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Introduction

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

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

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

Case 2124: NYC V; V(2)(a); V(2)(b)
Finland: Supreme Court, S88/310[1]
Bankruptcy estate of Kommandiittiyhtiö Finexim O. Ivanoff (Finexim) and Ferromet Aussenhandelsunternehmen
27 February 1989
Original in Finnish

Abstract published on www.newyorkconvention1958.org[2]

Ferromet Aussenhandelsunternehmen (Ferromet) sold Kommandiittiyhtiö Finexim O. Ivanoff (Finexim) steel plates pursuant to five Sales Agreements including provisions on the reservation of the title to the goods. An arbitration clause providing for arbitration under the Court of Arbitration of the Czechoslovakian Chamber of Industry and Commerce, was included in the General Conditions of Export of the Sales Agreements. Finexim went bankrupt before the purchase price was paid and a dispute arose when Ferromet unsuccessfully requested the recession of the goods.

On 27 February 1986, an award was rendered in Czechoslovakia in favour of Ferromet, who subsequently sought enforcement in Finland. Finexim's bankruptcy estate opposed the action for enforcement on the grounds that the award was rendered against the bankrupt company instead of the bankruptcy estate and would therefore result in a different outcome than if the dispute had been decided in accordance with mandatory Finnish bankruptcy legislation, and enforcement would therefore be against Finnish public policy within the meaning of Article V(2)(b) NYC. The bankruptcy estate also argued that the tribunal had decided issues outside the scope of the arbitration agreement, which constituted a ground for non-enforcement under Article V(1)(c) NYC. Furthermore, Finexim's bankruptcy estate argued that the enforcement of the award should be refused pursuant to Article V(2)(a) NYC because it would determine the issue of what is included in the bankruptcy estate, a question which is not arbitrable under Finnish bankruptcy law, which it argued constituted a further ground for non-enforcement under Article V(2)(b) NYC.

Tampereen maistraatti (Tampere Register Office) decided that the award should be enforced, and rejected the objections that the dispute was governed by Finnish bankruptcy law and that the award decided issues outside the scope of the arbitration agreement. It further reasoned that the grounds for refusal of recognition and enforcement set forth in Articles V(2)(a) and V(2)(b) NYC did not exist in the present case, making the award enforceable. Finexim's bankruptcy estate appealed at the Turun hovioikeus (Turku Court of Appeals), which affirmed the decision of Tampereen maistraatti, and then appealed the decision to the Korkein oikeus (Supreme Court). The Supreme Court of Finland affirmed the decision of Turun hovioikeus, reasoning that the enforceability of an arbitral award against a bankruptcy estate should be assessed pursuant to territorial jurisdiction under Finnish law. The Supreme Court reasoned that because the bankruptcy estate had sold the goods regardless of the arbitral claimant's demand to separate the goods from the bankruptcy estate, the award concerned a debt of the bankruptcy estate and was therefore enforceable.

[1] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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

Case 2125: NYC V; V(1)(a)
Germany: Oberlandesgericht München (Higher Regional Court of Munich),
34 Sch 15/10[3]
11 July 2011
Original in German

Abstract published on www.newyorkconvention1958.org[4]

A Ukrainian and a German company entered into a sales agreement containing an arbitration clause providing for arbitration before the International Court of Arbitration of the Zurich Chamber of Commerce. Shortly thereafter, the parties entered into a supplementary agreement providing for arbitration before the Ukrainian Chamber of Industry and Commerce in Kiev. The Ukrainian party obtained an award against the German party before that tribunal in Kiev and sought enforcement thereof before the Oberlandesgericht (Higher Regional Court) München. The German Defendant argued that the second arbitration agreement was invalid as it constituted a mere collusion ("Scheingeschäft"). The German Defendant argued that it only agreed to this provision as the Ukrainian party had pretended that it was a pro forma requirement of the Ukrainian customs authority in order to be able to continue to export the goods. The Claimant, for its part, countered that the supplementary agreement had been entered into for cost reasons.

