions on the enforcement of foreign arbitral awards than are imposed on the enforcement of domestic arbitral awards. Comparing Articles 296 to 301 of the Code of Procedure, which are applicable to enforcement of foreign decisions, with Articles 55 to 58 of

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the Egyptian Arbitration Law, which are applicable to enforcement of arbitral awards issued in Egypt, the Court concluded that the provisions of the Code of Procedure provide for more onerous conditions. Accordingly, it decided that the enforcement of the arbitral award shall be governed by Articles 55 to 58 of the Egyptian Arbitration Law which provide for the jurisdiction of the Cairo Court of Appeal to rule on the enforcement of arbitral awards. The Court decided to overrule the decision of the Chairman of the 75th Commercial Circuit as it did not apply Article III NYC and misinterpreted the term "rules of procedure" mentioned in the NYC as limited to the Code of Procedure, whereas they include all laws organizing the proceedings such as the Arbitration Law which is a procedural law falling under the term "rules of procedure". It also granted Omnipol's request for enforcement of the award given that it is not contrary to public policy in Egypt, was correctly notified to Samiran and no claim was made that it contradicts a judgment issued by Egyptian Courts.

Case 1612: NYC III
Egypt: Court of Cassation
Case nr. 966/73
El Nasr Company for Fertilizers & Chemical Industries (SEMADCO) v. John Brown Deutsche Engineering
10 January 2005
Original in Arabic

Abstract published on www.newyorkconvention1958.org[3]

On 26 March 2001, an award was issued following arbitration proceedings in Geneva, Switzerland, between John Brown Deutsche Engineering ("John Brown") and El Nasr Company for Fertilizers & Chemical Industries (SEMADCO). John Brown requested enforcement of the award before the Chairman of the Cairo Court of Appeal, who rejected the request on 10 July 2002. On 21 July 2002, John Brown requested the Cairo Court of Appeal to overrule the Chairman's order and grant enforcement to the award, arguing that the award met all requirements for enforcement and was not contrary to public policy in Egypt. SEMADCO objected, arguing that the Cairo Court of Appeal did not have jurisdiction to rule on the request for enforcement and that the award contravened public policy in Egypt. The Cairo Court of Appeal decided to overrule the Chairman's order and grant enforcement to the award, finding that it had jurisdiction to rule on the request for enforcement. The Court noted that Egypt had acceded to the NYC and that, therefore, the NYC was applicable even when in contradiction with Egyptian laws. It added that Article III NYC provides that the contracting States shall not impose substantially more onerous conditions on the enforcement of foreign arbitral awards than are imposed on the enforcement of domestic arbitral awards.

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The Court found that Articles 297 and 298 of the Code of Civil and Commercial Procedure, which are applicable to foreign arbitral awards and provide for the jurisdiction of the Courts of First Instance, impose more onerous conditions than those imposed by Articles 56 and 58 of the Egyptian Arbitration Law applicable to domestic arbitral awards. Accordingly, the Court held that enforcement of the award should be governed by Articles 56 and 58 of the Egyptian Arbitration Law, under which the Cairo Court of Appeal had jurisdiction to rule on the enforcement of the award. As John Brown had produced all the required documents and the award did not contravene public policy in Egypt, the Court of Appeal granted enforcement.

Case 1613: NYC III; [V(I); V(I)(a); V(I)(b); V(1)(c); V(I)(d)]
Egypt: Cairo Court of Appeal
Case nr. 4/120 and 15/120
International Trade Corporation v. V/O Stankoimport
28 January 2004
Original in Arabic

Abstract published on www.newyorkconvention1958.org[4]

On 17 September 2001, an arbitral tribunal seated in the Russian Federation issued an award in favour of V/O Stankoimport ("Stankoimport") against International Trade Corporation ("International Trade") in arbitral proceedings administered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. On 29 January 2003, Stankoimport requested enforcement of the award before the Chairman of the Cairo Court of Appeal, who granted enforcement to the award by an order dated 15 February 2003. On 1 March 2003, International Trade filed a lawsuit before the Cairo Court of Appeal, seeking a suspension of the enforcement of the award and its setting aside on the basis of Articles V(1)(a), V(1)(b), V(1)(c) and V(1)(d) NYC. Stankoimport objected to the jurisdiction of the Cairo Court of Appeal to rule on International Trade's request. On 9 March 2003, International Trade filed a second lawsuit before the Cairo Court of Appeal, requesting it to overrule the Chairman's order. International Trade argued, inter alia, (i) that the request for enforcement of the award was in breach of Article 58(1) of the Egyptian Arbitration Law since it was made less than 90 days after the issuance of the award, and (ii) that the order of the Chairman of the Cairo Court of Appeal breached Article 298 of the Code of Civil and Commercial Procedure ("Code of Procedure") by granting enforcement to the award even though the dispute between the Parties had been subject to the jurisdiction of Egyptian Courts.

