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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.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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Printed in Austria

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

Case 1945: NYC V(2); V(2)(b)

Argentina: Supreme Court of Justice of Argentina
CSJ 1460/2016/CS1
Milantic Trans S.A. v. Astilleros Río Santiago/Ministry of Production of Buenos Aires Province
5 August 2021
Original in Spanish

Published in: CSJN, Judgments of the Supreme Court of Justice of Argentina, vol. 344, 1857

This case deals with the limits to the intervention of judges ex officio in the enforcement and recognition of a foreign arbitral award in the light of the provisions of the New York Convention.

The Panamanian company Milantic Trans S.A. (the claimant) applied to Court of First Instance No. 2 for Administrative Disputes of the Judicial District of La Plata (hereinafter: "the court of first instance") for the recognition and enforcement of an arbitral award rendered on 15 November 2004 in London, United Kingdom. According to the award, the public shipbuilding company Astilleros Río Santiago (ARS) was ordered to pay $3,248,568.50 plus interest to the claimant for damages arising from the delay in the construction of a vessel. Since the public company ARS was domiciled in Buenos Aires Province, the claim was made against the latter (the respondent). The respondent argued that ARS had not been authorized to enter into the contract that had given rise to the arbitration because the contract had not been approved in accordance with provincial law. However, the court of first instance rejected the arguments made by Buenos Aires Province and ordered the enforcement of the award.

Consequently, the Public Prosecutor's Office of Buenos Aires Province appealed the decision, but only in relation to the costs imposed on Buenos Aires Province. The Court of Appeal for Administrative Disputes of La Plata ("the court of appeal") overturned the judgment of the court of first instance in its entirety on the ground that, although the respondent's appeal was limited to costs, the manner in which the appeal had been brought required examination of the case on the merits. The claimant then appealed to the Supreme Court of Justice of Buenos Aires Province, which upheld the ruling of the court of appeal. The latter argued that the appeal of the Public Prosecutor's Office did not prevent the court from examining – on its own motion – the judgment on the merits of the case. The court also argued that article V(2)(b) of the New York Convention provides for the possibility of refusing the recognition and enforcement of an arbitral award on the ground of public policy. Thus, since the arbitration agreement and the submission to arbitration were contrary to Argentine public law, the decision to refuse the recognition of the award was justified.

Finally, the claimant filed an extraordinary appeal before the Supreme Court of Justice of Argentina. In its decision, the Supreme Court of Argentina pointed out that judges are limited by the principle of consistency to examining ex officio the merits of a case in which a final judgment has already been handed down by a court of first instance. It added that the principle of res judicata is of such importance in Argentine constitutional law that it cannot be overridden even for reasons of public policy, since that would affect the stability of judgments and, in turn, public policy itself. It further added that since the respondent (ASR/Buenos Aires Province) in this case had only appealed the decision of the court of first instance with respect to costs and had not objected to the recognition of the award, the court of appeal had acted beyond its jurisdiction by reviewing the merits of the case. The Supreme Court of Buenos Aires had likewise erred in upholding the judgment of the court of appeal. For those reasons, the Supreme Court

of Argentina overturned the appealed judgment and referred the case to the court of first instance for enforcement and recognition of the arbitral award.

Case 1946: NYC V(1)(c); V(1)(e); V(2)(b)

Cayman Islands: Court of Appeal of the Cayman Islands
CICA (Civil) Appeal 12 of 2019 (Formerly FSD 137 of 2016)
Gol Linhas Aéreas SA v. Matlinpatterson Global et al.
11 August 2020
Original in English

Available on the Official Website for the Chartered Institute of Arbitrators Caribbean Branch at: https://ciarbcaribbean.org/resources/articles/Newsletter%201-14%20CICA's%20Gol%20v%20MP%20Funds%20Judgment.pdf

The appellant, a Brazilian company, concluded a share purchase and sale agreement with the respondents, companies from the United Sates and Cayman Islands. Under that agreement, the appellant purchased 100 per cent of the issued shares of a Brazilian airline from two special purpose companies set up by the respondents to perform the sale. Subsequently, a dispute arose concerning the working capital of the airline and a demand was made for adjustment to the purchase price paid under the agreement. The appellant then initiated arbitration proceedings in Brazil against the sellers and respondents in 2007. A partial award was issued in 2009 in favour of the appellant followed by a final award in 2010. The respondents commenced actions before the Brazilian courts for a review of both awards but were unsuccessful at first instance and their appeals dismissed.

