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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.1). CLOUT documents are available on the UNCITRAL website: (http://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 Law on International Commercial Arbitration (MAL)

Case 1717: MAL 34

Greece: Hellenic Supreme Court of Civil and Penal Justice (Areios Pagos)
Case no. 366/2016
16 May 2016
Original in Greek

Abstract prepared by Artemis Malliaropoulou

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

On 7 May 2010 the seller (hereinafter "the claimant") initiated an arbitration proceeding against the buyers (hereinafter "the respondents") on the basis of the arbitration clause contained in a Share Purchase Agreement (hereinafter "the SPA") concluded between the parties in 2007. Two years after the agreement was concluded, the respondents notified the claimant of their withdrawal from the SPA, on the basis of the claimant's alleged failure to meet its contractual obligations that included monthly transfer of shares in proportion to the monthly instalments paid by the respondents. The claimant argued that the withdrawal of the respondents had no legal effect, as the legal conditions of withdrawal had not been met and that the withdrawal violated article 281 of the Hellenic Civil Code (abusive exercise of a right) and it sought full payment of the amount corresponding to the remaining instalments. The respondents claimed that their withdrawal was lawful, that the claimant had failed to meet its obligations and sought the amount already paid to the claimant, plus fulfilment of the claimant's obligations by way of penalty clause. The arbitral tribunal decided that the respondents' right of withdrawal was exercised in a lawful way and ordered the claimant to return part of the amount sought by the respondents.

The claimant filed an application before the Athens Civil Court of Second Instance requesting the setting aside of the award on the basis of article 897, paragraph 6, of the Hellenic Code of Civil Procedure that provides for annulment of an arbitral award in violation of the public order. The claimant argued that the respondents' withdrawal from the contract was an abuse of their right and that it violated article 281 of the Hellenic Civil Code, which is mandatory, constitutes part of the Hellenic public order and provides that the exercise of a right is prohibited where it manifestly exceeds the boundaries of good faith, morality or the economic or social purpose of that right. The Athens Civil Court of Second Instance rejected the claimant's application as its allegations were based on an erroneous interpretation of the conditions provided by the law. With specific regard to the allegation of abuse of right, the Court pointed out that a potential misinterpretation of the factual background by the arbitral tribunal could not be considered as a ground for annulment of an award under the Hellenic Code of Civil Procedure.

Following the Court's rejection, the claimant appealed the decision[1] before the Hellenic Supreme Court of Civil and Penal Justice, arguing that the decision erred in the interpretation of a provision of substantive law.

The Supreme Court, among other things, holds that misinterpretation or misapplication of the applicable law or insufficient reasoning of the arbitral award are not grounds for setting aside an arbitral award, unless enforcement of the award can lead to a situation that would be contrary to the fundamental principles of the Hellenic public order. Article 34, paragraphs 1 and 2bb of law 2735/1999 (the article is consistent with article 34 MAL) provide the Court the competence to examine *ultra petita* (i.e. beyond the request of the party) any potential contradiction of the arbitral award with international public order, as it is defined in the context of article 33 of the Hellenic Civil Code.

The Court notes that a contrary view suggesting that all mandatory rules (*jus cogens*) should be considered as part of the public order and, thus potential ground for setting

[1] Decision number 383/2014.

aside the award, would lead to a re-examination of the substance of the case and it would make arbitration a pre-stage or pre-requirement of a proceeding before a national judge. Such a result would undeniably contradict the rationale and essence of the principle of finality, which is a core element of an arbitral award. The Supreme Court concludes that the Court of Second Instance's decision is correct in substance and results, while it is added that the appropriate reasoning is the one of the Supreme Court. The Court thus rejects the appeal and the setting aside of the arbitral award.

Case 1718: MAL 34
Paraguay: First Chamber of the Civil and Commercial Appeals Court of Asunción
Carnicas Villacuenca S.A. v. arbitral process entitled Yvu Poty S.A. v. Pabensa S.A. and Carnicas Villacuenca S.A.
29 December 2016
Full text published at http://www.csj.gov.py/

Abstract prepared by Raul Pereira

[**Keywords**: *recourse against award; public policy*]

The respondent in the arbitral proceedings filed an application for setting aside of the arbitral award and its note of clarification, on the ground that the award violated the National Constitution and the Civil Code of Paraguay. The claimant in the arbitral proceedings contested the setting aside of the award, arguing that the respondent had not based its application for setting aside on any of the grounds contained in article 42 of Act No. 1879/02 (hereinafter referred to as the "Arbitration Act"), which were the only grounds on which an award could be set aside. By a majority decision, the application was approved and the arbitral award was set aside. However, that decision was made only on the basis of articles 15 and 159 of the Code of Civil Procedure of Paraguay, as the award was considered to violate the requirement that the judgment address the petitions of the parties (judgment *infra petita*).