The Oberlandesgericht granted the enforcement. It held that the Defendant was certainly already barred from invoking the invalidity of the agreement as it had not done so before the arbitral tribunal. Moreover, the Court did not find the agreement to constitute a collusion under Ukrainian law applicable to that question. In particular, it held that if it is true that the party seeking enforcement always bears the burden of proof with respect to the existence of a valid arbitration agreement, the opposing party alleging that an agreement is a collusion yet bears the burden of proof for that allegation. The Court held that the Respondent has not satisfied that burden of proof.

Case 2126: NYC V; V(1)(a); V(2)(b)
Germany: Oberlandesgericht Saarbrücken, 4 Sch 03/10[5]
30 May 2011
Original in German

Abstract published on www.newyorkconvention1958.org[6]

A sales contract on a stallion provided for arbitration at the International Chamber of Commerce (ICC). Following a dispute on the stallion's ability to serve as a dressage and breeding horse, the Buyer initiated ICC proceedings, aimed at annulling the contract and obtaining damages based on alleged deficiencies of the stallion. However, an award was rendered in favour of the Vendor ordering the Buyer to pay the outstanding part of the sales price. The vendor sought enforcement in Germany before the Oberlandesgericht (Higher Regional Court) Saarbrücken. In order to oppose enforcement, the Buyer asserted that the sales price agreed upon had been too high in light of the stallion's actual deficiencies and requested the Court to find that

[3] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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

[5] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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

this price gap constituted a violation of the domestic public order which made the contract void in accordance to § 138 BGB (German Civil Code). The Buyer further asserted that since the sales contract was void the arbitration agreement was void. The Oberlandesgericht Saarbrücken granted enforcement.

The Court held that with regard to Article V NYC, there were no reasons in the case at hand to refuse recognition and enforcement of the award. First, with regard to Article V(2)(b) NYC, the Court started out by recalling that a party alleging the invalidity of the arbitration agreement is not required to do so during the arbitration proceedings. A proven violation of German domestic public order would be such a case. However, the Court said, the case at bar is particular because the Buyer based the alleged violation of the domestic public order and the invalidity of the arbitration agreement on a substantive objection: the price gap the Buyer was aware of already during the arbitration proceedings. However, substantive objections are not admissible if the causes on which they are based already existed during the arbitration proceedings. Thus, the Buyer was barred from raising this objection. The Court further reasoned that even if one were to accept the objection as being in principle admissible, the result would not be any different. This is so, said the Court, because the prohibition of reviewing the substance of the case only allows a limited control of the accuracy of the award. Therefore, the public order exception applies only to cases where fundamental and indispensable values of the German legal order needs to be protected. If § 138 BGB as such is certainly part of German domestic public order as it annuls contracts that violate public morality, this cannot mean however that the entire domestic case law on § 138 BGB with all its variations is also part of the domestic public order. This would have the undesirable result that foreign judgments and awards granting claims from a contract which is void according to § 138 BGB are never recognizable and enforceable. Yet, German legal order has to accept that foreign legal orders set less strict rules to the parties' price determination. Thus, the price determination by the parties is not part of the German domestic public order. Finally, the Court found that even though it had accepted the argument, the Buyer was unable to proof its case pursuant to the Danish law the Court found applicable in accordance with the German rules of private international law. Second, with regard to Article V(1)(a) NYC, the Court did not accept the Buyer's argument pursuant to which there was no valid arbitration agreement. It held that since the sales contract was not void. Even more, said the Court, the invalidity of the main contract has no effect whatsoever on the validity of the arbitration agreement.