Deeming the two lawsuits filed by International Trade to be interlinked, the Cairo Court of Appeal decided on both in the same judgment, declining jurisdiction over International Trade's request for setting aside and rejecting International Trade's challenge to the order granting enforcement to the award. The Court decided that it lacked jurisdiction to rule on International Trade's request for setting aside the

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award since the Parties were in agreement that the award had been issued in the Russian Federation and that they had not agreed on the application of the Egyptian Arbitration Law. In rejecting International Trade's challenge to the order granting enforcement, the Court held that Article 58(1) of the Egyptian Arbitration Law applies only to domestic arbitral awards or to awards made in arbitral proceedings that the Parties have agreed to subject to the Egyptian Arbitration Law.

It added that enforcement of the award is governed by the NYC, which does not set any time limits for enforcement. The Court also held that the NYC does not make enforcement of a foreign arbitral award conditional upon a determination that the Courts of the State where enforcement is sought do not have jurisdiction over the dispute which is the subject matter of the award. The Court recalled that Egypt acceded to the NYC by Presidential Decree No. 171/1959 and that the provisions of the NYC are applicable even when in contradiction with the Code of Procedure. The Court further noted that Article 298 of the Code of Procedure is applicable to foreign arbitral awards and that the Egyptian Arbitration Law, which applies to domestic arbitral awards, contains no similar provision. Thus, it held that Article 298 of the Code of Procedure would not apply based on Article III NYC which provides that the contracting States shall not impose substantially more onerous conditions on the enforcement of foreign arbitral awards than are imposed on the enforcement of domestic arbitral awards. The Court of Appeal confirmed the order granting enforcement to the award, holding that International Trade had failed to establish that the award should be denied enforcement under Article V(1) NYC.

Case 1614: NYC III; V(1)(e)
Egypt: Cairo Court of Appeal
Case nr. 129/118
Nile Cotton Ginning Company v. Cargill Limited
29 June 2003
Original in Arabic

Abstract published on www.newyorkconvention1958.org[5]

Pursuant to an arbitration agreement dated 30 October 1998 concluded by Nile Cotton Ginning Company ("Nile Cotton") and Cargill Limited ("Cargill"), the latter initiated arbitration proceedings under the auspices of the Arbitration Administration Committee at the American Fats and Oils Association. On 15 December 1999, an arbitral award was issued in the United States of America, ordering Nile Cotton to pay damages to Cargill. On 27 December 2001, Nile Cotton filed a lawsuit before the Cairo Court of Appeal, requesting the suspension of the enforcement of the award and its setting aside. The Court decided that it lacked jurisdiction to rule on the challenge made by Nile Cotton. It noted that the application of the Egyptian Arbitration Law is limited by its Article 1 to arbitration proceedings held in Egypt and international arbitration proceedings which the

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Parties agreed to submit to the Egyptian Arbitration Law and that this position corresponds to Egypt's commitment under the NYC to recognize and enforce foreign arbitral awards as well as to the Parties' agreement to hold arbitration proceedings outside of Egypt without submitting them to the Egyptian Arbitration Law, which means that they agreed that their dispute should escape the jurisdiction of the Egyptian Courts. The Court deducted from Articles III and V(1)(e) NYC that only the Courts of the State where the award was issued have jurisdiction to rule on requests for its setting aside. Given that the provisions of the NYC are applicable even when in contradiction with the Egyptian Code of Civil and Commercial Procedure and Arbitration Law, the rule that Egyptian Courts lack jurisdiction to rule on requests for the setting aside of foreign arbitral awards is a rule relating to jurisdiction and may be applied by the Court *sua sponte*. Since the arbitral award challenged by Nile Cotton was issued in the United States and the Parties did not agree on the application of the Egyptian Arbitration Law, this law did not apply to the arbitral award.