The dissenting judge indicated that the Arbitration Act, the text of which was an almost literal reproduction of the UNCITRAL Model Law on International Commercial Arbitration, was the legislation that should be used to resolve the issues encountered in the current case relating to the setting aside of the arbitral award, in order to avoid unnecessary intervention by the Court. Accordingly, the dissenting judge indicated that article 40 of the Arbitration Act, which was an almost literal reproduction of article 34 of the Model Law, contained an exhaustive list of the cases in which it was possible to apply to set aside an arbitral award. Therefore, because the respondent had only criticized the manner in which the arbitral tribunal had interpreted the facts and applied the law, rather than invoking any of the grounds set out in article 40 of the Arbitration Act, it was the responsibility of the Appeals Court to reject the application for setting aside.

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

Case 1719: MAL 5; 36(1)(b); NYC V(2)(b)
Kenya: Court of Appeal at Mombasa
Civil appeal No. 38 of 2013
Tanzania National Roads Agency v. Kundan Singh Construction Limited
14 November 2014
Text available at: www.kenyalaw.org

[**Keywords**: *jurisdiction; courts; public policy; award — recognition and enforcement*]

The appellant (before the courts at Mombasa) and the respondent (before the courts at Mombasa) entered into an agreement for works to upgrade roads. The contract provided that in case of a dispute, a Dispute Resolution Board should be appointed

and if any party was still dissatisfied after the decision of the Board, the issue could be brought before the Stockholm Chamber of Commerce for arbitration.

A dispute regarding delays in the execution of the contract arose between the parties and the respondent, dissatisfied with the decision of the Dispute Resolution Board, referred the matter to arbitration. The appellant, satisfied with the award rendered by the Stockholm Chamber of Commerce, filed a notice of motion before the High Court at Mombasa to recognize and enforce the award. Meanwhile the respondent filed an application before the High Court in Nairobi requesting that part of the award be set aside or be remitted to the arbitrators for decision on the same since the arbitrators had applied English law to the arbitral proceedings and not Tanzanian law as established by the parties. The High Court in Nairobi ruled that Sweden was the country of primary jurisdiction in relation to the arbitration and Kenya only had a secondary jurisdiction as to recognition and enforcement of the award.

The core issue before the High Court at Mombasa was whether the recognition of the arbitral award rendered by the Stockholm Chamber of Commerce (i.e. an international arbitral award) would be contrary to the public policy of Kenya pursuant to section 37 of the Arbitration Act (which conforms to article 36 MAL). In order to decide on this matter the Court first ruled on its jurisdiction over the case and held that according to the above-mentioned section 37, it had jurisdiction to recognize and enforce any arbitral award. The Court clarified that the power to enforce awards was vested in the Court "*irrespective of the country in which [the award] was made, save that the recognition or enforcement of the award could be refused where the Court finds that the recognition or enforcement of the award would be contrary to the public policy of Kenya; that the arbitration award was arrived at in breach of the express terms of the agreement between the parties […] that the arbitration shall be governed by the law of Tanzania …and that enforcing such a contract would be contrary to the public policy of Kenya*". Eventually, the High Court dismissed the application for the recognition of the award.

The applicant appealed before the Court of Appeal at Mombasa to overrule the High Court's decision. The respondent reiterated that the appeal should be dismissed, in particular because of the Court's lack of jurisdiction pursuant to section 37(1)(b) of the Arbitration Act, article V(2)(b) NYC and article 36(1)(b) MAL. In particular the respondent argued that the Arbitration Act does not include any provision permitting appeals to the Court of Appeal for the recognition and enforcement of international arbitral awards; that the Arbitration Act only gives the High Court the power to recognize and enforce such awards and no jurisdiction has been given to the Court of Appeal to deal with decisions emanating from the High Court in that respect.

The Court of Appeal sustained the respondent's arguments and stated that jurisdiction regarding recognition or enforcement of arbitral awards was indisputably with the High Court. The Court of Appeal further pointed out that according to Kenya's Constitution, the right of appeal must be vested on the appellant by the Arbitration Act or, in the case of international arbitration, by the rules of international law or the conventions ratified by Kenya. In this respect, the Court noted that the Arbitration Act does not provide any right of appeal in the case of international awards and that the MAL clearly and deliberately limits the Court intervention in arbitration matters (article 5 MAL) in order to protect arbitration from unpredictable court interference. The Court also stated that the Model Law only provides for a "*one-step intervention in a "competent Court"*" and that in the case at hand such "competent court" was the High Court as established by sections 36 and 37 of the Arbitration Act.