Case 2127: NYC II; II(2); VII
Germany: Bundesgerichtshof, XI ZR 350/08[7]
25 January 2011
Original in German

Abstract published on www.newyorkconvention1958.org[8]

The three Claimants, all German citizens living in Germany, sought damages from a brokerage house in the United States, the Defendant, for losses arising from stock option transactions on the US stock exchange. The Defendant cooperated with various agents worldwide who conducted financial transactions on US stock exchanges via an online platform. Following a telephone advertisement, the Claimants signed standard form contracts with one of the Defendant's agents for the provision of stock option services. In addition, they also signed the Defendant's "Option Agreement and Approval Form", which contained an arbitration clause. The Defendant opened individual investment transaction accounts for each of the Claimants. Subsequently,

[7] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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

the Defendant sent its standard Terms and Conditions to Claimants, which contained a different arbitration clause from the one contained in the broker's standard form contract and which, moreover, foresaw the application of New York substantive law. The Claimants subsequently terminated the brokerage agreements and raised tort claims before the Landgericht (Regional Court) Duesseldorf. The Defendant objected to the jurisdiction of the German court, arguing, inter alia, that the dispute should be referred to arbitration based on the existence of an arbitration agreement between the parties.

The Landgericht rejected the Claimants' claims, following which the Claimant's appealed to the Oberlandesgericht (Higher Regional Court) Duesseldorf. The Oberlandesgericht held that it had jurisdiction over the dispute and granted the majority of the Claimants' claims. The Defendant appealed to the Bundesgerichtshof (Federal Supreme Court) on points of law, seeking a reversal of the Oberlandesgericht's decision and the reinstatement of the Landgericht's decision.

The Bundesgerichtshof rejected the Defendant's appeal and upheld the Oberlandesgericht's finding on jurisdiction, finding the respective arbitration clauses to be either non-binding or invalid. It held that the arbitration agreement that the Claimants had signed had not become binding on one of the Claimants pursuant to Section 37(h) of the Wertpapierhandelsgesetz (German Securities Trading Act), since that party was not a merchant and hence subjectively not capable to arbitrate pursuant to that legislation. The Bundesgerichtshof held that as regards the other two Claimants, the arbitration agreements were invalid for formal reasons, as they neither fulfilled the requirements of Article II(2) NYC nor those of the less stringent German law, which would apply pursuant to the more-favorable-right provision at Article VII NYC. The Bundesgerichtshof reasoned that the contracts containing the relevant arbitration agreements were consumer contracts under German law and hence, under Section 1031(5) of the German Civil Procedure Code, subject to the more strict form requirements for arbitration agreements involving consumers. It concluded that the arbitration agreements did not meet these requirements since, inter alia, they had not been signed by both parties. The Bundesgerichtshof upheld the Oberlandesgericht's decision on merits granting damages to the Claimants.

Case 2128: NYC V
Russian Federation: Федеральный арбитражный суд Московского округа (Federal Arbitrazh Court for the Moscow District), A40-105056/10-52-930
Rual Trade Limited (BVI) v UAB Ukio Banko Investicine Grupe, Vladimir Romanov, Roman Romanov (Lithuania) & Viva Trade LLC (BVI) (third party)
9 October 2012
Original in Russian

Abstract published on www.newyorkconvention1958.org[9]

Rual Trade Limited ("Rual Trade") sought recognition and enforcement before the Moscow Arbitration Court (court of first instance) of an arbitral award rendered on 21 April 2010 by an arbitral tribunal under the auspices of the Stockholm Chamber of Commerce (SCC) with its seat in Stockholm (Sweden). The award ordered UAB Ukio Banko Investicine Grupe, Vladimir Romanov, and Roman Romanov (the "Debtors") to jointly and severally pay Rual Trade USD 2,500,000 and accrued interest. The court granted recognition and enforcement of the arbitral award and issued a writ of execution. The ruling was appealed by Mr. Roman Romanov, one of the Debtors, before the Federal Arbitrazh Court for the Moscow District (court of cassation). By a

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ruling of the court of cassation, the decision of the court of first instance was quashed and the case was remanded to the court of first instance for re-examination.

