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Contents

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Introduction

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

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Cases Relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention (NYC)

Case 1293: NYC IV(1); IV(2)
Republic of Korea
Busan District Court Decision 2011Gahap8532
26 October 2011
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

In the case at hand the plaintiff was seeking enforcement of an arbitration decision by the Tokyo Maritime Arbitration Commission in Busan, South Korea. As per Article IV (1) NYC, the plaintiff was to submit the following: (a) the duly authenticated original award or a duly certified copy thereof, and (b) the original agreement referred to in article II NYC or a duly certified copy thereof. Further, as required under Article IV (2), the plaintiff should have submitted a translation of the award, because in this case the award was not made in the official language of the country in which the award was being relied upon.

Though the plaintiff failed to submit a translation of the award, the court ruled that the award could be enforced, unless other exceptional circumstances existed, because the defendant did not file any objection concerning the existence or content of the award, and the mere failure to submit a translated copy is not a sufficient ground to reject a demand of execution.

Case 1294: NYC V(1)(d)
Republic of Korea
Supreme Court 2011Da41352
19 August 2011
(First instance — Seoul Central District Court 2010Gahap17142, Second instance — Seoul High Court 2010Na72375)
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff, a company from the Philippines, initiated action for enforcement of the arbitral award decided against the defendant, a Korean company, by the Construction Industry Arbitration Commission (CIAC) in the Philippines.

The Korean court found that the plaintiff and the defendant had originally contracted to submit any dispute to arbitration subject to the arbitration provisions of the ICC (International Chamber of Commerce) and that an award rendered under the CIAC arbitration rules fell outside this agreement. The court held that the case was within the scope of Art V (1)(d) NYC, according to which if the composition of the arbitral authority or the arbitral procedure is not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place, enforcement of the award can be refused. On this basis the court rejected the plaintiff's claim for enforcement of the award.

Case 1295: NYC II
Republic of Korea
Seoul Central District Court 2009Gahap103580
17 June 2011
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff (a company incorporated in Bahamas) sought enforcement of an arbitral award rendered by the LMAA (London Maritime Arbitration Association) which was modified by the High Court of England and Wales against the defendant (a Singaporean company). The court found that the arbitration agreement concluded through e-mails exchange constitutes an agreement in writing, as provided by Article II NYC, and ruled in favour of the plaintiff.

Case 1296: NYC V(2)(b)
Republic of Korea
Changwon District Court (Tongyeong Branch Court) 2009Gahap194
18 November 2010
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff, a company of the Marshall Islands, sought execution of the arbitral award rendered by the London Court of International Arbitration against the defendant, a Korean company. The defendant argued that the amount of the award was excessive and contravened the public policy of Korea, and should not be enforced, pursuant to Article V (2)(b) NYC.

The court held that the party seeking denial or enforcement bears the burden of proof in relation to raising a public policy defence. In the present case, the amount of the award amounted to two-thirds of the original contract fee. The court held that this fact alone was not sufficient to establish that it was contrary to the moral or other social orders of Korea. The defendant's claims were thus rejected.

Case 1297: NYC V(2)(b)
Republic of Korea
Seoul Central District Court 2009Gahap 136849
9 July 2010
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff, controlling shareholders of a Korean oil company, sought execution of the arbitral award by the International Court of Arbitration of the International Chamber of Commerce.

(1) The defendants argued that the recognition and execution of the award must be rejected on grounds that the Korean court lacked international jurisdiction required for its execution.

(2) The defendants also claimed that the recognition or enforcement of the award would be contrary to the public policy under Article V (2) (b) NYC since the award violated the law concerning the organization and operation of corporations.

The court rejected the arguments of the defendant, and held that the award should be enforced.

In relation to (1), the court held that since the New York Convention does not have a provision to define international jurisdictions, the jurisdiction of this case should be defined by the Private International Act of Korea. And since Korea is substantially related to the issue at hand, Korean courts can exercise jurisdiction in accordance with such Act (arts. 2.1 and 2.2).

In relation to (2), the court rejected the defendants' argument on the grounds that when the New York Convention applies, the court of the country where recognition and enforcement is sought may independently inquire and/or judge the issues of the case, but only in exceptional and limited circumstances (see Supreme Court of Korea Decision 2006Da20290 decided on 28 May 2009). The arbitral award of the case in question simply recognized the contract violation of the defendants in accordance with the principle of "pacta sunt servanda" and did not violate any imperative law concerning the organization and operation of corporations.

Case 1298: NYC II(2)
Republic of Korea
Supreme Court 2009Da66723
15 July 2009
(First instance — Busan District Court 2007Gahap20559, Second instance — Busan High Court 2008Na17090)
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff, a Korean company and the holder of the bill of lading (B/L) claimed damages for losses during cargo transportation against the defendants, who were: the forwarder (a Korean company) and the ship owner (a company from Panama). The defendants asked for dismissal of the case because of the existence of the arbitration agreement.