Finally, the Court rejected the appellant's argument that a right of appeal could be established on the ground that the appeal raised matters of general public importance. According to the Court, such matters would transcend the particular case and would have a "significant bearing" on the public interest. In this regard the Court made a distinction between the notion of general public importance and that of public policy that is "*an indeterminate principle, which fluctuates with the circumstances of the time*". The Court further clarified that being in conflict with public policy of Kenya

meant that the award was inconsistent with the Constitution or other written or unwritten laws of the country; inimical to the national interest of the country or contrary to justice and morality. In light of this reasoning, the Court held that the appeal did not raise any issue of general public importance, but only concerned the recognition and enforcement of an agreement between two individuals.

The Court thus declared its lack of jurisdiction and rejected the appeal.

Case 1720: MAL 8; 16(1); NYC II(3)
Paraguay: Civil and Commercial Appeals Court of Asunción
Edupca v. Rosario del Pilar López
7 April 2014
Original in Spanish

Abstract prepared by Raul Pereira

[**Keywords**: *arbitration agreement; validity; kompetenz-kompetenz; judicial intervention*]

The franchisee (i.e. the respondent in appeal) and the franchisor (i.e. the claimant in appeal) concluded a franchising agreement that included an unclear dispute resolution mechanism. It provided for an arbitration clause with a sole "expert arbitrator" to decide on the conflicts arising between the parties, but immediately after, the contract indicated that "*for all matters arising from this contract, the parties agree to the jurisdiction and competence of the courts and tribunals of the city of Asunción* […] *excluding any other jurisdiction*." In first instance, the Court rejected the franchisor's motion to dismiss the case on the grounds of the existence of an arbitration clause. The franchisor appealed this decision. On appeal, the franchisor argued that, by virtue of the competence-competence principle provided for in article 19 of the Paraguayan Arbitration Act (the "PAA"), which conforms with article 16(1) MAL, the Court should have automatically dismissed the case and referred the parties to arbitration, without deciding on the validity of the arbitration clause. The respondent argued that the contract gave jurisdiction and competence to the national Courts, excluding any other jurisdiction.

The Court of Appeals indicated that article 19 of the PAA unequivocally adopts the competence-competence principle, however, its competence to review the validity of the arbitration clause should be analysed also in light of article 11 of the PAA, which establishes that "[t]*he judge before which a conflict is brought in a matter that is subject to arbitration, shall refer the parties to arbitration if a party so requests no later than the submission of the first memorial on the merits, unless it finds that the agreement is null and void, inoperative or incapable of being performed*." The Court of Appeals noted that article 11 of the PAA is an almost literal version of article 8 MAL and was inspired by article II(3) NYC. Referring to the New York Convention as a guide, the Court decided that "*there are no doubts that the judge has the competence to analyse the existence of an arbitration agreement without violating the competence-competence principle, since this principle is limited to give the arbitral tribunal the competence to decide on its own competence* […] *when the parties have decided to take such matter to the arbitral tribunal, but this without prejudice to the fact that if such matter is taken first to the judiciary, then the judge can also decide about the existence and validity of the arbitration agreement in order to refer, or not, the parties to arbitration.*"

After concluding that it had competence to decide on the validity of the arbitration clause, the Court of Appeals indicated that the arbitration clause was clearly ambiguous, therefore rendering the clause inoperable because it could not be established with certainty the parties' intention to arbitrate their eventual disputes. Therefore, the Court rejected the appeal and confirmed the decision of the lower court.

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

Case 1721: CNY V(1)(b); V(1)(d); V(2)(a); V(2)(b)
Colombia: Civil Appeals Chamber of the Supreme Court of Justice
Tampico Beverages Inc. v. Productos Naturales de la Sabana S.A. Alquería
12 July 2017
Text published at www.cortesuprema.gov.co

Abstract prepared by Raul Pereira

In February 2001, party A (claimant) and party B (respondent) signed a trademark licence agreement. Party A terminated the agreement in 2009 and initiated arbitral proceedings to declare the agreement terminated and to obtain damages from party B for the improper marketing of the trademark. The arbitral tribunal ruled in favour of party A, which began the process of applying for enforcement of the award subsequent to recognition. Party B opposed enforcement of the award on the ground that the arbitrator appointed by party A failed to disclose that he and the legal counsel of party A were connected by other arbitral proceedings before the International Centre for Settlement of Investment Disputes (ICSID). In those proceedings, the legal counsel of party A was an arbitrator and the arbitrator appointed by party A in the current case was a legal counsel. According to party B, that situation affected the independence and impartiality of the arbitrator in the current case, making it impossible for party B to "present its case" (article 112(a)(ii) of the Colombian act on international arbitration and article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

The Court began by examining the two cases in which enforcement could be refused ex officio: (i) arbitrability of the dispute (article V(2)(a) of the 1958 New York Convention); and (ii) compliance with public policy (article 112(b)(ii) of the Colombian act on international arbitration, which is identical to article V(2)(b) of the 1958 New York Convention). The Court found that the dispute was arbitrable and that the situation described by party B did not violate the international public policy of Colombia.

