United Nations A/CN.9/SER.C/ABSTRACTS/143

General Assembly

Distr.: General
14 March 2014
English
Original: English and Russian

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.14-01659 (E) 020414 030414

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.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

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 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.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. 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 1347: MAL 1 (2)
Russian Federation: Judicial Division of the Supreme Commercial Court of the Russian Federation (VAS), Moscow
No. VAS-8148/12
10 July 2012
Original in Russian
Published in Russian: online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — setting aside; internationality; place of business; jurisdiction*]

An Italian company requested the Court to set aside an award made by the Arbitration Tribunal of the Chamber of Commerce and Industry of Samara province requiring it to pay moneys to a Russian company.

The courts of first and second instance dismissed the applications. The Supreme Commercial Court of the Russian Federation rejected the Italian company's application for review of the courts' decisions, on the following grounds.

The Italian company claimed that when its dispute with the Russian company was heard by the Arbitration Tribunal, the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (International Arbitration Act), which regulates international commercial arbitration, should have been applied rather than the Federal Arbitration Tribunals in the Russian Federation Act of 2002, which regulates domestic arbitration. Since the Arbitration Act had not been applied, the award ought to have been set aside.

The Supreme Commercial Court did not uphold that argumentation and stated that the parties could chose the procedure.

Article 1, paragraph 2, of the International Arbitration Act (consistent with Article 1 MAL) provides that disputes concerning contractual and other civil law relationships arising from the implementation of foreign trade and other forms of international economic relations, can with the agreement of the parties, be referred to international commercial arbitration if the business of at least one of the parties is based abroad. However, the provisions of the Act are not mandatory. According to article 1, paragraph 2, of the Federal Arbitration Tribunals in the Russian Federation Act of 2002, any dispute arising from a civil law relationship could, with the consent of the parties be referred to domestic arbitration. Therefore, if there is any foreign aspect to a dispute, the parties have more options for its resolution — either international commercial arbitration or domestic arbitration. In this case, the Court stipulated that the dispute between the Russian and Italian companies could be heard in the frame of domestic arbitration, since the Italian company had given its consent thereto by signing the contract.

Case 1348: MAL 12; 34 (2)
Russian Federation: Judicial Division of the Supreme Commercial Court of the Russian Federation (VAS), Moscow
No. VAS-15384/11
30 January 2012
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru).

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — set aside; appointment of arbitrators; conflict of interest; independence of arbitrators*]

A Russian company (the respondent) requested the court to set aside an award made by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC) requiring it to pay a Russian citizen (the claimant) approximately US$ 319 million in connection with a share purchase agreement.

The courts of first and second instance set aside the award made by ICAC. The Supreme Commercial Court of the Russian Federation dismissed the citizen's application for a review of the courts' decisions, on the following grounds. The courts had found that two arbitrators had not disclosed the fact that they and the signatories of the expert opinion submitted to ICAC by the claimant had a professional relationship within the same educational and scientific institutions. One of the experts was even the superior officer of one of the arbitrators. According to Article 12 of the International Arbitration Act (corresponding to Article 12 MAL) and Article 34 (2) of the same act (corresponding to Article 34 (2) MAL), the setting aside was therefore justified. Furthermore, the Court found that ICAC had no jurisdiction to hear the case.

Case 1349: MAL 4; 36
Russian Federation: Judicial Division of the Supreme Commercial Court of the Russian Federation (VAS), Moscow
No. VAS-15216/11
30 January 2012
Original in Russian
Published in Russian: online database of court judgements http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — recognition and enforcement; waiver; procedure; grounds for refusing recognition or enforcement*]

A Russian company requested the court to enforce an award by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC) requiring the payment of moneys by a Turkish company. The court granted the application. The court of second instance upheld the decision. The

Supreme Commercial Court of the Russian Federation upheld the courts' decisions, on the following grounds.

The Turkish company had argued that, when making the award, ICAC had violated the company's right to a fair trial and legal protection; that the courts had not examined the evidence submitted by the Turkish company indicating that the expert review of the case had been improperly conducted during arbitration; that the experts' conclusions were not supported by the facts of the case; that ICAC had rejected the Turkish company's application during arbitration; and that ICAC had not addressed the Turkish company's application regarding its lack of opportunity to submit evidence to the tribunal compared with the opportunities given to the Russian company. In particular, ICAC had dismissed the Turkish company's request for an independent review, rejecting its arguments about the confirmation of the amount of work that had been performed; it had not allowed an expert from the Turkish company's party to give evidence; it had not taken any steps to validate the reliability of the review carried out by the Russian company; and it had not accepted or analysed the substance of the experts' findings.