In 2016, the appellant commenced enforcement proceedings in the Cayman Islands pursuant to sections 7(2) and 7(3) of the Foreign Arbitral Awards Enforcement Law (1997 Revision) (which mirror Article V NYC). The respondents challenged the application to enforce the arbitral awards before the first instance court on the grounds that (i) the respondents were not party to the arbitration agreement relied on; (ii) if they were, the claims raised in arbitration were outside the scope of the arbitration agreement; (iii) the arbitral tribunal decided the case on a legal ground, namely, article 148 of the Brazilian Civil Code, which was not submitted by the appellant and contrary to public policy in the Cayman Islands; and (iv) the legal ground relied on by the arbitral tribunal was not within the terms of reference of the arbitration and, therefore, had not been submitted to the arbitral tribunal for a decision. In 2019, the first instance court agreed with all four grounds and refused to enforce the awards in the Cayman Islands. The appellant's submissions based on Brazilian law and estoppel were rejected.

On appeal, the Court overturned the decision of the lower court in its entirety and focused on the appellant's argument of estoppel. First, the Court determined whether the Brazilian court decisions were "final and conclusive" and addressed the clash between article 502 of the Brazilian Code of Civil Procedure, which provides that, as a matter of Brazilian law, any judgment under appeal is not "res judicata", and English authorities, which make clear that the prospect of appeal is irrelevant to any judgment being final and conclusive. In its view, the doctrine of estoppel was a matter of the law of the Cayman Islands law and that the English test should prevail. Second, the Court addressed whether the first instance court had correctly rejected estoppel on the basis that the issues before the English and Brazilian courts were not identical and found that the first instance court had erred. The Court held that the issues decided by the Brazilian courts were indeed the same issues and that Brazilian judgments were the best evidence there is of Brazilian law. Furthermore, the Court applied its own views of contractual interpretation under Brazilian law. As a result, the Court agreed that the respondents were estopped from challenging the Brazilian law decisions issued on the validity of arbitrators' jurisdiction in this case.

As to whether enforcement could be refused on public policy (Article V(2)(b) NYC), the Court found that the issue was a matter for the law of the Cayman Islands. However, in its view, based on leading English authorities, proper regard must be had to foreign procedure and what the foreign courts would say about the issue of due

process. Thus, the Court carefully considered the doctrine of iura novit curia in international law. In its view, the doctrine was so well recognised in civil law jurisdictions that it would be concerned if English and Cayman law sought to ignore it when determining whether to allow the enforcement of an arbitral award from a civil law jurisdiction. Nonetheless, after acknowledging the novelty of the public policy defence in English and Cayman jurisprudence, the Court was persuaded by the fact that both the Brazilian courts and ICC Court of Arbitration had considered the arbitrators' deployment of the doctrine without finding a breach of due process. Therefore, referring to Article VI NYC, the Court allowed the appeal to enforce the award subject to a stay pending the conclusion of the proceedings in Brazil initiated by the respondents to set aside the award.

Case 1947: NYC I; II

India: Supreme Court
Civil Appeal No. 1647 of 2021
PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited
20 April 2021
Original in English

Available at: https://main.sci.gov.in/supremecourt/2021/2818/2818_2021_33_1501_27661_Judgement_20-Apr-2021.pdf; https://indiankanoon.org/doc/79928496/

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

In this appeal, the Supreme Court of India ("Court") settled the legal question of whether two Indian parties could validly choose a seat of arbitration outside India. While answering the question in the affirmative, the Court also decided that such an award made at a seat outside India, to which the NYC applied, would be enforceable as a "foreign award" under Part II of the Indian Arbitration & Conciliation Act, 1996 ("1996 Act"). Part II of the 1996 Act is concerned with enforcement of certain foreign awards.

In this case, PASL Wind Solutions Private Limited ("PASL") and GE Power Conversion India Private Limited ("GE") had agreed to resolve their disputes by arbitration with the seat at Zurich, Switzerland. Switzerland is a signatory to the NYC. PASL had commenced arbitration and contended that two Indian parties could validly choose a foreign seat. The arbitral tribunal, which agreed with PASL on this procedural issue, ultimately decided against it on merits, and awarded legal costs to GE. PASL failed to pay those costs, and GE initiated enforcement proceedings in India against PASL under Part II of the 1996 Act. In the enforcement proceedings, PASL reversed its earlier position and contended that two Indian parties could not have chosen a foreign seat, and that Mumbai, which was the venue of the arbitration, was actually the seat.