The Busan District Court, the court at first instance, accepted the defendants' objection, on the grounds that the forwarder issued a B/L containing a valid arbitration clause.

The Busan High Court, at second instance, affirmed the above decision and dismissed the plaintiff's case. First of all, The High Court ruled that the ship owner (carrier) can also invoke the forwarder's objection to jurisdiction based on the arbitration clause in the B/L.

Further, the High Court held that, concerning the term "agreement in writing", Article II (2) NYC does not limit the arbitral clause to be in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Therefore the arbitration clause contained in the B/L also satisfies such a requirement.

The Supreme Court affirmed the decision of the Busan High Court on the same grounds.

Case 1299: [NYC I]
Republic of Korea
Seoul Central District Court 2009Gahap7811
19 June 2009
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff, a Korean company, entered into a chartering contract with a third party company (non-party to this litigation). The defendant, a Korean bank, entered into a payment guarantee agreement with the plaintiff in which the defendant guaranteed to pay for the liability (including all the interests and costs) which the third party company might be bearing against the plaintiff under the chartering contract.

The plaintiff commenced arbitration proceedings against the third party company and received an arbitral award; subsequently, the plaintiff demanded a guarantee fee from the Korean bank. This latter resisted enforcement on the basis that under the New York Convention an arbitral award cannot be executed without approval or judgment of execution from the domestic court.

The court rejected the defendant's argument on grounds that a foreign arbitral award that meets the recognition requirements of the Convention shall be recognized by the court without the need for the court to confirm that it meets such requirements. Even when the court finds that the foreign arbitral award meets the recognition requirements, the procedure is simply declaratory in nature, that is, the foreign arbitral award is binding and effective even without such confirmation. The award in the case at hand was valid, and the defendant was thus liable to pay the guarantee fee as decided in the award.

Case 1300: NYC V(1)(b)
Republic of Korea
Seoul Central District Court 2008 Na 20361
15 October 2008
(first instance — Seoul Central District 2007Gadan 446248)
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff, a charter-broker company of Singapore, sought enforcement of an arbitral award regarding a chartering contract, decided under the LMAA (London Maritime Arbitration Association) Rules. The defendant, a Korean company, argued that the award was unenforceable under Article V (1)(b) NYC, on the basis that its right to defence was violated. It argued that the absence of a key employee responsible for contracting with the plaintiff on behalf of the defendant prevented the defendant from accessing relevant e-mails until a month after they were sent; as a result, the defendant could not respond to notices of the arbitral procedures in time.

The court found that the defendant's argument was without merit. Article V (1)(b) NYC provides that a court may refuse to recognize or enforce an award when a party is not given proper notice of the appointment of an arbitrator, or is otherwise unable to present its case. In this case, however, the court found that there was no violation of that Article.

Case 1301: NYC V(1)(a); V(1)(d); V(1)(e)
Republic of Korea
Seoul Central District Court 2006Gahap97721
7 March 2008
Original in Korean

Abstract prepared by Haemin Lee, National Correspondent

The plaintiff had contracted to charter ships from the defendant. When the defendant unilaterally terminated the contract, the plaintiff initiated arbitration proceedings. The arbitral award was rendered in favour of the plaintiff, which sought enforcement of the award.

The Seoul Central District Court held that the award should be enforced, for inter alia, the following reasons:

(a) Article V (1)(d) NYC provides that a court may refuse to recognize or enforce an award when the composition of the arbitral authority or the arbitral procedure is not in accordance with the agreement of the parties, or, failing such agreement, is not in accordance with the law of the country where the arbitration took place. In the case in question, the parties had agreed to submit any contract dispute to an arbitration tribunal of three arbitrators in London. Specifically, the parties' agreement stated that the two arbitrators, appointed by each party, shall appoint the third arbitrator, and that the arbitral award given by the arbitral tribunal by agreement of two or three arbitrators shall be considered as final.

According to the court, the fact that the arbitral tribunal only comprised two arbitrators until the third arbitrator was appointed two days before the arbitral award was issued may appear to be in violation of the parties' agreement. However, Article 8 LMAA Rules (London Maritime Arbitration Association) recognizes the authority of the two original arbitrators to render an arbitral award before the third arbitrator has been appointed or if the position has become vacant. In the present case, the court found no evidence of any disagreement between the two original arbitrators or of any fact that the substantial hearing was held before the third arbitrator was appointed. Thus the court held that the composition of the arbitral tribunal or the arbitral procedure was not defective, nor in any case affected the award.

(b) The defendant argued that the award, which addressed the undisputed portion of liability and damages, had not become binding on the parties, pursuant to Article V (1)(e) NYC, because it was a mere interim award rather than a final one. The court held that the award had become "become binding on the parties" because there was no other procedure providing for appeal or any other recourse (i.e., all remedies had been exhausted). The court also distinguished an interim award from provisional measures which are only of a provisional nature.