However, the case file showed that representatives of the Turkish company had attended the ICAC hearings, they had expressed their objections to the Russian company's arguments concerning the substance of the dispute and they had presented documents and evidence to support their own arguments. They had also submitted an application for an independent review and a request to hear testimonial evidence from an individual in the Turkish company who had been involved in the construction work. Those arguments had been considered and investigated by ICAC and been given due attention.

According to the Supreme Court, the consideration of the legality and validity of an award made by an arbitration tribunal are not among the grounds for refusing the enforcement of such an award as set out in article 36 (corresponding to Article 36 MAL) of the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (Arbitration Act).

Furthermore, according to the provisions of article 4 of the Arbitration Act (corresponding to Article 4 MAL), a party who is aware of any procedural defects must state its objection "without undue delay or, if a time limit is provided therefor, within such period of time".

As the case file and the disputed court decisions showed, the representatives of the Turkish company who had participated in the ICAC hearings had not made any objections regarding the way in which the arbitration proceedings had been conducted nor how their rights to due process had been violated. The representative had not submitted any evidence to the contrary to the courts, either.

For these reasons the Supreme Commercial Court of the Russian Federation granted the enforcement of the award.

Case 1350: MAL 34
Russian Federation: Moscow Area Federal Arbitration Court, Moscow
No. A40-7186/11-50-55
6 October 2011
Original in Russian
Published in Russian: online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru).

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — set aside; arbitration agreement; arbitral proceedings; courts*]

An Italian company requested the court to set aside an award made by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC) requiring it to pay moneys to a Russian company and terminating a service contract.

The court of first instance discontinued the legal proceedings, on the grounds that the case could not be heard by a court because the arbitration agreement stipulated that the award of the arbitration tribunal would be final. Under the Arbitration Tribunals in the Russian Federation Act of 2002, an ICAC award could not be challenged.

The Moscow Area Federal Arbitration Court (the court of second instance) upheld the appeal by the Italian company and set aside the ruling of the court of first instance, on the following grounds. The decision of the court of first instance had been based on the provisions of the Arbitration Tribunals in the Russian Federation Act of 2002, which deals with domestic arbitration. This Act, however, is not applicable to the case at hand, which should be governed by the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (the International Arbitration Act). Article 34 of the International Arbitration Act (corresponding to Article 34 MAL) provides for the right to contest any award made in international commercial arbitration. The parties cannot agree to waive this right beforehand.

Case 1351: MAL 19; 22 (1); 22 (2); 34 (2)
Russian Federation: Judicial Division of the Supreme Commercial Court of the Russian Federation (VAS), Moscow
No. VAS-7815/10
26 July 2010
Original in Russian
Published in Russian: online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

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

A Russian company requested the court to set aside an award made by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC), pursuant to which it was required to make a payment to a Finnish company and another Russian company.

The Russian company said that ICAC had not applied the provisions of Russian procedural law despite an agreement that Russian law would be applied, that the proceedings had violated the principle of equality of parties and the procedure agreed upon by the parties, given that the evidence of the Finnish company and the Russian insurance companies had been given in a foreign language even though the agreed language of proceedings was Russian, and that the ICAC award had involved an incorrect application of substantive law provisions and been based on inadmissible evidence.

The courts of first and second instance rejected the application. The Supreme Commercial Court of the Russian Federation upheld those decisions on the following grounds.

