United Nations A/CN.9/SER.C/ABSTRACTS/194

General Assembly

Distr.: General
25 September 2018

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.18-06380 (E) 280918 290918

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: (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 1780: NYC VII

France: Cour de cassation (Supreme Court)
Case No. 05-18.053[1]
Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices
29 June 2007
Original in French
Available at: https://www.legifrance.gouv.fr

Abstract published on www.newyorkconvention1958.org[2]

An Indonesian company (Putrabali) sold a cargo of white pepper to a French company (Est Epices, which later became Rena Holding). The contract provided for arbitration according to the Rules of Arbitration and Appeal of the International General Produce Association (IGPA). A dispute arose when the cargo was lost in a shipwreck. The Indonesian company commenced arbitration in London in accordance with the IGPA rules. In an award dated 10 April 2001, the arbitral tribunal held that Rena Holding's refusal to pay was "well-founded". Putrabali challenged the award on a point of law before the High Court on the basis of the Arbitration Act 1996 for England and Wales, which partially set aside the award and held that the Rena Holding's failure to pay for the cargo amounted to a breach of contract. In a second award dated 21 August 2003, the arbitral tribunal ruled in favour of Putrabali and ordered Rena Holding to pay the contract price. An enforcement order was issued by the President of the Tribunal de Grande Instance de Paris (First Instance Court of Paris) allowing recognition and enforcement of the 2001 award in France.

Putrabali challenged the decision of the Cour d'appel de Paris (Paris Court of Appeal) of 31 March 2005 which dismissed the appeal against the enforcement order, on the grounds that, inter alia, the setting aside of an arbitral award in a foreign country does not prevent the interested party from seeking enforcement of the award in France. Further, the Cour d'appel de Paris held that the enforcement of the 2001 award would not be contrary to international public policy.

The Cour de cassation (Supreme Court) affirmed the decision of the Cour d'appel de Paris. It reasoned that an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Pursuant to Article VII NYC, it held that Rena Holding was allowed to seek enforcement in France of the 2001 award rendered in London in accordance with the arbitration agreement and the IGPA rules and could avail itself of the French rules on international arbitration, which do not list the setting aside of an award in the country of origin as a ground for refusing the recognition and enforcement of that award.

[1] This case is cited in the UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards available at: www.uncitral.org.

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

Case 1781: NYC II
France: Cour de cassation (Supreme Court)
Case No. 05-21.818
SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG
21 November 2006
Original in French
Available at: https://www.legifrance.gouv.fr

Abstract published on www.newyorkconvention1958.org[3]

A French company (Deher Frères) entered into a contract with a German company (MS Regine Hans und Klaus Heinrich KG), for the transportation of a passenger ship from Toulon to Pointe-à-Pitre on 31 March 1999. The ship was damaged. The insurer of the French company (Groupama) commenced proceedings before domestic courts. The Cour d'appel de Basse-Terre (Basse-Terre Court of Appeal) dismissed the action and referred the parties to arbitration. Groupama challenged this decision on the grounds that it was not bound by the arbitration agreement included in the contract and that the lower courts had failed to establish that the French company (and its insurer) had knowledge of the content of the said arbitration agreement.

The Cour de cassation (Supreme Court) reasoned that NYC provides for the application of a more favourable domestic law concerning the recognition of the validity of arbitration agreements. It noted that the principles of validity of international arbitration agreements and of Compétence-Compétence preclude a national judge from ruling on the existence, validity and scope of the arbitration agreement before the arbitral tribunal has ruled on these matters, except if the agreement is manifestly void or not applicable, which it held was not the case here.

Case 1782: NYC II
France: Cour de cassation (Supreme Court)
Case No. 05-18.681[4]
Société Generali France Assurances et al. v. Société Universal Legend et al.
11 July 2006
Original in French
Available at: https://www.legifrance.gouv.fr

Abstract published on www.newyorkconvention1958.org[5]

A bill of lading for the transportation of goods was signed on 6 August 2002, which referred to a charter-party agreement dated 22 July 2002. The goods were damaged during transportation. The import company sought damages against the insurance companies before the Tribunal de commerce de Bordeaux (Commercial Court of Bordeaux). The insurance companies requested the joinder of the other parties to the agreement, which invoked the arbitration clause in the charter-party agreement and requested suspension of the proceedings until the arbitral tribunal ruled on its own jurisdiction. The Cour d'appel de Bordeaux (Bordeaux Court of Appeal) dismissed

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[4] This case is cited in the UNCITRAL Secretariat Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards available at: www.uncitral.org.