PASL also contended that a foreign award under Part II of the 1996 Act could only arise from an "international commercial arbitration" as defined in Section 2(1)(f) under Part I of the 1996 Act (corresponding to Article 1(3) MAL). That would require, inter alia, that at least one party be a national or a habitual resident of a country other than India, or a body-corporate incorporated outside India. Since, neither PASL nor GE satisfied these conditions, PASL argued that the award was not a foreign award enforceable under the New York Convention (which has been incorporated into Indian law in Part II of the 1996 Act).

The Court rejected this argument. It analysed Section 44 (corresponding to Articles I and II of the NYC), which is contained in Part II of the 1996 Act and which contains the definition of a "foreign award". The Court ruled that Part I and Part II of the 1996 Act are mutually exclusive, and the meaning of a foreign award under Part II could not be based on a definition in Part I.

The Court laid down four ingredients of a foreign award under Section 44. First, the dispute must be considered to be a commercial dispute under the law in force in India. Second, the award must be made in pursuance of an agreement in writing for arbitration. Third, the disputes must arise between "persons" (without regard to their nationality, residence, or domicile). Finally, the arbitration must be conducted in a country which is a party to the NYC.

In arriving at this conclusion, the Court explored the scope of Article I (1) of the NYC. It held that any award made in a State which is a signatory to the NYC, other than the State of the recognition or enforcement court, is a foreign award and clarified that nationality, domicile, or residence of the parties is not relevant in determining whether an award is a foreign award. The Court also referred to Article I (3) of the NYC, and the two conditions a State can make when it signs, ratifies, or accedes to the NYC. First, any State may on the basis of reciprocity, declare that it will apply the NYC to awards made only in the territory of another Contracting State, and second, it will apply the NYC only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State making such a declaration.

The Court noted the distinction between the Geneva Convention of 1927 and the NYC. It noted that the Geneva Convention applied to awards which have been "made in a territory of one of the High Contracting Parties to which the Convention applied, and between persons who are subject to the jurisdiction of one of the High Contracting Parties." The Court observed that the requirements under Section 53(b) of the 1996 Act, which deals with awards under the Geneva Convention of 1927, and reflected Article I of that Convention is conspicuously absent in Section 44 of the 1996 Act (which is based on Article I(1) of the NYC). Therefore, there was no bar on two Indian parties from choosing a seat of arbitration outside India. The Court observed that Section 44 was drafted in pursuance to Article I of the NYC and described it to be a "party neutral", and "seat-oriented" provision for countries that are signatories to the NYC. The Court held that an award arising out of an arbitration between two Indian parties, made in a seat outside India, to which the NYC applied, would be a foreign award under Part II of the 1996 Act.

The Court relied upon its previous decision in *Atlas Export Industries v. Kotak & Co*. ("Atlas"), [1] which held that two Indian parties could validly choose a foreign seat of arbitration. Atlas was decided in the context of the Foreign Awards Act, 1961, the precursor to Part II of the 1996 Act. The Court also noted that the Foreign Awards Act, 1961 was enacted to give effect to the NYC. The Court ruled its single judge decision in *TDM Infrastructure Private Limited v. UE Development India Private Limited*,[2] which had held the opposite, to be without precedential value.

The Court also held that two Indian parties agreeing to an arbitration with a seat outside India was not contrary to Indian public policy, as there was no "clear and undeniable harm" to the Indian public arising out of such a choice. Permitting such an agreement was also held to be consistent with the principle of party autonomy.

[1] Supreme Court of India; *Atlas Export Industries v. Kotak & Co.;* Civil Appeal No. 7410 of 1994 decided on 1 September 1999 – not reported in CLOUT.

[2] Supreme Court of India; *TDM Infrastructure Private Limited v. UE Development India Private Limited;* Arbitration Application No. 2 of 2008 decided on 14 May 2008 – not reported in CLOUT.

Case 1948: NYC V(1)(e)
Luxembourg: District Court of Luxembourg
Docket No.: TAL-2021-00125. Ref. No.: 2021TALREFO/00188
6 April 2021
Original in French

Available at: https://justice.public.lu

This case concerns an application for the enforcement of a foreign arbitral award that was suspended in the country where the award was made pending a decision on the application for the setting aside of the award.