The Russian company's argument that ICAC had not applied the provisions of procedural law despite an agreement that Russian law would be applied was unfounded, because the agreement on the law to be applied concerned only the application of substantive law. The procedure for hearing a dispute in international commercial arbitration was governed by the regulations, if any, of the arbitration tribunal itself. That requirement is contained in article 19 (corresponding to Article 19 MAL) of the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (Arbitration Act), which stipulates that, in the absence of an agreement between the parties on how an arbitration tribunal would conduct proceedings, the tribunal might, subject to the provisions of the Act, conduct the arbitration in such a way as it deems appropriate. The power conferred upon the arbitration tribunal thus includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Russian company's argument that the principle of equality between parties, a fundamental principle of Russian law, had been violated during ICAC's hearing of the case, in that evidence had been presented in a foreign language without translation although an agreed arbitration clause stipulated that the language of proceedings would be Russian, was also found to be unjustified. Under article 22, paragraph 1, of the Arbitration Act (corresponding to Article 22, paragraph 1 MAL), an agreement between parties on the language or languages to be used during arbitration proceedings applies to any written statement by a party, any hearing and any award, decision or other communication by the arbitration tribunal, unless stated otherwise. It does not state that the agreement extends to the evidence given by the parties. Article 22, paragraph 2, of the Act (corresponding to Article 22 MAL, paragraph 2), provides for the right, but not the obligation, of an arbitration tribunal to order that any documentary evidence should be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitration tribunal.

The language of the arbitration proceedings and the language in which evidence was presented were thus not identical. They came into different legal categories and were regulated differently. The submission of evidence by a party in a language other than that of the proceedings did not in itself represent a violation of the arbitration procedures mutually agreed upon by the parties nor of the principle of equality as a fundamental principle of Russian law (public order).

Therefore, the Russian company's arguments that the ICAC award was based on an incorrect application of substantive law on limitation periods and on inadmissible

evidence constituted an attempt to seek a review of the substance of the arbitration result. Article 34, paragraph 2, of the Arbitration Act (corresponding to Article 34 MAL, paragraph 2), which prescribes the circumstances in which a court could set aside an arbitral award, could not be adduced in support of those arguments.

Case 1352: MAL 15; 18; 29

Russian Federation: Presidency of the Supreme Commercial Court of the Russian Federation, Moscow
No. 4325/10
20 July 2010
Original in Russian
Published in Russian: Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii (Bulletin of the Supreme Commercial Court of the Russian Federation of the Russian Federation), 2010, No. 11; online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — set aside; arbitrators — composition; mandate; appointment of a substitute arbitrator; decisions; equal treatment; waiver*]

A Cypriot company requested the court to set aside an award made by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC), pursuant to which it was required to pay moneys to a Russian company in relation to a property purchase agreement, the Cypriot company being the buyer.

The court of first instance granted the application. The court of second instance set aside the decision of the court of first instance and rejected the appeal to overturn the award. The Supreme Commercial Court of the Russian Federation upheld the decision of the court of first instance, on the following grounds.

To hear the case, a panel of three arbitrators had been formed in ICAC. They had conducted an oral hearing, but their award had not been announced. Then the arbitrator appointed by the Cypriot company had died and the company had requested ICAC to conduct a second oral hearing with a substitute arbitrator. However, this request had not been granted. The award had been signed by the two arbitrators and accompanied by a statement from the President of ICAC certifying that the absence of the third arbitrator's signature was due to his death.

It is both a basic principle of international commercial arbitration and also a requirement under article 18 (corresponding to Article 18 MAL) of the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (Arbitration Act) that all parties should receive equal treatment. That principle means that, when a case is heard in an international arbitration tribunal, parties must be given the opportunity of equal representation in the composition of the tribunal. Each party is entitled to appoint an arbitrator and each arbitrator must be given an equal opportunity to participate in the discussion and formulation of the draft award.

That principle is also addressed in article 15 of the Arbitration Act (corresponding to Article 15 MAL), under which, if the mandate of an arbitrator is terminated for any

reason, a substitute arbitrator is appointed according to the rules that are applicable to the appointment of the arbitrator being replaced. It is clear from article 15 of the Act that the intention of the legislature is to ensure that an arbitrator is replaced in the event of his or her departure, for whatever reason. It is not the intention that the arbitration should be allowed to continue without the participation of the arbitrator who has departed. Moreover, the procedure for replacing an arbitrator is set out in detail under that article and is identical to the procedure used for appointing the original arbitrator.

On the basis of these articles of the Arbitration Act, and also its article 29 (corresponding to Article 29 MAL), an international commercial arbitration award made by a panel of arbitrators must be issued both by a majority of the arbitrators and by the full tribunal. There might be exceptional circumstances under which an award could be made by an incomplete arbitration tribunal. However, in accordance with the articles mentioned above and with the principle of equal treatment of parties and fair trial, such a situation would be acceptable only if all the stages of the decision-making process had been completed and the departing arbitrator had been able to convey his or her opinion on the case to the remaining arbitrators.