At the request of the court of cassation, the court of first instance included Viva Trade LLC as a third party and granted Rual Trade recognition and enforcement of the award and issued a writ of execution. The court of first instance concluded that there was no basis either under Russian law or Article V(1) NYC for refusing recognition and enforcement of the award. Roman Romanov re-appealed the decision of the court of first instance before the Federal Arbitrazh Court for the Moscow District asserting that the decision of the court of first instance had to be quashed as it was rendered in violation of material and procedural norms.

The Federal Arbitrazh Court upheld the decision of the Moscow Arbitration Court granting recognition and enforcement of the award, concluding that there was no basis either under Russian law or Article V(1) NYC for refusing recognition and enforcement of the award. The court held that the jurisdiction of the arbitral tribunal derived from the arbitration agreement and the Debtors had not challenged the competence of the arbitral tribunal during the course of the proceedings; it also held that the Debtors were duly notified of the time and place of the arbitration hearing. Furthermore, it held that neither NYC nor Russian court practice required the award debtor to be domiciled at the location where enforcement is sought against his assets. The court also rejected the Debtors' assertion that no evidence was presented to show that the Debtors' property was located in Russia, noting that the court of first instance, based on the examination of case materials, had concluded that the Debtors had property in Moscow. The court of cassation also rejected the assertion of the Debtors that the award had not entered into force since the Debtors failed to furnish such evidence. The court concluded that the norms of material and procedural law had been correctly applied by the lower court and upheld the decision of the Moscow Arbitration Court granting recognition and enforcement of the award and issuing a writ of execution.

Case 2129: NYC V; V(1)(a)
Russian Federation: Федеральный арбитражный суд Московского округа (Federal Arbitrazh Court for the Moscow District), A40-65888/11-8/553[10]
Mabofi Holdings Limited v RosGas A.G.
24 January 2012
Original in Russian

Abstract published on www.newyorkconvention1958.org[11]

On 19 May 2011, an arbitral tribunal seated in Moscow, Russia, under the arbitration rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation issued an award confirming its jurisdiction over a dispute between RosGas A.G. ("RosGas") and Mabofi Holdings Limited ("Mabofi") concerning the validity of a contract for the sale of shares in Hungarian company Emfesz (the "Contract"). In concurrent proceedings, Mabofi obtained a judgment from a Hungarian court declaring that the Contract and the arbitration clause contained therein never came into existence since the Mabofi representative who signed the Contract lacked the necessary authority under the power of attorney granted to him. Mabofi applied to the Moscow Arbitrazh Court (court of first instance) to have the arbitral tribunal's ruling on jurisdiction annulled. Relying on Article V(1)(a) NYC, the court of first instance rejected the application. It held that Russian law, being the law of the country where the award was rendered, applied to

[10] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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

issues concerning the validity of the arbitration clause and the Hungarian judgment was therefore irrelevant. In a complaint filed with the Federal Arbitrazh Court for the Moscow District (court of cassation), Mabofi alleged that the court of first instance should have suspended the proceedings until the Hungarian court had rendered its decision. Failing such suspension, Mabofi argued that the court violated its right to judicial protection and, in so doing, called into question the performance by the Russian Federation of its international obligations.

The Federal Arbitrazh Court for the Moscow District overturned the first instance decision and remanded the case to the Moscow Arbitrazh Court. It held that by disregarding the Hungarian judgment, which declared the arbitration agreement null, the court of first instance violated the principle of comity, as well as the bilateral treaty providing for mutual recognition of judgments in force between Hungary and the Russian Federation. The court of cassation further held that the court of first instance incorrectly applied Article V(1)(a) NYC pursuant to which the validity of an arbitration agreement is determined according to the law of the country where the award is rendered only if the parties have not otherwise agreed on the agreement's applicable law. Thus, contrary to the decision of the court of first instance, Russian law did not apply to the arbitration agreement given that the parties had agreed that it should be governed by Hungarian law.

