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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 have emanated from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL webpage (http://www.uncitral.org).

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the Court or arbitral tribunal. Second, 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 by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

The abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. 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 UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 637: MAL 4, 7 (2), 16 (2)
Russian Federation: Presidium of the Supreme Court of the Russian Federation, decision dated 24 November 1999
Original in Russian
Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2004, No. 1[1]
Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *arbitration agreement; objections; jurisdiction; estoppel; form of arbitration agreement*]

The plaintiff submitted a dispute for resolution to the Maritime Arbitration Commission at the Russian Federation Chamber of Commerce and Industry (MAC), and the respondent raised no objections regarding its jurisdiction. After losing the case at the MAC, the respondent sought to have its award set aside in state courts, claiming that the arbitral tribunal did not have the jurisdiction to hear the given dispute.

The Presidium of the Supreme Court of the Russian Federation held that the form of establishing an arbitration agreement provided for under paragraph 2, article 7, of the Russian Federation International Commercial Arbitration Law involving the exchange of statements of claim and defence, in which the respondent does not dispute the jurisdiction of the arbitral tribunal to examine the given dispute, does not grant the losing party any additional grounds for setting aside the arbitral award. If the respondent had raised an objection to the jurisdiction of the MAC at the very outset of the arbitral proceedings, the arbitral tribunal would have had to recognize the absence of an arbitration agreement between the parties and decline to examine the dispute on its merits. The respondent, however, raised an objection to the jurisdiction of the MAC only after it had granted the arbitral award. At that point the arbitration agreement was already established in the form of an exchange of statements of claim and defence, in which the existence of an agreement is alleged by one party and not denied by another.

Pursuant to article 4 of the aforementioned Law, a party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Moreover, paragraph 2, article 16, of the Law provides that a plea alleging that an arbitral tribunal does not have jurisdiction may be raised no later than the submission of the statement of defence.

[1] The journal has been published on a quarterly basis, in Russian, since January 2004.

Case 638: MAL 28, 34

Russian Federation: Federal Arbitration Court, Moscow District, decision dated 18 November 2002 (case No. KG-A40/7628-02)

Original in Russian

Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2004, No. 3

Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *applicable law; public policy; award—setting aside*]

A company that lost a dispute in the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (CICA) appealed to a state arbitration court to set aside the CICA award, arguing that it was in conflict with public policy.

Pursuant to part 4, article 233, of the Code of Arbitration Procedure of the Russian Federation, an award of an international commercial arbitral tribunal may be set aside by a court on grounds provided for by an international treaty of the Russian Federation and the federal law on international commercial arbitration.

The applicant alleged that in issuing the award the arbitral tribunal violated the public policy of the Russian Federation, which is grounds for setting aside an award in accordance with paragraph 2, article 34, of the Russian Federation International Commercial Arbitration Law. The violation of public policy took the form of the arbitral tribunal's breach of legal principles set forth in paragraph 2, article 1; paragraph 1, article 9; paragraph 3, article 10; and articles 309 and 328 of the Civil Code of the Russian Federation.

The court held that the applicant's arguments were not based on law. It follows from the sense of article 1193 of the Civil Code of the Russian Federation that violation of public policy can occur only when a foreign legal norm is applied that is in conflict with Russian principles of law and order.

It is evident from the case record that in hearing the civil legal dispute the arbitral tribunal was governed by the relevant norms of Russian law, which is based on the provisions of clause 2, paragraph 1, article 1186, and paragraph 1, article 1211, of the Civil Code of the Russian Federation; article 28 of the Russian Federation International Commercial Arbitration Law; and paragraph 9 of the CICA Statute, since the contract is linked closely to the Russian Federation.

The Moscow District Federal Arbitration Court held that application of the norms of domestic law by the international commercial arbitration court precluded the possibility of claiming a violation of the public policy of the Russian Federation.

Case 639: MAL 36 (1); 36 (2)
Russian Federation: Federal Arbitration Court, Northwest District, decision dated 20 March 2003 (case No. A56-34456/02)
Original in Russian
Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2004, No. 3
Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *public policy*]

A foreign company that prevailed in a dispute heard by the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (CICA) applied to a state court to issue an enforcement order. The court of first instance declined to grant the request.

In refusing to issue an enforcement order for compulsory execution of the CICA award, the court stated that fundamental principles of Russian law were violated in the resolution of the dispute, i.e., paragraph 2, part 3, article 233 of the Code of Arbitration Procedure of the Russian Federation (CAP) (this norm corresponds to subparagraph 2, para. 1, art. 36 of the Russian Federation International Commercial Arbitration Law, according to which an arbitral award that "is contrary to the public policy of the Russian Federation" shall not be subject to enforcement).

The court of first instance cited failure to apply applicable legal norms, failure to observe the principle of proportionality of liability for violation of obligations and failure to take into account the creditor's culpability in increasing the amount of losses among the "fundamental principles of Russian law" that were violated. Furthermore, the court mentioned improper calculation of the penalties to be collected, failure to ascertain the legal status of the foreign person, as well as the fact the CICA award did not break down the amount payable into debt and penalties, as required under CAP article 320.