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the action and referred the parties to arbitration. The insurance companies challenged this decision on the grounds that they were not bound by the arbitration agreement and that the lower courts had failed to establish the parties' knowledge of the arbitration agreement included in the contract by reference. They also claimed that the arbitration agreement was manifestly null and void and therefore that the decision of the Cour d'appel de Bordeaux was contrary to Article II NYC, Article 1492 of the Code of Civil Procedure and Article 1134 of the Civil Code.

The Cour de cassation (Supreme Court) upheld the decision of the lower courts but did not refer to NYC. It reasoned that the charter-party agreement contained an arbitration agreement which was binding upon the successive holders of the bill of lading. It held that the insurance companies failed to demonstrate that the arbitration agreement was manifestly void and, therefore, confirmed that the Tribunal de Commerce de Bordeaux lacked jurisdiction to hear this dispute and that the arbitrators should rule on the existence, validity and scope of the arbitration agreement.

Case 1783: NYC IV
Italy: Corte di Cassazione (Supreme Court)
Case No. 17291
Microware s.r.l. in liquidation v. Indicia Diagnostics S.A.
23 July 2009
Original in Italian

Abstract published on www.newyorkconvention1958.org[6]

A French company ("Indicia Diagnostics") and an Italian Company ("Microware") entered into a contract for the supply of products, which contained an arbitration agreement. A dispute arose and Indicia Diagnostics initiated arbitration against Microware under the Rules of the International Chamber of Commerce (ICC). An award was rendered in Paris in favour of Indicia Diagnostics, for which its successor ("Indicia Biotechnology") obtained an ex parte order (decreto) for recognition and enforcement in Italy from the President of the Corte di Appello di Venezia (Venice Court of Appeal). Microware filed a petition against the enforcement order as per Article 840 of the Italian Code of Civil Procedure (opposizione), arguing that part of the award's order for payment concerned supplies that were extraneous to the parties' contract and therefore not subject to the arbitration agreement. It further argued that enforcement should be denied because Indicia Biotechnology had failed to supply the original or a certified copy of the arbitration agreement when filing its enforcement application.

The Corte di Appello di Venezia noted that although Indicia Biotechnology had supplied a certified copy of the contract containing the arbitration agreement, the signature on the certificate of authenticity was illegible and the capacity of the signatory was not indicated. It therefore granted Indicia Biotechnology a time limit to provide the original arbitration agreement or a duly certified copy thereof. Indicia Biotechnology complied with such a request and the Corte di Appello di Venezia partially confirmed the enforcement order, accepting Microware's challenge only in respect of the supplies that were not covered by the parties' contract containing the arbitration agreement. Microware appealed the decision, arguing that the lower court had violated Article 839.2 of the Italian Code of Civil Procedure by disregarding the requirement that the arbitration agreement be produced at the time of the request for enforcement.

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The Corte Suprema di Cassazione (Supreme Court) reversed the lower court's decision and denied enforcement. It held that compliance with Article IV of NYC (the wording of which is equivalent to Article 839.2 of the Italian Code of Civil Procedure and requires that the original arbitration agreement or its certified copy be produced at the time of filing of the enforcement request) is a condition for the admissibility of the enforcement proceedings and not just a matter of evidence. The Corte Suprema di Cassazione concluded that the supply of the original or of a certified copy of the arbitration agreement is a procedural prerequisite to be verified at the commencement of the proceedings and not a mere condition for the action, the absence of which may be cured in the course of the proceedings. However, the Corte Suprema di Cassazione noted that the lower court's finding that the requirement of Article IV has not been met, did not preclude a new enforcement application for the same award.