An arbitral award rendered in Belgium required a group of Panamanian companies (the claimants) to pay several million dollars to a company of Seychelles (the respondent). An application for the setting aside of the award was filed by the claimants before the Brussels court of first instance, which, by means of an interlocutory judgment, ordered a stay of the enforcement of the arbitration award pending the court's decision on the merits.

The claimants were then served with a writ of attachment in respect of their assets held with various banking institutions located in Luxembourg, on the basis of the arbitral award.

The claimants applied to the District Court of Luxembourg (the Court), as court hearing urgent applications, for the cancellation of the attachment on the grounds that the arbitral award suspension of which had been ordered by the Belgian court was not a valid basis for initiating an attachment procedure. The respondent objected to the cancellation, arguing that the lack of enforceability of the arbitral award did not prevent the freezing of a debtor's funds as a precautionary measure.

The Court noted that in order to constitute a basis for attachment in accordance with article 963 of the New Code of Civil Procedure, the disputed arbitral award, having been rendered in Belgium and invoked before the Luxembourg court hearing urgent applications, must be recognized in Luxembourg, where its enforcement was sought. The Court cited the grounds listed in article 1251 of the New Code of Civil Procedure on which the Luxembourg court could refuse the enforcement of a foreign arbitral award "subject to the provisions of international conventions." Contrary to some legal opinions and case law, the court interpreted that phrase as excluding the application of article 1251 in all cases governed by an international convention and raised the applicability of the New York Convention in the case in question. Noting that under article V of the Convention, the suspension of an arbitral award in the State where it was made prevents not only its enforcement but also its recognition in the State where it is invoked, the Court concluded that the Belgian arbitral award that had been suspended in Belgium could not be recognized or enforced in Luxembourg.

The Court concluded that there was no valid ground, within the meaning of article 693 of the New Code of Civil Procedure, for attachment. Accordingly, the Court, ruling that the disputed attachment was manifestly unlawful, ordered its cancellation.

Case 1949: NYC V(1)(b); V(1)(d)

Nepal: Supreme Court of Nepal
Case No. 067-WO-0419
Hanil Engineering & Construction Co., Ltd. v. KONECO Pvt. Ltd. et. al.
26 December 2017
Original in Nepali

Published: *Nepal Kanoon Patrika* Volume 60 Year 2075 Issue 11

Available at: http://nkp.gov.np/full_detail/9190

Abstract prepared by Devendra Pradhan

This case primarily concerns the enforcement of a foreign arbitral award in Nepal. Hanil Engineering & Construction Co., Ltd. (the "Plaintiff"), a South Korean

company, entered into an agreement with Melamchi Water Supply Development Board (the "Melamchi Board") to construct access roads for the Melamchi Water Supply Project. The Plaintiff subcontracted the construction work to KONECO Pvt. Ltd. (the "Defendant"), a Nepali company. The Defendant failed to complete the construction work within the prescribed deadline. Consequently, the Plaintiff was declared by Melamchi Board to be in default under the main contract and the latter forfeited the former's bank guarantee. As a result, the Plaintiff suffered financial loss.

The subcontract between the Plaintiff and the Defendant contained an arbitration clause and Korean law was designated as the choice of law for the settlement of disputes between the parties. Furthermore, the arbitration clause mandated that the parties first attempt to settle disputes amicably and in good faith before proceeding with arbitration. Nonetheless, the Plaintiff approached the Korean Commercial Arbitration Board (the "Arbitration Board") to adjudicate its dispute with the Defendant. The Arbitration Board rendered an award against the Defendant and awarded the Plaintiff damages.

Subsequently, the Plaintiff applied to the then-Appellate Court Patan (now the High Court Patan) in Nepal for enforcement of the arbitral award. The Appellate Court Patan declined to enforce the arbitral award and dismissed the Plaintiff's petition. The Plaintiff then approached the Supreme Court through a writ petition to quash the decision of the Appellate Court and to enforce the arbitral award under the New York Convention (NYC) and 1999 Arbitration Act (2055) of Nepal (the "Arbitration Act").

The Supreme Court dismissed the Plaintiff's writ petition, upheld the decision of the Appellate Court and ruled that the arbitral award in the instant case was unenforceable in Nepal on various grounds.