The federal court held that the competence of a state court examining a plea for an enforcement order for compulsory execution of an award granted by an arbitral tribunal, such as the CICA, does not include verification of the proper application of the norms of substantive or procedural law, but rather verification of observance of the fundamental principles of law, i.e., basic principles of law with universality, the highest legal force, and peculiar general validity, since only the violation of these principles may serve as grounds for refusal to grant an enforcement order.

Consequently, failure to apply legal norms, which are applicable in the opinion of the court of first instance in the resolution of a dispute, cannot be recognized as a violation of the fundamental principles of Russian law. Moreover, in its award the CICA provided arguments to support the application of those norms of law by which it was governed.

The finding of the court of first instance was set aside by the court of appeal, and the case was remanded for a new hearing.

Case 640: MAL 34

Russian Federation: Federal Arbitration Court, Moscow District, decision dated 15 August 2003 (case No. KG-A40/5470-03P)

Original in Russian

Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2004, No. 3

Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *public policy; award—setting aside*]

The respondent, a Russian joint-stock company, was supposed to pay the plaintiff, a Polish bank, a certain amount of money pursuant to an award by the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (CICA). The respondent did not wish to comply voluntarily with the arbitral award and applied to the competent court to set it aside. The applicant asked that the arbitral award rendered by the CICA be set aside in connection with its alleged violation of fundamental principles of Russian law, i.e., on the basis of paragraph 2, part 3, article 233 of the Code of Arbitration Procedure of the Russian Federation (this norm corresponds to subparagraph 2, para. 2, art. 34 of the Russian Federation International Commercial Arbitration Law, pursuant to which an arbitral award that "is in conflict with the public policy of the Russian Federation" shall be set aside.)

The state court of first instance and the court of appeal granted the application, citing subparagraph 2, paragraph 2, article 34 of the Russian Federation International Commercial Arbitration Law, and stating that "an arbitral award may be set aside if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration," and it found that the disputed award rendered by the CICA applied to a dispute not covered by the arbitration agreement.

The court of appeal held that if the agreement concluded between the parties to the dispute "had not become binding" (which did in fact occur in this case in the opinion of the CICA), the effect of the arbitration clause contained therein (in spite of its autonomous nature) "could not extend to the resolution of issues that fall outside the scope of legally significant circumstances concerning the dispute referred to arbitrators for examination".

The court of appeal did not concur with the opinion of the CICA regarding the merits of the dispute, and it found that the arbitral tribunal violated one of the fundamental principles of Russian civil law—the principle of equal treatment of parties, which manifested itself in a one-sided assessment of the case and in the allocation of adverse property consequences for the plaintiff only, while each party to entrepreneurial activity bears entrepreneurial risks, which the state arbitration court equated with a violation of Russian public policy.

Case 641: MAL 36 (1)
Russian Federation: Federal Arbitration Court, Moscow District,
decision dated 8 January 2004 (case No. KG-A40/10524-03)
Original in Russian
Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2004, No. 3
Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *award—recognition and enforcement*]

A Ukrainian company, after prevailing in an arbitration dispute in the Court of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Industry (Ukrainian CICA), applied to the competent court of the Russian Federation to recognize and enforce the award of the Ukrainian CICA. The respondent challenged this motion, stating that the Ukrainian CICA went beyond the scope of the arbitration agreement. The court of first instance did not concur with this opinion and issued a decision calling for the plaintiff's application to be granted. The court of appeal upheld this decision.

The court of appeal held that the circumstances which serve as grounds for refusing to issue an enforcement order for compulsory execution of an award made by an arbitral tribunal pursuant to article 36 of the Russian Federation International Commercial Arbitration Law were not present.

It follows from the content of the Ukrainian CICA award and the respondent's position that the respondent did not agree with the assessment of the circumstances of the case and the evidence presented which was given by the arbitral tribunal, and the application of norms of substantive law in the examination of the case and the rendering of an award.

The assessment of the circumstances of the case and the evidence presented by the parties that was given by the arbitral tribunal, with which a party to the case did not agree, as well as the application of certain norms of substantive law, by virtue of the aforementioned norms of law, are not grounds for a refusal to recognize and enforce a foreign arbitral award.

The arguments contained in the appeal are not grounds for setting aside the finding of the court of first instance, since they concern the assessment of evidence and application of certain norms of substantive law of the Russian Federation, which do not fall under the authority of a court of appeal in the examination of an appeal of a finding regarding recognition and enforcement of a foreign arbitral award.

Case 642: MAL 34 (2)
Russian Federation: Federal Arbitration Court, Moscow District, decision dated 18 November 2004 (case No. KG-A40/10275-04)
Original in Russian
Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2005, No. 2
Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *public policy; award—setting aside*]

After losing a dispute in the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (CICA), a Russian company applied to a court to set aside the CICA award.

