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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 Model Law on International Commercial Arbitration (MAL)

Case 1984: MAL 7; 31; 35; 36
Australia: Supreme Court of Victoria, Court of Appeal
Pinchus Feldman and Yosef Feldman v. Corey Stephen Tayar
24 June 2021
Original in English:
Published: [2021] VSCA 185
Available at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2021/185.html

[**Keywords**: *arbitration agreement; validity; disputed matters; award; award – recognition and enforcement; award – setting aside; reasons; reasons for the award; courts; enforcement; procedure;*]

This case deals primarily with the arbitrability of the disputes between the parties and reasons for the award under the MAL.

The dispute arose from loans made by Mr. Tayar (the respondent) to Messrs. Feldman (the appellants), which were not repaid (together with other areas of dispute). The parties decided to arbitrate their disputes and entered into an arbitration agreement. The terms of the arbitration agreement did not precisely define the disputed matters, but referred to them in general terms, and conferred the to-be-composed arbitral panel with the power to determine the disputed matters on the basis of written pleadings. However, the parties made their submissions orally, and the panel subsequently set out what the disputed matters comprised based on the parties' oral statements. The arbitral panel found in favour of the respondent, including requiring the appellants to pay the loan claim. The reasons for the award were short, and the language was disjointed.

The respondent sought enforcement of the award under Section 35 of the Commercial Arbitration Act 2011 (enacting the MAL in Australia), applicable to domestic commercial arbitration. The appellants resisted the enforcement on the basis of invalidity of the arbitral agreement (Art. 36 MAL), claiming, *inter alia*, that the disputed matters were not identified in writing (as required by Art. 7 MAL) and that the award did not state the reasons upon which it was based (as required by Art. 31 MAL). The judge made the enforcement order, holding that the agreement was valid and enforceable since it sufficiently identified the disputed matters, and that, despite the disjointed language in the reasons, they were sufficiently grounded in and followed the facts.

On appeal, the Court of Appeal (the Court) assessed the lower court's reasoning.

With regard to the validity of the arbitration agreement, the Court referred to Art. 7 MAL and found that the agreement provided for "all or certain disputes" to be submitted, in writing, to arbitration. In the Court's view, neither "all" nor "certain" characteristics of disputes indicated a need for greater specificity. In interpreting Art. 7 MAL, Court held that "particular disputes need not be identified in the arbitration agreement." In the case at hand, the general nature of the disputes was identified in the agreement, leaving their precise articulation to the panel. Consequently, the Court recognized the agreement as meeting the requirements of Article 7 MAL.

With regard to the reasoning of the first-instance award, the Court interpreted the requirement in Article 31 MAL and stated, referring to a precedent (*Westport Insurance Corporation v Gordian Runoff Ltd)*, that the "adequacy or sufficiency of reasons will depend on the evidence, the complexity and nature of the issue, and the relevant finding." In other words, the reasons "must address why the arbitrators have reached a particular decision." The reasons for the award in the case at hand were "not easy to understand", and the language was disjointed, but they still presented a sufficient process of reasoning and followed the facts identified. Thus, the reasons

were adequate in material part. The Court, having found against the appellants on all the grounds upon which the appeal was based, dismissed the appeal.

Case 1985: MAL 7(2); 11(5); 12(1); 12(2); 16(3); 34
Serbia: Supreme Court of Cassation
Case No. PREV. 37/2018
Alita Group v. the Serbian Privatization Agency
25 October 2018
Original in Serbian

Published in the Newsletter of the Supreme Court of Cassation number 4/2019; Uglješa Grušić, Subjektivni domašaj arbitražnog sporazuma u srpskom pravu, *Revija kopaoničke škole prirodnog prava*, br. 2/2020, 79. Vladimir Pavić, "Osvrt na praksu Vrhovnog kasacionog suda u arbitražnoj materiji", *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije – 2019*, (ed. Vuk Radović), Beograd, 2019, 370. Mirko Vasiljević, "Arbitraža bez arbitražnog ugovora (direktnog ili indirektnog)", *Pravo i privreda*, br. 10–12, tom LVII, 2019, 7. Rajko Ignjačević, "Proširenje arbitražnog sporazuma na nepotpisnika sa osvrtom na dve arbitražne odluke", *Liber amicorum: Gašo Knežević*, (ur. Tibor Varady i ostali), Beograd, 2016, 267.