First, the Supreme Court ruled that, under the "doctrine of separability", the arbitration clause was separable from the contract. Thus, the governing law of the contract could not have automatically been deemed to have been the governing law of the arbitration clause. Therefore, it was found that, unless otherwise agreed by the parties, the governing law of the contract shall neither apply to the appointment of arbitrator(s) nor to the arbitration proceedings. Second, the Supreme Court ruled that the Plaintiff had failed to comply with the subcontract since it initiated arbitration proceedings before having attempted to resolve the dispute with the Defendant amicably; as per the precondition included in the arbitration clause.

Third, the Supreme Court referred to Article V(1)(d) NYC and §34(2)(a) of the Arbitration Act which stipulate that arbitrators must be appointed and agreed to by the parties. However, the parties in this case had neither agreed on the appointment of arbitrator(s) nor on the appointment procedure. The Supreme Court further ruled that the action of the Arbitration Board in appointing arbitrators on an *ex parte* request of the Plaintiff was contrary to the Korean Arbitration Act, Arbitration Act and NYC.

Finally, the Supreme Court referred to both Article V.1.(b) NYC and §34(2)(c) of the Arbitration Act which require timely notification of arbitration proceedings to the parties in order to ensure a fair trial. The Supreme Court ruled that separate notices must be issued during each step of arbitration proceedings in accordance with applicable law in order for a foreign arbitral award to be both recognized and enforceable in Nepal. The Supreme Court concluded that the Defendant was not properly served with notice of arbitration proceedings and thus did not receive a fair opportunity to be heard.

Case 1950: NYC V(1)(c)

People's Republic of China: Xinxiang Intermediate People's Court, Henan Province
Case No. (2015) Xin Zhong Min San Chu Zi No. 53
Chenco Chemical Engineering and Consulting GmbH v. Do Fluoride Chemicals Co. Ltd.
5 May 2017
Original in Chinese

Available at: https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=7742cf5ff7b64d009d2fa7d100ffc710

This case deals with the partial recognition of an award which also decided on matters that had not been included in the request for arbitration.

Chenco Chemical Engineering and Consulting GmbH (a German company, hereinafter as "the claimant") entered into an agreement with Do Fluoride Chemicals Co., Ltd. (a Chinese company, hereinafter as "the respondent") to construct new production plants in the latter's facilities in China. The agreement contained an arbitration clause providing for arbitration under the ICC rules and with a seat in Switzerland.

Alleging that the respondent was using technology for which it had not been granted authorization, the claimant filed an arbitration request to the International Chamber of Commerce (hereinafter "ICC") against the respondent under which it requested that the respondent be ordered to cease the unauthorized use of claimant's technology and pay damages for the harm caused.

The ICC tribunal seated in Switzerland rendered the final award in favour of the claimant (ICC Case No. 18046/JHN/GFG). Along with other reliefs granted, the respondent was ordered to pay liquidated damages, plus interest, for its continued use of "Chenco (the claimant)'s technology".

The claimant then filed an application to Xinxiang Intermediate People's Court, Henan Province, P. R. China (hereinafter as "the Court") for recognition and enforcement of the final award in its entirety. The respondent argued that the reliefs granted by the award exceeded the initial claims made by the claimant in the request for arbitration, which concerned only the use of unauthorized technology.

The Court held that, although the claimant requested the respondent to stop using the technology it had not been authorized to use, it was awarded damages for the continued use (by respondent) of "Chenco's technology". The Court stressed that that broad wording did not make a distinction between the authorized and the unauthorized technology and hence included the authorized technology. Referring to Article V(1)(c) NYC and Article 154 (1) (11) and Article 283 of the Chinese Civil Procedure Law, the Court concluded that the award exceeded the scope of the claimant's submission to arbitration and refused to recognize and enforce that part of the final award granting liquidated damages, plus interests, for respondent's continued use of "Chenco (the claimant)'s technology". The rest part of the award was recognized and enforced.