Case 1784: NYC II; II(2); III; V
Italy: Corte di Cassazione (Supreme Court)
Case No. 17312[7]
Nigi Agricoltura s.r.l. v. Inter Eltra Kommerz und Produktion GmbH
23 July 2009
Original in Italian

Abstract published on www.newyorkconvention1958.org[8]

A German company, Inter Eltra Kommerz und Produktion ("Inter Eltra"), entered into a contract for the sale and purchase of oil seeds with an Italian Company, Nigi Agricoltura s.r.l. ("Nigi"), through a confirmation order signed by Nigi's broker that was sent to Inter Eltra's broker. The order referred to the Federation of Oils, Seeds and Fats Associations (FOSFA) standard contract, which contained an arbitration clause. A dispute arose and Inter Eltra initiated arbitration against Nigi in London. Nigi failed to nominate an arbitrator due to which FOSFA appointed an arbitrator in Nigi's place. The tribunal composed of two arbitrators rendered an award in favour of Inter Eltra, which then obtained an ex parte order of enforcement (decreto) for the award from the President of the Corte di Appello di Firenze (Florence Court of Appeal). Nigi filed a petition before the Corte di Appello di Firenze against the enforcement order under Article 840 of the Italian Code of Civil Procedure (opposizione).

The Corte di Appello di Firenze held that the arbitration agreement was valid under Article 833 of the Italian Civil Code and Article II(2) NYC. It further dismissed Nigi's allegation that the arbitral tribunal's impartiality was affected by the even number of arbitrators, reasoning that Nigi's argument was based on Article 809 of the Italian Code of Civil Procedure, which concerns only domestic arbitration and is irrelevant in the context of the enforcement of a foreign award, as it is not one of the grounds for refusal of enforcement provided by Article V NYC and Article 840 of the Italian Code of Civil procedure. Nigi appealed to the Corte Suprema di Cassazione (Supreme Court) on the grounds of the inexistence of the arbitration clause and of the arbitral tribunal's lack of impartiality. Nigi first stated that no contract had been entered into between the parties because its broker would have refused to conclude the deal when it received the confirmation order of Inter Eltra's broker, and because Inter Eltra's broker was a third party with no mandate to accept its contractual offer. Nigi further argued that Article 809 of the Italian Code of Civil Procedure was applicable to the

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present case under Article III NYC (which provides for the application of the procedural rules of the place of enforcement of the award).

The Corte Suprema di Cassazione affirmed the decision of the Corte di Appello di Firenze and dismissed Nigi's petition against enforcement. The Corte Suprema di Cassazione refused to review Nigi's factual allegations pertaining to the inexistence of an arbitration agreement between the parties, noting that the appeal was grounded on a document whose content was not even reproduced and whose relevance could not be reviewed in the proceedings on issues of law (giudizio di legittimità). It held that Nigi had failed to properly challenge the lower court's finding that the defect related to the number of arbitrators is not a ground for refusal of enforcement under Article V NYC and Article 840 of the Italian Code of Civil procedure. The Corte Suprema di Cassazione noted that Nigi had only invoked Article III NYC, which concerns the proceedings for the enforcement of foreign awards and is manifestly irrelevant to issues pertaining to the arbitration proceedings itself or the composition of the arbitral tribunal, which were the issues invoked in this appeal.

Case 1785: NYC II
Italy: Corte di Cassazione (Supreme Court)
Case No. 11529[9]
Louis Dreyfus S.p.A. v. Cereal Mangimi s.r.l.
19 May 2009
Original in Italian

Abstract published on www.newyorkconvention1958.org[10]

Two Italian companies, Louis Dreyfus and Cereal Mangimi, entered into a sales contract, which referred to the general conditions of the Paris Grain Trade Association (INCOGRAIN) form No. 12, providing for arbitration before the Paris Arbitration Chamber. A dispute arose and Cereal Mangimi launched a lawsuit against Louis Dreyfus before the Tribunale di Bari (Bari First Instance Court). Louis Dreyfus raised a motion for lack of jurisdiction, based on the existence of an arbitration agreement. Both the Tribunale di Bari and the Corte di Appello di Bari (Bari Court of Appeal) held that the arbitration agreement was invalid since it was contained in a contract which had been executed by an agent whose mandate had been granted orally, in breach of Article 1392 of the Italian Civil Code, which provides that the mandate must have the same form as the main contract entered into by the agent. Louis Dreyfus appealed the decision by arguing that the arbitration agreement was valid given that an arbitration agreement is not required to be in writing *ad substantiam*, as a validity requirement, but only *ad probationem*, for an evidential purpose.