Available at: www.vk.sud.rs/sr-lat/prev-372018-arbitra%C5%BEa

Abstract prepared by Maja Stanivuković, National Correspondent

[**Keywords:** *arbitrators – duty of disclosure, conflict of interest, arbitration agreement; formal requirements; jurisdiction; procedure; award – setting aside*]

The dispute arose out of a 2007 Privatization Contract (Contract) between the Serbian Privatization Agency (Agency), the Respondent, and the State Share Fund as sellers of shares of a socially owned company, and a Lithuanian company Alita, and United Nordic Beverages (UNB), Sweden, as the buyers. Before the Contract was terminated by the Agency, Alita split up its operations into two separate companies: Alita Group (AG), the Claimant, and Alita. AG took over the production facilities in Lithuania, while Alita, subsequently renamed ALT Investicijos (ALTI), remained in charge of the investment in Serbia.

The Agency initiated arbitration against ALTI and UNB for payment of damages on grounds of various breaches of the Contract. After ALTI went bankrupt, the Agency joined AG as an additional respondent to the arbitral proceedings and sought an award ordering it to pay the same amount based on joint and several liability. AG objected to the jurisdiction of the arbitral tribunal (the Tribunal) on grounds of (a) not being a party to the contract that contained the arbitration clause and (b) the Tribunal being improperly constituted due to a conflict of interest of a member of the Tribunal.

The Tribunal held that splitting up of a company may not be used to frustrate the right of the creditor to enforce its claim towards the property of its debtor in the proceedings that were agreed upon before the debtor was split up. Any other interpretation would allow a party to evade a contractual obligation to resolve the dispute by arbitration. For that reason, AG was bound by the arbitration clause although it did not sign the Contract. The Tribunal dismissed the challenge of one of the arbitrators in a partial award.

AG sought annulment of the partial award rendered by the Tribunal.

The Commercial Court initially annulled the award pursuant to Article 58 Serbian Arbitration Act (SAA) corresponding to Article 34 MAL. This decision was appealed, and the Court of Appeal stated that the award was not subject to annulment because it was not an award on the merits, but rather a decision on jurisdiction which could be challenged only under Article 30(2) SAA, corresponding to Article 16(3) MAL.

The Court of Appeal then sent the case back to the Commercial Court to have it examine whether the claimant's action was not time-barred.

Thereupon, the Commercial Court dismissed the action as it had not been filed within a period of 30 days from the receipt of the partial award, as per Article 30(2) SAA. AG appealed.

On appeal, the Court of Appeal, contradicting its earlier decision, held that the partial award in the part in which it decided on jurisdiction, could be challenged pursuant to provisions of Article 58 SAA (corresponding to Article 34 MAL), according to which the time limit for seeking annulment was 3 months. Since AG filed an action for annulment within 3 months from receiving the partial award, its action was admissible, and the case was remanded again to the Commercial Court which again annulled the award pursuant to Article 58 SAA.

This third decision by the Commercial Court was again appealed and the Court of Appeal decided on the merits and considered that the award should not be annulled.

On extraordinary appeal filed by AG, the Supreme Court of Cassation (the Supreme Court) upheld the last decision of the Commercial Court.

The Supreme Court referred to Article 12 SAA (corresponding to Article 7(2) ML) which contains mandatory provisions requiring written form of the arbitration agreement and specifies when such an agreement exists. In the present case it has been established that AG did not enter into an arbitration agreement with the Agency in any way envisaged by the law. AG was not a signatory to the contract, nor did it become the party to the arbitration agreement by assignment or subrogation. Therefore, the arbitration agreement was not transferred to AG within the meaning of Article 13 SAA. The second instance court was wrong in considering that the transfer of the arbitration agreement took place because the same persons that signed the contract adopted a decision on incorporating AG and transferring to it most of Alita's receivables. The arbitration clause in the Contract binds only ALTI which still exists as a legal entity. AG's joint and several liability for the obligations of Alita, even if proven, would not represent a valid basis for the jurisdiction of the Tribunal over AG. Jurisdiction over AG could be based either on the fact that it was a signatory of the arbitration agreement within the meaning of Article 12 SAA or on the fact that the arbitration agreement was transferred to it in accordance with Article 13 SAA.

On the second ground for annulment, the Court noted that the arbitral award could be valid only if it was rendered by impartial members of tribunal, as provided expressly in Article 19(3) SAA (corresponding to Article 11(5) MAL). According to the mandatory provision of Article 21 SAA (corresponding to Article 12(1) MAL), a person who has been proposed as an arbitrator shall, before accepting the appointment, disclose any circumstances that may justifiably raise doubts as to his impartiality or independence. It considered that in the case at hand, this provision had been grossly violated as it had been established that the arbitrator had failed to disclose facts that are important and directly raise doubts as to her impartiality and independence. It concluded that the Partial Award was rendered by an improperly constituted tribunal, contrary to Articles 19(3) and 21(1) SAA.