Case 1615: NYC I; II; II(3)
India: High Court of Gujarat
Civil Application No. 23 of 2005
Swiss Singapore Overseas Enterprises Pvt Ltd v. M/V African Trader
7 February 2005
Original in English
Available at: http://gujarathighcourt.nic.in/

Abstract published on www.newyorkconvention1958.org[6]

Swiss Singapore Overseas Enterprises ("Swiss Singapore", the charterer) entered into a charter party with M/V African Trader ("African Trader", the owner), which African Trader alleged provided for arbitration in Durban, South Africa. After a dispute arose, Swiss Singapore launched a legal action before the High Court of Gujarat, Ahmedabad. African Trader applied to the High Court to stay the action commenced by Swiss Singapore, pursuant to Section 45 of the Arbitration and Conciliation Act, 1996 (the "1996 Act") (mirroring Article II(3) NYC). In its argument, Swiss Singapore relied on Articles I and II(3) NYC. The High Court of Gujarat rejected African Trader's application, finding that Section 45 of the 1996 Act was inapplicable as the Indian Central Government had not issued a notification that South Africa was a reciprocating State party to the NYC. Consequently, the High Court held, that the award could not be a "foreign award" as the term was defined in Section 44 of the 1996 Act (implementing Articles I and II NYC) and, as a result, Section 45 was inapplicable. According to the High Court, notification by the Central Government is one of the four conditions set out in Section 44 of the 1996 Act: (i) the award is on a difference arising out of legal relationships considered as commercial under the law of India; (ii) the award was made on or

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after 11 October 1960; (iii) the award was made in pursuance of an agreement in writing for arbitration to which the NYC applied; and, (iv) the award was made in one of the reciprocating contracting States notified by the Central Government. The High Court found the award met the first three conditions but, due to the lack of notification, failed to meet the fourth. In addition, the Court considered that the alleged arbitration agreement was "absolutely vague, ambiguous and self-contradictory". In the Court's view, such an agreement was not capable of being performed and therefore fell within an exception of Section 45. Finally, the Court noted that in reaching its decision it also placed weight to the fact that African Trader had moved the application to stay only after Swiss Singapore had commenced legal action, something which — according to the Court — showed that African Trader did not intend to refer the dispute to arbitration.

Case 1616: NYC I; II; V
India: High Court of Gujarat
First Appeal No. 1787 of 2002; Civil Applications Nos. 6301, 6556 and 8562 of 2002
Nirma Ltd v. Lurgi Energie und Entsorgung GmbH and ors
19 December 2002
Original in English
Available at: http://gujarathighcourt.nic.in/

Abstract published on www.newyorkconvention1958.org[7]

Nirma Ltd ("Nirma") entered into a contract with the Lurgi Energie und Entsorgung GmbH ("Lurgi") for the provision of know-how and supervision over a certain project, which contained a clause for arbitration under the rules of the International Chamber of Commerce ("ICC") in London. The contract was governed by the "laws of India". A dispute arose and Lurgi commenced an arbitral proceeding in London. The tribunal issued a First Partial Award on jurisdiction, holding that the dispute between the parties fell within the scope of the arbitration clause in the contract. Nirma applied to District Court in Bhavnagar, India, to set the First Partial Award aside pursuant to Section 34 of the Arbitration and Conciliation Act, 1996 (the "1996 Act"). The District Court dismissed Nirma's application. Nirma appealed the District Court's decision to the High Court of Gujarat. The High Court of Gujarat dismissed Nirma's appeal, upholding the decision of the District Court on the ground that the First Partial Award did not constitute an "award" within the meaning of Section 34 of the 1996 Act and, consequently, could not be set aside. The High Court considered that there was "no doubt about the fact that the arbitration in question is an international commercial arbitration". However, the High Court stressed, Section 34 of the 1996 Act made no distinction between foreign or domestic awards and, consequently, an Indian court had the power to set aside an award made outside India. The High Court found that even an award made in an arbitration with its seat outside India would be a "domestic award" if the agreement

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pursuant to which it was made was governed by the law of India. In reaching this conclusion, the Court did note that Section 44 of the 1996 Act (implementing Articles I and II NYC) set out the essential attributes of a foreign award as (i) an award on differences between persons, arising out of legal relationships, whether contractual or not, considered commercial under the law in force in India; (ii) made after or on 11 October 1960 in pursuance of an agreement in writing to which the NYC applies; (iii) made in one of the territories that the Central Government, by notification to the Official Gazette, has declared as a territory to which the NYC applies. The Court also briefly surveyed the content of Sections 46, 48 (mirroring Article V NYC) and 49 of the 1996 Act. On the facts of the case, the High Court considered that Indian law governed the arbitration agreement. However, the High Court concluded, the First Partial Award was not an "award" as understood by Section 24 of the 1996 Act but only an "order or decision" which could only be challenged at a subsequent stage, if the final award itself were to be challenged.