The Corte Suprema di Cassazione (Supreme Court) affirmed the decision of the Corte di Apppello di Bari and rejected Louis Dreyfus' motion for lack of jurisdiction. The Court noted that the issue of whether or not the agent needed a written mandate to conclude an arbitration agreement would most likely be of no relevance under the new wording of Article 808 of the Italian Code of Civil Procedure, resulting from the Italian arbitration law reform of 1994, which provides that the authority to enter into a contract includes the authority to enter into the arbitration clause. The Corte Suprema di Cassazione, however, avoided ruling on this issue and reached a conclusion based on different grounds, holding that the generic reference in the contract to the INCOGRAIN form did not satisfy the NYC requirement that an

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agreement in writing must be concluded between the parties to submit their disputes to arbitration, as per Article II NYC and Article 808 of the Italian Civil Code of Procedure. It distinguished between contracts containing an express and specific reference to an arbitration agreement contained in a separate document (per *relationem perfecta*), which it found were valid, and contracts containing a general reference to a separate document containing an arbitration agreement (per *relationem imperfecta*), which it found were not valid. The Corte di Cassazione therefore concluded that the Italian courts had jurisdiction to hear the case.

Case 1786: NYC III; IV; V
United States of America: U.S. Court of Appeals, Second Circuit
Case nos. 15-1133-cv(L), 15-1146-cv(CON)
CBF Indústria de Gusa, S/A v. AMCI Holdings, Inc.
2 March 2017
Original in English
Available on the Internet: https://caselaw.findlaw.com

Abstract prepared by S.I. Strong, National Correspondent

The plaintiffs-appellants sought to enforce a foreign arbitral award in New York district court. The district court refused to enforce the award on the grounds that it must first be confirmed pursuant to domestic law. The Second Circuit Court of Appeals overturned the district court decision, noting that Articles III, IV and V NYC operate together, as a single process, to provide both recognition and enforcement of a foreign award. Because the New York Convention was meant to eliminate double *exequatur*, it was not necessary to confirm an award prior to enforcing it. The Court of Appeals remanded the case to determine whether the award could be enforced against appellees as alter-egos of the award-debtor in the underlying arbitration.

Following entry of this decision, the plaintiff sought certiorari from the U.S. Supreme Court, but that petition was denied.

Case 1787: NYC II(3); III; V
United States of America: U.S. Court of Appeals, Eleventh Circuit
Case No. 14-11793
Escobar v. Celebration Cruise Operator, Inc.
25 June 2015
Original in English
Available on the Internet: https://caselaw.findlaw.com

Abstract prepared by S.I. Strong, National Correspondent

The plaintiff-appellant, a citizen of Honduras, was injured in the course of his duties as a seaman on the defendant-appellee's cruise ship, which was flagged in the Bahamas. The defendant was incorporated in the Bahamas and has its principal place of business in Fort Lauderdale, Florida, in the United States of America.

The plaintiff filed suit in Florida state court, and the defendant removed the matter to U.S. federal court and moved to compel arbitration. The district court entered an order compelling the matter to be heard in arbitration, and the plaintiff appealed. The Court of Appeals affirmed the district court, holding that Articles II(3) and III NYC required the matter to be referred to arbitration, even though chapter one of the Federal Arbitration Act specifically exempts actions that involve contracts regarding the employment of seamen from arbitration in the domestic context. In reaching this decision, the Court of Appeals noted that the narrow language in chapter one of the Federal Arbitration Act (FAA) was in conflict not only with the broad language of chapter two of FAA (the chapter that provides for domestic implementation of the New York Convention) but with the Convention itself. Therefore, the Court concluded that the New York Convention applied to international actions involving the employment of seamen. In its ruling, the court recognized a consensus among the Fourth, Fifth, Ninth and Eleventh Circuits in construing arbitration agreements

involving the employment of seamen in the international context to be subject to the New York Convention.

The plaintiff also sought to avoid arbitration by raising an affirmative defence involving a purported choice of law provision. The Court of Appeals interpreted the defence as involving public policy and indicated that such defences were premature and therefore inadmissible in an action to compel arbitration. Instead, the Court of Appeals held that such defences should be raised at the enforcement stage pursuant to Article V NYC.

Following entry of this decision, the plaintiff sought certiorari from the U.S. Supreme Court, but that petition was denied.