Cases relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York Convention" (NYC)[1]

Case 1986: NYC I

Colombia: Corte Suprema de Justicia
Case no. 11001-0203-000-2008-00648-00
Alexander Peter Van't Hof v Maria del Socorro Munoz

[1] The website www.newyorkconvention1958.org is a project supported by UNCITRAL that provides information on the application of the "New York Convention" (1958) and supplements the cases collected in the CLOUT system. Several of the following abstracts are reproduced as part of the CLOUT documentation so that 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 editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

17 September 2009
Original in Spanish
Available at www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org

An individual requested the recognition of the decision which granted a divorce on 19 December 2007, by the Family Court of Holland. The Corte Suprema de Justicia denied recognition of the decision. It considered that no Treaty existing between Colombia and the Netherlands established reciprocity for the recognition and enforcement of decisions. The Corte Suprema de Justicia noted that the NYC did not apply to the recognition and enforcement of a decision in family matters.

Case 1987: NYC I
Colombia: Corte Suprema de Justicia
Case no. 11001-0203-000-2003-00065-02
Norma Ruth Cote Alzate v Arend Verstegen
19 October 2009
Original in Spanish
Available at www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org

An individual petitioned the Court to enforce the decision granting a divorce on 15 December 1995 in Arnhem in the Netherlands. The Corte Suprema de Justicia (Supreme Court) denied recognition of the decision. It noted that enforcement proceedings result in granting the same effect to foreign decisions as to national ones. For enforcement to be granted, a decision has to comply with substantial and formal requirements. In particular, the Corte Suprema de Justicia noted that no bilateral convention existed between the Netherlands and Colombia. The NYC, invoked by the petitioner, did not apply to the case at hand

Case 1988: NYC I
Colombia: Corte Suprema de Justicia
Case no. 11001-0203-000-2007-02058-00
Nora Cecilia Pedrosa de Villamediana & Luis Guillermo Pedrosa Uribe
23 May 2011
Original in Spanish
Available at www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org

Two individuals requested the recognition of the decision rendered by a Venezuelan Court declaring the adoption of the two petitioners by another individual. The Corte Suprema de Justicia (Supreme Court) denied recognition of the decision. It first considered that reciprocity is needed when enforcing a foreign decision. It noted that no bilateral agreement was in force between Colombia and Venezuela regarding decisions related to adoption. The Court considered that the NYC did not apply in the present case as the challenged decision was not an “arbitral award”. It added that no international treaty was in force between the two States, and that no internal regulation granted enforcement to Colombian decisions in Venezuela.

Case 1989: NYC I
Colombia: Corte Suprema de Justicia
Case no. 11001-0203-000-1999-07858-01
Ernesto Reuter v Guiomar Aguado Rojas
14 October 2011
Original in Spanish
Available at www.cortesuprema.gov.co

Abstract published on www.newyorkconvention1958.org

An individual requested the recognition of the judgment of a Luxembourg tribunal rendered on 29 December 1984 which granted a divorce. The Corte Suprema de Justicia (Supreme Court) denied enforcement to the decision. The Corte Suprema de Justicia noted that no agreement was in force between Colombia and Luxembourg with respect to family matters. The Court noted that the sole convention in force in the two States is the NYC but the Corte Suprema de Justicia held that it did not apply in the present case.

Case 1990: NYC V; V(2)(b)
Costa Rica: First Division of the Supreme Court of Justice
File No.:18-000209-0004-AR
Hidroeléctrica San Lorenzo S.A. v. Saret de Costa Rica S.A.
28 January 2021
Original in Spanish

Full text: https://app.vlex.com/#vid/862803645

This case concerns the powers of a court to refuse enforcement of a foreign arbitral award under the New York Convention (NYC).

The Panamanian company Hidroeléctrica San Lorenzo S.A. (the claimant) initiated arbitral proceedings for breach of contract against the company Saret de Costa Rica S.A. (the respondent) before the Arbitral Tribunal of the International Court of Arbitration of the International Chamber of Commerce in Panama (the Arbitral Tribunal). The Arbitral Tribunal ruled in favour of the claimant. The respondent filed appeals before the Panamanian courts but the appeals were rejected. The claimant subsequently applied to the Supreme Court of Justice of Costa Rica (the Supreme Court) for recognition and enforcement of the arbitral award against Saret.