Case 1617: NYC II; V; V(1)(a)
India: High Court of Andhra Pradesh
Civil Revision Petition Nos. 331 and 1441 of 2002
International Investor KCSC v. Sanghi Polyesters Ltd
9 September 2002
Original in English
Available at: www.indiankanoon.org

Abstract published on www.newyorkconvention1958.org[8]

International Investor KCSC ("KCSC") entered into a contract with Sanghi Polyesters Ltd ("SPL") for the purchase of goods from SPL, which provided for arbitration in London under the auspices of the International Chamber of Commerce ("ICC"). The contract was to be governed by English law, but only to the extent that English law did not conflict with Shari'a law. A dispute arose between the parties and KCSC initiated arbitration in London, obtaining a favourable award. SPL sought, unsuccessfully, to annul the award before the High Court in London. KCSC sought to enforce the award in India and seized the Principal District Judge of the Ranga Reddy District to that effect. The District Judge granted enforcement of the award but found that KCSC would have to file a separate petition for the execution of the award. It denied KCSC's request to direct SPL to disclose its properties. SPL appealed to the High Court of Andhra Pradesh against the decision. First, it argued that that the award should not be enforced under Section 48(1)(a) Arbitration and Conciliation Act 1996 (the "1996 Act") (mirroring Article V(1)(a) NYC) because, according to SPL, KCSC was claiming for interest on the basis of an agreement governed by Shari'a law. Second, SPL argued that it had not been afforded an opportunity to present its case. KCSC also appealed against the decision to the High Court of Andhra Pradesh, arguing that a separate step was not needed for the

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execution of the award, and also that SPL should be ordered to disclose its properties. The High Court of Andhra Pradesh allowed KCSC's appeal and dismissed SPL's appeal, ordering the enforcement of the award and finding that KCSC need not take a separate step to execute the award. The High Court rejected both grounds for non-enforcement advanced by SPL. It rejected SPL's argument that "agreement" in Section 48(1)(a) of the 1996 Act refers to the purchase agreement, holding that the reference to "agreement" in Section 48(1)(a) is to the arbitration agreement entered into by the parties. Further, the High Court considered that SPL had already raised the argument that it had not been afforded an opportunity to present its case before the High Court in London, which had been rejected. Consequently, the High Court of Andhra Pradesh noted that the doctrine of res judicata prevented SPL from relying on the same ground. In reaching these conclusions, the Court remarked that Sections 44 and 48 of the 1996 Act are "substantially a reproduction" of Articles II and V NYC. The Court stated that the arbitral award in question was "a foreign award, governed by the New York Convention", an expression defined in Section 44 of the 1996 Act, and also placed burden of proof on the party challenging enforcement, as provided by Section 48 of the 1996 Act.

Case 1618: [NYC I]
India: Supreme Court of India
Civil Appeal 6527 of 2001
Bhatia International (Ind) v. Bulk Trading S.A. & Anr
13 March 2002
Original in English
Available on line at http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[9]

Bhatia International entered into an agreement with Bulk Trading and agreed to arbitrate any disputes in Paris, under ICC rules. Following a dispute, Bulk Trading filed a petition for interim relief, including an injunction, under Section 9 of India's 1996 Arbitration and Conciliation Act ("Act"). Bhatia objected, arguing that Section 9 did not apply to arbitrations occurring outside of India and that only Part II of the Act (which applies to foreign awards and implements the NYC) applied. Because no section of Part II contains a provision for interim relief, Bhatia maintained that none could be granted by the court here.

The Supreme Court held that Part I of the Act applied to foreign awards unless the parties affirmatively excluded this Part in their arbitration agreement. It reasoned that this must be the case because if Part I did not apply to foreign awards then there would be no Indian law governing awards rendered in non-NYC countries. Because the plain language of the Act did not conclusively establish otherwise, the Court found that Part I of the Act presumptively applies to both domestic and foreign awards, and the burden is on the parties to modify this by express or implied agreement.

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