In support of its claims, the applicant cited the invalidity of the arbitration agreement, since the contract that contained the arbitration clause was, in the applicant's opinion, an invalid (void) transaction by virtue of the fact that the contract was signed on behalf of the foreign company by an unauthorized person.

The applicant claimed that the CICA award violated the fundamental principles of Russian law [public policy], namely: the principle of equal treatment of parties to civil legal transactions, the principle of maximum safeguards and legal protection for civil rights, the principle of the rule of law, and also the fact that the arbitral tribunal was not in compliance with the requirements of the law on verifying the legal status of the plaintiff, in connection with which it asked that the CICA award be set aside.

The court of first instance and the court of appeal held that the applicant did not prove the existence of grounds for setting aside the award in accordance with article 34 of the Russian Federation International Commercial Arbitration Law. The applicant did not present the appropriate evidence proving the existence of grounds for setting aside the CICA award. The court also held that the CICA award was not in conflict with the public policy of the Russian Federation.

With regard to the applicant's arguments that the contract was signed on behalf of the foreign company by an unauthorized person, both the courts held that these arguments were not supported by the case record.

Case 643: MAL 36 (1)
Russian Federation: Presidium of the Higher Arbitration Court of the Russian Federation, decision dated 22 February 2005 (case No. 14548/04)
Original in Russian
Published in the journal *Mezhdunarodnyy kommercheskiy arbitrazh* [*International Commercial Arbitration*], 2005, No. 3
Abstract prepared by A. S. Komarov and B. R. Karabelnikov

[**Keywords**: *award—recognition and enforcement; notice*]

A foreign company applied to the competent court for recognition and enforcement of a foreign arbitral award rendered in arbitration against a Russian company in Stockholm under the Statute of the Arbitration Institute of the Stockholm Chamber of Commerce. The Russian court of first instance and court of appeal refused to grant the application, agreeing with the respondent's arguments that it was not given

proper notice of the arbitral proceedings (para. 1, art. 36, of the Russian Federation International Commercial Arbitration Law.)

In the opinion of the court of first instance and the court of appeal, recognition and enforcement of the foreign arbitral award should be refused for the reasons that the respondent was not given proper notice of the arbitral proceedings, did not have an opportunity to present his case, and also because the power of attorney granted to the respondent's representative did not contain the authority to participate in sessions of an arbitral tribunal. In the courts' opinion, notice of the arbitral tribunal session should have been sent to the address of the respondent's state registration, and not to the address of its representative that was provided to the arbitral tribunal.

The Presidium of the Higher Arbitration Court of the Russian Federation (HAC RF) ruled that the disputed legal acts should be set aside, and the plaintiff's application for enforcement of the arbitral award should be granted.

Failure to provide a party of timely and proper notice of the time and place that a case is to be heard or inability to present one's case to an arbitral tribunal for other reasons are treated as grounds for refusal of recognition and enforcement of an arbitral award under paragraph 1, article 36, of the Russian Federation International Commercial Arbitration Law.

It follows from said norms that establishment of a circumstance that a party against whom an award is invoked was not able to present evidence to an arbitral tribunal, including as a result of failure to provide due notice to said party, is treated as an ultimate fact. It follows from paragraph 1, article 36, of the Russian Federation International Commercial Arbitration Law that the burden of proof with regard to circumstances of improper notice and inability to present evidence for other reasons is borne by the party against whom an arbitral award is invoked.

In the case in question the Russian company, which did not present evidence to support the failure to provide proper notice, is such a party. Placement of the burden of proof with regard to the circumstances in question on the applicant petitioning for enforcement of a foreign arbitral award does not arise from the norms of an international treaty and Russian law.

In refusing recognition and enforcement of the foreign arbitral award, the courts of both instances cited the failure to notify the respondent of the date of the arbitration session. Furthermore, it follows from the case record that the Russian company concluded an agreement on arbitral proceedings, selected an arbitrator for the examination of a dispute and appointed a representative for contacts with the arbitral tribunal, granting him power of attorney, from which arose his authorities to exercise the rights of a plaintiff, respondent, and third party on behalf of the company, and also the right to receive and examine documents from the arbitral tribunal related to arbitral proceedings. The representative named in the power of attorney sent a statement of defence to the arbitral tribunal on behalf of the company, as well as a countersuit using the stationery of a law firm, containing an address that was the same as the actual address of the Russian respondent company. The arbitral tribunal carried on correspondence with the respondent through its representative by sending documents to said address.

It follows from the representative's correspondence with the arbitral tribunal, which it conducted on behalf of the Russian respondent company, that it was notified of

the arbitration session in a timely manner. Thus, when evaluating the fact of the respondent's notice of the session of the arbitral tribunal, one should take into account the representative's power of attorney in the case record, as well as the correspondence between the arbitral tribunal and said person.

The Presidium of the HAC RF, without remanding the case for a new hearing, instructed the court that examined the plea for enforcement of the award of the Arbitration Institute of the Stockholm Chamber of Commerce, to issue an enforcement order to the applicant for enforcement of the given arbitral award on the territory of the Russian Federation.

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