The circumstances of the case under consideration showed that the opposite had occurred. The ICAC award had been made more than two months after the arbitrator's death. No evidence had been submitted to the Court to prove that before his death the arbitrator had participated in the formulation of the arbitration tribunal's award, in the form of a draft award, for example, or a dissenting opinion.

That ICAC had made the award without the participation of the arbitrator appointed by the Cypriot company meant that the arbitrator had been denied any opportunity of influencing the process of making the arbitral award. This represented a violation of the principle of equality of the parties in the resolution of a dispute and thus a violation of a fundamental principle of Russian law (public order).

Therefore, it could not be said that the Cypriot company had waived its right to object in accordance with article 4 of the Arbitration Act (corresponding to Article 4 MAL) and the ICAC regulations. It had submitted its first application for the case to be reheard with a substitute arbitrator without undue delay after the original arbitrator's death.

Case 1353: MAL 19; 31; 34
Russian Federation: Judicial Division of the Supreme Commercial Court of the Russian Federation (VAS), Moscow
No. VAS-2682/10
19 April 2010
Original in Russian
Published in Russian: online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — set aside; procedure; formal requirements; arbitral award; ordre public; signature*]

An Austrian company requested the court to set aside an award made by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC), requiring it to pay moneys to a Russian company.

The Austrian company said that ICAC had violated its constitutional rights, in particular, the right to legal protection, and that it had violated public order and the fundamental principles of Russian law, including rules on representation, by unlawfully considering a claim signed and submitted by an unauthorized person.

The courts of first and second instance found no grounds to set aside the ICAC award under article 34 (corresponding to Article 34 MAL) of the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (Arbitration Act). The Supreme Commercial Court of the Russian Federation refused the Austrian company's application for a review of the courts' decisions, on the following grounds.

The claim had been submitted by a duly authorized person and ICAC was competent to consider the dispute.

The Austrian company's argument that ICAC had acted in violation of its own regulations and that the procedure for considering the dispute was therefore not in accordance with what the parties had agreed upon — in particular, that the Austrian company's request to amend the record of the arbitration procedure had not been considered by ICAC — should be rejected.

Under article 19 of the Arbitration Act (corresponding to Article 19 MAL), in the absence of an agreement between the parties on the rules of arbitration procedure, an arbitration tribunal might, subject to the provisions of the Act, conduct an arbitration however it deemed appropriate. ICAC regulations stipulated that the parties had the right to see the record of the arbitration proceedings. At the request of either party, amendments and additions could be made to the record, with the consent of the members of the tribunal, if the request was deemed justified.

Thus, the absence in this case of an agreement to make amendments to the record of the arbitration procedure was evidence not of a violation of arbitration procedure but of the fact that ICAC considered the request to be unjustified. The argument that ICAC had acted in violation of its own regulations, in that it had not discussed its decision and had not voted to adopt it, should also be rejected. Finally, the argument that ICAC had made an award that was not legally binding, since it contained

neither the signature nor the dissenting opinion of one of the arbitrators, was unfounded.

Neither the Arbitration Act nor the ICAC regulations contained specific requirements on the form of the procedure for making an award, nor did they contain specific time frames for an arbitrator not in agreement with the arbitral award to issue a dissenting opinion. In full compliance with the requirements of article 31 of the Arbitration Act (corresponding to Article 31 MAL) and the ICAC regulations, the absence of a signature of one of the arbitrators on the ICAC award had been duly certified by the President of ICAC. The opinion of the dissenting arbitrator had been written later and sent to the parties. The ICAC award had been made and officially registered in accordance with the ICAC regulations and Russian legislation.

The claim that ICAC had not given due weight to the evidence submitted by the applicant during the hearing was unfounded. This argument related to the analysis of evidence in international commercial arbitration proceedings with a view to reassessing the actual circumstances of a case, which, according to article 34 of the Arbitration Act (corresponding to Article 34 MAL), tribunals were not entitled to do.

Thus, there was no violation of the arbitration procedure agreed by the parties, no violation of the applicant's right to legal protection and no violation of Russian public order.