Case 2130: NYC II; V; V(1)(c)
Russian Federation: Presidium of the Highest Arbitrazh Court of the Russian Federation, A40-4113/10-25-33[12]
HiPP GmbH & Co. Export KG (Austria) v OOO SIVMA Baby Foods (Russia) and ZAO SIVMA (Russia)
14 June 2011
Original in Russian

Abstract published on www.newyorkconvention1958.org[13]

On 19 August 2009, an arbitral tribunal at the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) rendered an award ordering two Russian companies belonging to the SIVMA Group to pay jointly to their Austrian supplier of baby foods, HiPP, the unpaid bills, interest and procedural costs. The first instance court (Moscow Arbitrazh Court), in re-examining the case following the cancellation of its first decision by the court of cassation (Federal Arbitrazh Court for the Moscow District), refused to grant HiPP's application for recognition and enforcement of the VIAC award, inter alia, on the basis of Article V(1)(c) NYC. The Moscow Arbitrazh Court found that the arbitration clause in the exclusive distribution agreement between HiPP and SIVMA did not apply to a dispute arising from unpaid deliveries under a supply contract concluded within the framework of the exclusive distributorship, the latter contract containing a dispute resolution clause that was clearly different from the one in the distribution agreement. The decision was upheld in cassation by the Federal Arbitrazh Court for the Moscow District.

The Presidium of the RF Highest Arbitrazh Court cancelled the decisions of the lower courts and ordered to issue to HiPP an enforcement writ for coercive enforcement of the VIAC award of 19 August 2009. Re-examining the decisions of the lower courts in the supervisory proceedings, the Presidium referred to paragraphs 1 and 2 of Article II NYC to recall that an arbitration agreement in writing may be in the form of an arbitration clause in the contract, a separate arbitration agreement signed by the parties, or contained in an exchange of letters or telegrams. The Presidium found that

[12] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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the arbitral tribunal correctly established its jurisdiction over the dispute between HiPP and the two Russian companies of the SIVMA Group on the basis of the VIAC arbitration clauses in the exclusive distribution agreement, as well as in the guarantee issued by one of the Russian companies to secure the payments to be made by the other. The Presidium further noted that the arbitral tribunal's decision on its jurisdiction was not challenged before the State courts in the country where the decision was made.

Case 2131: NYC V; V(1)(c); V(2)(b)
Russian Federation: Федеральный арбитражный суд Западно-Сибирского округа (Federal Arbitrazh Court for the West-Siberian District), A27-781/2011[14]
Ciments Français (France) v OAO Holding Company Siberian Cement (Russia), OOO Financial Industrial Association Sibconcord (Russia), Istanbul Çimento Yatırımları (Turkey)
5 December 2011
Original in Russian

Abstract published on www.newyorkconvention1958.org[15]

On 7 December 2010, an arbitral tribunal at the International Chamber of Commerce (ICC) seated in Istanbul (Turkey) rendered a partial award declaring that the French company Ciments Français had properly exercised its right to terminate a Share Purchase Agreement (SPA) entered into with the Russian company Siberian Cement, that the termination was valid, and that Ciments Français was entitled to retain the initial payment amount under the SPA. Ciments Français sought recognition of that partial arbitral award in Russia. The first instance court (Arbitrazh Court of the Kemerovo Region) granted recognition of the award.

The Federal Arbitrazh Court for the West-Siberian District cancelled the first instance court's ruling in cassation on two grounds. First, by reference to Article V(2)(b) NYC, the cassation court held that because there was a decision of a Russian court declaring the SPA void and ordering Ciments Français to return the initial payment amount, the recognition of the partial arbitral award would result in mutually contradictory decisions, which would be contrary to the principle of mandatory authority of Russian court decisions, such principle being an integral part of the public policy of the Russian Federation. Second, by reference to Article V(1)(e) NYC, the Federal Arbitrazh Court for the West-Siberian District considered that because the partial arbitral award was being challenged in Turkish State courts, it was not binding on the parties.

[14] This case is cited in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

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