Case 1951: NYC II(3)

United States of America: United States Court of Appeal, Ninth Circuit
Case No. 18-35573
Setty v. Shrinivas Sugandhalaya LLP
7 July 2021
Original in English

Published: 3 F.4th 1166 (9th Cir. 2021)

Available at: https://protect-au.mimecast.com/s/-mZOCk81N9tOLgKg5InC29s?domain=cases.justia.com

Abstract prepared by Stacie I. Strong, National Correspondent

Defendant-appellant brought a motion to compel arbitration against plaintiffs-respondents. An earlier decision by the instant court (Setty v. Shrinivas Sugandhalaya LLP, 771 F. App'x 456 (9th Cir. 2019)) held that defendant – a third party to a partnership deed between the plaintiffs which contained an arbitration provision – could not equitably estop the plaintiffs from avoiding arbitration. The matter was appealed to the Supreme Court of the United States, where certiorari (discretionary permission to appeal) was granted and the decision vacated and remanded to consider

in light of *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC* (CLOUT Case 1873).

According to GE Energy, "the New York Convention does not conflict with the enforcement of arbitration agreements by non-signatories under domestic-law equitable estoppel doctrines." However, GE Energy "did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination."

The Court here decided that the question of whether a non-signatory to an arbitration agreement could compel arbitration involving matter under the New York Convention was to be determined pursuant to federal substantive law. Furthermore, as a matter of principle, a non-signatory could compel arbitration in a case arising under the New York Convention. However, the facts presented in the current dispute did not fall within the terms of the arbitration agreement in question, which was a prerequisite for compelling arbitration as a matter of equitable estoppel.

Cases relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards - The "New York Convention" (NYC) and to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1952: NYC II(2); IV(1); MAL 7; 35; 36(1)(a)(iii)

Canada: Court of Queen's Bench for Saskatchewan
QBG 368 of 2020
Parrish & Heimbecker Limited. v. TSM Winny Ag Ltd.
31 December 2020
Original in English

Published: 2020 SKQB 348

Available at: https://www.canlii.org/en/sk/skqb/doc/2020/2020skqb348/2020skqb348.html

Abstract prepared by Heather Clark

[Keywords: arbitration agreement; arbitration clause; award – recognition and enforcement; electronic commerce; form of arbitration agreement; formal requirements; signatures; telecommunications; writing]

The applicant made an offer to the respondent for the purchase of wheat. Initial exchanges between the parties were made by text message, and the applicant subsequently sent the respondent a purchase contract confirmation by email which included an arbitration clause. The respondent did not send the requested confirmation, and the applicant treated a subsequent text message from the respondent as a cancellation of the contract and issued an invoice to it for the increase in the market price at cancellation, which the respondent refused to pay. The applicant initiated an arbitration pursuant to rules featuring an appeals mechanism. The award of the appeals committee awarded damages to the applicant.

The applicant applied to the Court of Queen's Bench for Saskatchewan for an order recognizing and enforcing the award pursuant to Saskatchewan's The Enforcement of Foreign Arbitral Awards Act (1986), which adopts and incorporates the terms of the New York Convention, and the International Commercial Arbitration Act (1988), which is based on the MAL.

The respondent resisted the application on three grounds. First, the respondent argued that there was no "agreement in writing" as required by Article II(1) NYC because no signed contract had ever been sent by the respondent to the applicant. The court rejected this argument on the basis that the definition of "agreement in writing" in the NYC (and the MAL) is inclusive and applies to an exchange of letters or telegrams, just as it applies to signed agreements. In this regard, the court held, consistent with its earlier case law, that it was logical for it to modernize the NYC's terminology and find that it encompassed other similar forms of electronic

communications, such as facsimile, text and email messages. The court also found that there was no formal requirement that an agreement be signed by both parties.

Second, the respondent argued that the applicant had failed to meet the procedural requirements for recognition and enforcement because it had not filed a certified or original copy of the arbitration agreement. The court found that while the applicant had filed copies of the agreement (and the award), there was no indication that the documents had been certified, which was a mandatory, albeit undefined, requirement of Article IV(1) NYC and Article 35(2) MAL. Given that the existence of the documents was not disputed, the court adjourned the application to give the applicant an opportunity to obtain the necessary certifications, consistent with corresponding case law in Ontario.

Third, the respondent argued that it had been deprived of the opportunity to present its case because the award had been informed by a question that neither party had addressed in their submissions. The court agreed but found that this did not warrant dismissal of the application pursuant to Article 36(1)(a)(iii) MAL given that the general purpose of the NYC and MAL was to favour resolution of arbitration proceedings. The Court considered the fact that the respondent had not challenged the award at its seat, and that it had failed to demonstrate palpable and overriding prejudice akin to a denial of natural justice.