Case relating to the UNCITRAL Model Arbitration Law (MAL) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention (NYC)

Case 1354: MAL 7 (2); NYC V
Russian Federation: Presidium of the Supreme Commercial Court of the Russian Federation, Moscow
No. 4525/08
16 September 2008
Original in Russian
Published in Russian: Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii (Bulletin of the Supreme Commercial Court of the Russian Federation of the Russian Federation), 2009, No. 2; online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — set aside; arbitration agreement; form of arbitration agreement; fax; documents; writing*]

A Turkish company requested the Court to set aside an award made by the Arbitration Tribunal of the Moscow province Chamber of Commerce and Industry, pursuant to which it was required to pay a company from the United States of America US$ 81 million in damages.

The United States company claimed that an oral agreement was made between its representative and a representative of the Turkish company, according to which the parties were required to take certain actions in relation to a privatization deal in Turkey. The United States company also claimed that an arbitration agreement had been stipulated between the two companies via facsimile and electronic mail. Under that agreement, the parties were committed to refer disputes that might arise in connection with the fulfilment of the agreement to the Arbitration Tribunal, applying the substantive law of New York State, United States.

The United States company was of the view that the Turkish company had violated the agreement and it requested the Arbitration Tribunal to require the Turkish company to pay US$ 162 million in damages. The Arbitration Tribunal ruled that the Turkish company was liable to pay US$ 81 million.

Following an application by the Turkish company, the court of first instance set aside the arbitral award, on the grounds that no evidence of the existence of an arbitration agreement had been provided. The court of second instance overturned the ruling and ordered that the case should be referred back to the court of first instance.

The court of first instance again set aside the arbitral award, reasserting that there was no arbitration agreement. The court also held that the representative of the Turkish firm had no authority to enter into the arbitration agreement, that the absence of an arbitration agreement was confirmed by the decisions of State courts in Switzerland and the Netherlands and that the arbitral award violated the fundamental principles of Russian law and conflicted with Russian public order.

The court of second instance declined to allow the appeal that the arbitral award should be set aside. It found that the conclusion that there was no arbitration agreement between the parties failed to take into account the provisions of the Russian Federal International Commercial Arbitration Act (Arbitration Act) No. 5338-1 of 7 July 1993. It also indicated that there were no grounds for considering that the arbitral award violated Russian public order. Following an application by the Turkish company, the Supreme Commercial Court of the Russian Federation set aside the decision of the court of second instance and upheld that of the court of first instance, on the following grounds.

According to article II NYC, an agreement in writing under which the parties undertake to submit to arbitration all or any differences that have arisen or that might arise between them in respect of a defined legal relationship should include an arbitral clause in a contract or an arbitration agreement, signed by the parties or concluded by an exchange of letters or telegrams. On the basis of article 7, paragraph 2, of the Arbitration Act (corresponding to Article 7, paragraph 2 MAL), an arbitration agreement is considered to be in writing if it is contained in a document signed by the parties or agreed by an exchange of letters, telex, telegrams or other means of electronic communication that provide a record of the agreement, or by an exchange of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

The court of first instance had found that the United States company had not submitted a single document showing that an arbitration agreement had been made in writing and signed by lawful representatives of the parties. Nor had there been

any other evidence in the case that such an agreement had been made in an admissible form.

The position of the Arbitration Tribunal regarding the existence of an arbitration agreement had been contradictory. In its ruling in another case, based on communications between the parties submitted by the United States company, the Tribunal had decided that it did not have jurisdiction to hear another dispute between the Turkish company and the United States company, indicating that the latter had not provided evidence to support the claim that the parties had concluded an arbitration agreement to refer disputes to the Arbitration Tribunal.

The lack of a properly concluded arbitration agreement between the Turkish company and the United States company had been confirmed in foreign court decisions handed down following appeals by the United States company's petition regarding the enforcement of awards made by arbitration tribunals in the foreign States. Thus the cantonal court of Geneva had held that facsimile correspondence provided by the United States company, which in its view constituted an arbitration agreement, had not established the intention of the parties to refer disputes to the Arbitration Tribunal. In addition, evidence presented by the Turkish company (including transcripts of telephone conversations and the absence of any indication in the facsimiles confirming their dispatch), had not proved the existence of that correspondence. The court of first instance of the Netherlands Antilles had also noted that the materials submitted by the United States company regarding the conclusion of an arbitration agreement did not constitute evidence in the matter. The court had subsequently rejected the United States company's application for the arbitral award to be enforced.