The respondent argued that (a) express and unequivocal consent had not been given in the arbitration agreement; and (b) due process and the rights of defence had been violated, which constituted a violation of public policy. Other reasons given were (a) non-compliance with the requirements stipulated in the agreement concluded by the parties for the initiation of arbitral proceedings; and (b) the existence of a pending dispute resolution proceeding between the parties in Costa Rica regarding the same dispute.

The Supreme Court rejected most of the claims filed by the respondent, since they dealt with substantive matters that had previously been dismissed by the Arbitral Tribunal and the Panamanian courts. It was emphasized that in enforcement proceedings, the Supreme Court is limited to examining and verifying the requirements set out in the national legislation of Costa Rica. Consequently, the Supreme Court approved the enforcement of the arbitral awards since enforcement was not prohibited under article 99.2 of the Code of Civil Procedure of Costa Rica, nor did it violate the public policy of Costa Rica (article 99.2.4 of the Code of Civil Procedure of Costa Rica; NYC V(2)(b)); moreover, enforcement was in accordance with the law on international commercial arbitration and the conventions ratified by the country on the recognition and enforcement of foreign judgments and awards (NYC).

Case 1991: NYC V; V(1)(e)
Germany: Bundesgerichtshof (Federal Court of Justice)
Case no. III ZB 97/06
17 April 2008
Original in German

Abstract published on www.newyorkconvention1958.org

A petroleum field licensing contract provided for International Chamber of Commerce arbitration in Copenhagen. The Claimant sought damages for breach of contract and obtained a favourable award. The Kammergericht (Higher Regional

Court Berlin) granted enforcement of that award, and the Defendant brought an application for review by the Bundesgerichtshof (Federal Supreme Court).

The Bundesgerichtshof set aside the decision of the Kammergericht on the basis that Defendant was precluded from raising grounds to refuse enforcement in Germany, since it had failed to request the setting aside of the award in its country of origin. The Bundesgerichtshof held that although the principle of good faith – and thus the notion of abuse of rights in the case of contradictory behaviour ("venire contra factum proprium") – also applied in international arbitration, not every contradictory behaviour was to be considered abusive. A party's behaviour could only be judged an abuse of rights if the behaviour of a party created legitimate expectations for the other party or additional contributory circumstances were in evidence. The Bundesgerichtshof held that the conscious decision not to file a request to set aside an arbitral award in the country of origin could not be understood to be a waiver of all other grounds for refusing enforcement in other countries pursuant to Article V NYC. Thus, the failure to request the setting aside of the arbitral award in the country of origin did not amount to abusive contradictory behaviour in the sense of an abuse of rights.

Case 1992: NYC V; V(2)(b); V(1)(b)
Germany: Kammergericht
Case no. 20 Sch 02/08
17 April 2008
Original in German

Abstract published on www.newyorkconvention1958.org

The Parties concluded a supply contact in 2004 containing an clause referring disputes to arbitration at the International Commercial Arbitration Court (ICAC) in the Ukraine. The Claimant commenced arbitral proceedings. The ICAC Secretariat subsequently sent the Statement of Claim, the ICAC Rules and a list of possible arbitrators to the Defendant by registered letter, which was not collected and returned to sender. A subsequent registered letter containing an invitation for the Defendant to attend the hearing was also returned to sender. The tribunal rendered an award in the Claimant's favour and sent it to the Defendant by registered letter, which was not collected. The Claimant's lawyer then sent the award to the Defendant, and sought enforcement in Germany.

The Kammergericht (Higher Regional Court Berlin) granted enforcement, finding that the Defendant was precluded from relying on grounds for non-enforcement since it had not raised them in annulment proceedings in the Ukraine within the three-month time limit set by Ukrainian law. The preclusion (Präklusion) provision in respect of domestic awards in Germany applied to the enforcement of foreign awards, even if there is no equivalent provision in the NYC. The Court considered that there had been no violation of due process justifying non-recognition under Article V(1)(b) NYC, as "assumptions of communication" [Zustellungsfiktionen] suffice for proper summons. The Court further found that there had been no violation of procedural due process within the meaning of Article V(2)(b) NYC, because under Ukrainian arbitration law, a registered letter is deemed to have been duly delivered to the defendant in an arbitration.