Case 1953: NYC IV; V; MAL 35; 36

India: Supreme Court of India
Civil Appeal 3185 of 2020
Government of India v. Vedanta Limited & others
16 September 2020
Original in English

Published: (2020) 10 SCC 1

Available at: https://indiankanoon.org/doc/177552381/

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[Keywords: enforcement, foreign seated arbitration, limitation, public policy]

Vedanta Limited ("Vedanta"), Ravva Oil (Singapore) Ltd and Videocon Industries Limited ("Videocon") obtained an award in April 2011 from a Kuala Lumpur seated arbitral tribunal to recover development costs of US$ 278.87 million from the Government of India ("Government"). The dispute arose out of a production sharing contract for the development of the Ravva oil and gas fields situated in India. The Government unsuccessfully challenged the award in Malaysia. Thereafter, a judgment dated 19 February 2020 was passed by the Delhi High Court directing the enforcement of the award in India. The Government filed an appeal before the Supreme Court of India ("Court") challenging the order of enforcement.

In its appeal, the Government contended that the enforcement petition filed before the Delhi High Court was barred by limitation under the Limitation Act 1963, and also that the enforcement of the award was contrary to the public policy of India under Section 48 of the Arbitration and Conciliation Act, 1996 (the "Act"), besides contending that the award contained decisions on matters beyond the scope of the submission to arbitration.

Prior to this judgment by the Supreme Court, there were conflicting judgments of various High Courts on the limitation period applicable to enforcement of foreign arbitral awards in India. Whilst certain decisions considered that the applicable limitation period was twelve years under Article 136 of the Schedule to the Limitation Act which applied to the "*execution of any decree… or order of any civil court*", other decisions considered the limitation period to be three years calculated under Article 137 of the Schedule to the Limitation Act which applied to "*any other*

application for which no period of limitation is provided elsewhere in this division". The Court relied on a Report of the General Assembly of the United Nations Commission on International Trade Law in its 41st Session dated 16 June–3 July, 2008 with respect to the legislative implementation of the NYC (United Nations document A/CN.9/656/Add.1), where it was noted that the NYC does not prescribe a time limit for making an application for the recognition and enforcement of foreign awards. Article III of the NYC provides that recognition and enforcement of arbitral awards should be done in accordance with the rules of procedure of the state where the award is to be enforced.

Section 49 of the Act provides that a foreign award is deemed to be a decree of "that court" for the limited purpose of enforcement and otherwise it is not a decree of an Indian court. The Court clarified that the phrase "that Court" refers to the Court which has adjudicated upon the petition filed under Sections 47 and 49 for enforcement of the foreign award. Therefore, the Court held that, for the purposes of the Limitation Act, the application for enforcement of the foreign award would be governed by the residuary provision, i.e. Article 137 and that Article 136 applied only to domestic awards and not to foreign awards.

However, on the facts, the Court found that the enforcement application was filed within the limitation period since the right to apply for enforcement only accrued in July 2014, when the Government issued a notice to the award holders demanding US$77 million as its share of petroleum sold to third parties. Further, the Court held that there were sufficient grounds to condone the delay given the previous lack of clarity on the applicable limitation period caused by conflicting High Court decisions.

The Court analysed the four types of laws applicable to international commercial arbitrations. It held that the Malaysian courts were justified in applying the Malaysian Act to the public policy challenge raised by the Government. It declined to second-guess or review the correctness of the judgments of the Malaysian courts and held that an enforcement court should examine the challenge to the award in accordance with NYC grounds.

The Court held that the enforcement court cannot set aside a foreign award because the power to set aside a foreign award vests only with the court at the seat of arbitration. While the grounds stated in Section 48 are exhaustive, the Court held that it does not provide a *de facto* appeal on the merits of the award. The enforcement court exercising jurisdiction under Section 48, therefore cannot refuse enforcement by taking a different interpretation of the terms of the contract.

On the public policy challenge, the Court held that an enforcement court cannot sit in appeal over the findings of the court at the seat of the arbitration and cannot reassess or reappreciate the evidence adduced in the arbitration. The Court held that errors of judgment were insufficient for refusing enforcement of a foreign award. It observed "the finality of awards in international commercial arbitrations and the limits of judicial intervention on grounds of public policy of the enforcement state are well settled in international arbitration". It concluded that the enforcement of the award did not contravene the public policy of India, nor was it contrary to the basic notions of justice and accordingly dismissed the appeal.