In court, the Turkish company had consistently disputed the jurisdiction of the Arbitration Tribunal and declined to confirm that an arbitration agreement had been made. Therefore, the court of first instance had rightly deemed the arbitration agreement to be invalid, on the grounds of the absence of an agreed declaration of intent by the parties for disputes to be referred to the Arbitration Tribunal. The absence of an arbitration agreement was further confirmed by the fact that the United States company had earlier petitioned a State Court — the Supreme Court of New York State — in a similar legal action over a disputed civil agreement.

Case relating to the UNCITRAL Model Arbitration Law (MAL) and the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 1355: MAL 34 (2)(2); CISG 1 (1)(a)

Russian Federation: Presidium of the Supreme Commercial Court of the Russian Federation, Moscow
No. 11861/10
13 January 2011
Original in Russian
Published in Russian: Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoy Federatsii (Bulletin of the Supreme Commercial Court of the Russian Federation of the Russian Federation), 2011, No. 4; online database of court decisions http://kad.arbitr.ru; online legal databases ConsultantPlus (www.consultant.ru) and Garant (www.garant.ru)

Abstract prepared by A. I. Muranov, National Correspondent, D. L. Davydenko and D. D. Yalaletdinova

[**Keywords**: *award — set aside; arbitration agreement; applicable law; ordre public*]

A Ukrainian company (the seller) requested the court to set aside an award made by the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC) requiring it to make a payment to a Russian company (the buyer) in relation to a food sales contract.

The court of first instance granted the application. The court of second instance upheld this decision. The Presidium of the Supreme Commercial Court of the Russian Federation set aside both courts' decisions, at the request of the Russian company, and upheld the ICAC award, on the following grounds.

According to the contract, if the parties were unable to reach agreement and the claimant was the seller, the dispute was to be referred to a three-person panel of the International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry, in accordance with its regulations; if the claimant was the buyer, it was to be referred to a three-person panel of ICAC, in accordance with its regulations. When the case was being heard, the substantive and procedural laws of the claimant's country were to apply.

Following a disagreement, the seller had applied to the International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry, seeking to recover from the buyer the value of the goods, a penalty and interest, as established in the contract. The buyer had filed a counterclaim for recognition of the invalidity of certain provisions in the contract. In its decision, the Ukrainian court had ruled that the substantive law of Ukraine was applicable to the dispute. While the case was being considered by the Ukrainian court, the buyer had applied to ICAC seeking to recover damages owing to the seller's breach of contract. The seller had made a counterclaim for damages. In a contested award, ICAC had granted the initial application in part but dismissed the counterclaim.

The courts of first and second instance had concluded that, in resolving the dispute, ICAC had been wrong to recognize Russian law as the applicable law, because the Ukrainian court had ruled that Ukrainian law was the applicable law. Consequently, the ICAC award had run contrary to Russian public order and that was why it had

been set aside, in accordance with article 34 (corresponding to Article 34 MAL) of the International Commercial Arbitration Act No. 5338-1 of 7 July 1993 (Arbitration Act). In addition, the courts of first and second instance had not taken into account the fact that the Russian Federation and Ukraine were parties to the United Nations Convention on Contracts for the International Sale of Goods (CISG). The Convention was an integral part of Russian and Ukrainian law. The arbitration tribunals of both countries had applied the provisions of the Convention, in view of the fact that the parties had not objected to its application to their contractual relations. When ICAC had made the contested award, it had indicated that, when issues arose over the provisions of the Convention that could not be resolved under the Convention itself, they should be settled by reference to the general principles on which the Convention was founded or, in the absence of such principles, by reference to the law that was applicable according to the rules of private international law. In such cases, violation of public order as grounds for setting aside an award must consist of a violation of the most fundamental principles of law and have real legal consequences for the applicant by restricting its rights and legitimate interests. However, the courts had decided that such circumstances did not exist and the applicant had not identified them.

For these reasons, ICAC's application of Russian law, as represented by its application of the provisions of the Convention and of the contract between the parties, could not in itself be considered a violation of public order.