Case 1993: NYC II, II(3)
Italy: Corte di Cassazione (Supreme Court)
Case no. 35
Heraeus Kulzer GmbH v. Dellatorre Vera SpA
5 January 2007
Original in Italy

Abstract published on www.newyorkconvention1958.org

A German company (Heraeus Kulzer) and an Italian company (Dellatorre Vera) entered into a distributorship agreement under which Dellatorre Vera would distribute

orthodontic products manufactured by Heraeus Kulzer in Italy. The contract referred to an arbitration agreement contained in a separate document. An individual buyer sued an Italian intermediate seller (Merident), who had acquired Heraeus Kulzer products from Dellatore Vera, before the Tribunale di Napoli (Naples Tribunal of First Instance) on the grounds of liability for hidden defects. Merident joined Dellatorre Vera in these proceedings, which in turn joined Heraeus Kulzer based on the warranty against hidden defects. Heraeus Kulzer raised a jurisdictional objection based on the arbitration clause referred to in the distributorship agreement. In the alternative, it argued that even if the parties' dispute was not covered by the arbitration agreement, the Italian courts would still lack jurisdiction in favour of German courts by virtue of a jurisdiction clause contained in a document attached to the distribution contract, based on Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("the Brussels Convention").

The Tribunale di Napoli found that the Italian courts lacked jurisdiction in respect of the dispute between Hereaus Kulzer and Dellatorre Vera over the existence of an arbitration agreement. The Corte di Appello di Napoli (Naples Court of Appeal) reversed the decision and upheld the jurisdiction of the Italian courts. It held that the arbitration clause referred to in the distributorship agreement could neither be extended to the third parties, which had initiated the domestic court dispute (such as Merident), nor be applied to Dellatore Vera's warranty claim against Heraeus Kulzer. Heraeus Kulzer appealed the decision, arguing that the Italian domestic courts lacked jurisdiction since the warranty claim was based on the distributorship agreement containing the arbitration clause and the broad wording of the arbitration clause covered disputes directly or indirectly arising out of the distributorship agreement.

The Corte Suprema di Cassazione (Supreme Court) reversed the decision of the Corte di Appello di Napoli. It noted that the validity of an arbitration clause relates to the merits of the case and does not constitute a jurisdictional issue. It further stated that it is an inherent part of the power of the domestic court to review the validity of the arbitration agreement, on the basis of which it waives its own jurisdiction. The Corte Suprema di Cassazione stated that such a principle is applicable even under Article II(3) NYC, which does not require that a case be referred to arbitration through a declaration for lack of jurisdiction by the domestic courts, but rather leaves it to the legal order of the contracting state to determine the mechanism by which domestic courts divest themselves of a case in favour of arbitration. According to the Corte Suprema di Cassazione, Article II(3) NYC, therefore, allows the Italian legal order to consider the issue of validity and efficacy of the arbitration agreement as an issue of admissibility of the claim rather than as an issue of jurisdiction. It held that while the Italian courts have a duty to review the validity or efficacy of an arbitration clause on a preliminary basis, they may not, however, exercise such review with respect to a foreign court. The Corte di Cassazione held that, in the case at hand, the Corte di Appello di Napoli had erred in maintaining the jurisdiction of the Italian courts after having decided that the dispute did not fall within the scope of the arbitration agreement, because it had ruled, on the wrong premise, that the interpretation of the arbitration agreement raised an issue of jurisdiction. The Corte Suprema di Cassazione further disapproved the lower court's finding that the arbitration agreement did not apply since the dispute before the Italian court involved parties that had no contractual link with the parties to the arbitration agreement. It noted that Dellatore Vera's warranty claim against Hereaus Kulzer was based on the distributorship agreement referring to the arbitration agreement, and that an examination of whether Dellatore Vera's warranty claim fell within the arbitration agreement was a prerequisite to the examination of the warranty claim by the lower court. After noting that it is up to the court deciding on the merits to assess the content of the arbitration agreement, the Corte di Cassazione held that the lower court had failed to examine the text of arbitration clause and, in particular, the reference to disputes directly or indirectly arising out of the distributorship agreement. The Corte Suprema di Cassazione concluded that the lower court had failed to give reasons why such broad wording would not include Dellatore Vera's warranty claim within the

scope of the arbitration agreement. It remanded the case before a different section of the Corte di Appello di Napoli for a re-examination of the scope of the arbitration agreement and refused to examine the alternative motion for lack of jurisdiction based on the jurisdiction clause in favour of the German courts

Case 1994: NYC V; V(1); V(1)(c); V(2); V(2)(b)
Lithuania: Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania)
Case no. 3K-3-510/2008
AB „Svenska Petroleum Exploration", AB "Geonafta" v. Government of the Republic of Lithuania
20 October 2008
Original in Lithuanian
Available at: https://www.lat.lt (website of the Supreme Court of Lithuania)

Abstract published on www.newyorkconvention1958.org

AB „Svenska Petroleum Exploration" ("Svenska"), AB "Geonafta" ("Geonafta") entered into an agreement with the Republic of Lithuania ("Republic of Lithuania"), which contained an arbitration clause.

A dispute arose and an award was rendered in favour of Svenska and Geonafta, against the Republic of Lithuania, which Svenska and Geonafta sought to have recognized and enforced in Lithuania before the Lietuvos Apeliacinis Teismas (Court of Appeals of Lithuania).

The Republic of Lithuania objected to the enforcement on the grounds of Articles V(1)(c) and V(2)(b) NYC, while at the same time challenging the validity of the contract (including the arbitration clause contained therein) in separate proceedings before the Kretinga district court. In the enforcement proceeding, the Republic of Lithuania argued that the contract breached Lithuanian public policy and that the proceedings for recognition and enforcement of the arbitral award should be suspended pending the proceedings before the Kretinga district court.

The Lietuvos Apeliacinis Teismas suspended the enforcement proceeding, and Svenska and Geonafta appealed to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania). The Lietuvos Aukščiausiasis Teismas upheld the decision of the Lietuvos Apeliacinis Teismas, suspending the enforcement proceeding pending the proceeding before the Kretinga district court, which, it noted, would have a judicial and evidential impact on the recognition and enforcement of the arbitral award. Referring to Articles V(1)(c) and V(2)(b) NYC, the Lietuvos Aukščiausiasis Teismas held that it would be contrary to public policy to enforce the award without deciding whether the Republic of Lithuania could commit to arbitration. It therefore decided to await the decision of the Kretinga district court on the matter.

Case 1995: NYC V
United Kingdom: High Court of England and Wales
Case no. 2006 Folio No. 460
Gater Assets Ltd v. Nak Naftogaz Ukrainiy
15 February 2008
Original in English
Published: [2008] EWHC 237 (Comm)
Available at: www.bailii.org/ (British and Irish Legal Information Institute)

Abstract published on www.newyorkconvention1958.org

The claimant Gater Assets Limited ("Gater"), was the assignee of an arbitration award made by the International Commercial Court in Moscow against the defendant Ukrainian company, Nak Naftogaz Ukrainiy ("Naftogaz"). It obtained an order for enforcement of the award in England under section 101 of the Arbitration Act 1996 (U.K.) ("the Act"). Naftogaz applied to have the order set aside, invoking section 103 of the Act (giving effect to Article V NYC). It argued, inter alia, that the award had

been procured by fraudulent or reprehensible or unconscionable conduct, such that its enforcement would be contrary to public policy.

The High Court held that there was no basis upon which to set aside the enforcement order. In so ruling, it found that nothing short of "reprehensible or unconscionable conduct" would suffice to invest the court with a discretion to consider denying to the award recognition or enforcement. That meant conduct effectively amounting to fraud, or conduct dishonestly intended to mislead. In this case, Naftogaz had not demonstrated that the award had been procured by conduct fitting such a description.

Case 1996: NYC II; II(3)
United States of America: U.S. Court of Appeals, First Circuit
Case no. 03-1056
InterGen N.V. (Netherlands) v. Grina (Switzerland)
10 October 2011
Original in English
Published: 344 F.3d 134
Available at: www.ca1.uscourts.gov/ (U.S. Court of Appeals, First Circuit website)

Abstract published on www.newyorkconvention1958.org

InterGen N.V. ("Intergen"), a Dutch company, filed a suit before the United States District Court for the District of Massachusetts against ALSTOM Power N.V. ("Alstom") and Eric Grina, a Massachusetts resident who allegedly acted as Alstom's agent, alleging that Intergen relied on Alstom's misrepresentations when choosing turbines for its projects. Eric Grina moved to compel arbitration on the basis of an arbitration clause in purchase orders and service and support agreements. The Court denied the motion and Mr. Grina appealed. The United States Court of Appeals for the First Circuit upheld the District Court's decision and denied the motion to compel arbitration. It held that the contracting states are obliged under II(3) NYC to recognize and enforce arbitration agreements unless they are "null and void, inoperative or incapable of being performed." It further held that, although the arbitration clauses at issue fell within the scope of the NYC, neither Intergen nor Alstom were signatories to any of the agreements containing the arbitration clauses.