The Court then examined party B's claim regarding its inability to "present its case" in light of article 112(b)(ii) of the Colombian act on international arbitration and article V(1)(b) of the 1958 New York Convention. The Court established that the standard of interpretation on the basis of those two articles was "ignorance of the arbitral process of such significance as to restrict the rights of the party; an irregularity or mistake is not sufficient grounds to refuse recognition; it must be of such significance as to make the affected party defenceless or prevent it from presenting its case to the Court". On the basis of that standard, the Court found that the relationship between the arbitrator and the legal counsel of party A in the arbitral proceeding before the International Centre for Settlement of Investment Disputes did not adversely affect party B's right to defend itself in the current arbitral proceeding.

The Court also examined whether or not the arbitrator's failure to disclose that the legal counsel of party A was an arbitrator in the arbitral proceeding before the International Centre for Settlement of Investment Disputes in which he was a legal counsel was a violation of article 112(a)(iv) of the Colombian act on international arbitration and article V(1)(d) of the 1958 New York Convention ("the constitution of the arbitral tribunal or the arbitral process was not in accordance with the agreement between the parties"). The Court dismissed that argument, finding that the arbitrator in the current case complied with the provisions of rules of arbitration of the International Chamber of Commerce (as chosen by the parties), which established a subjective standard of disclosure, it being left to the arbitrator's discretion to reveal any information that he believed might affect his independence and impartiality.

The Court decided to grant enforcement and to recognize and enforce the arbitral award.

Case 1722: NYC II; V(1)(d)
Ukraine: Supreme Court
"SES Astra AB" v. State Enterprise "Ukrkosmos"
22 March 2017
Original in Ukrainian

Abstract prepared by Sergei Voitovich, National Correspondent

In November 2014 the claimant requested the Ukrainian courts to enforce an arbitral award rendered by the International Court of Arbitration of the International Chamber of Commerce on debt recovery for the services of electronic data transfer by the satellite system "ASTRA" provided from 1 January 2011 to 31 January 2014.

The request for enforcement of the arbitral award was heard twice in the First Instance Court, Appellate and Cassation Court. These courts took various judgments with respect to the enforcement sought by the claimant. By its second decision the High Specialized Court of Ukraine for Civil and Criminal Cases refused the enforcement of the award.

The decision of the High Specialized Court was challenged before the Supreme Court of Ukraine. In its application to the Supreme Court, the claimant referred to a different application by the Cassation Court in this and other cases of the same rules of substantive law, namely, articles I, IV and V(1)(d) NYC.

The key issue in dispute was whether the case should be heard by a sole arbitrator or three arbitrators. In the original arbitration agreement the parties had agreed that disputes arising out of it should be settled by three arbitrators in accordance with the ICC Rules of Arbitration. Ultimately, based on the parties' exchange of letters, the tribunal was constituted of a sole arbitrator.

The Supreme Court found that the arbitration agreement as to the number of arbitrators was properly modified by the parties in writing. Accordingly, the arbitral tribunal consisting of a sole arbitrator was formed in compliance with the parties' intention and article II NYC providing that the term "agreement in writing" includes, among others, an arbitration agreement contained in an exchange of letters by the parties.

Also, the Court found that the State Enterprise "Ukrkosmos" participated in the arbitration proceeding, but did not raise objections to the composition of the arbitral tribunal and the procedure for the appointment of the sole arbitrator. Therefore, the respondent waived its right to object pursuant to article 4 of the Law of Ukraine "On International Commercial Arbitration".

The Supreme Court thus satisfied the request of the claimant as to the recognition and enforcement of the award as there were no grounds for refusal.

Case 1723: NYC V
United Kingdom: High Court of Justice, Queen's Bench Division (Mercantile Court, Manchester)
2016 EWHC 71 QB
Pencil Hill Limited v. US Citta Di Palermo S.p.A
19 January 2016
Original in English

Abstract prepared by Reza Beheshti

The parties entered into a sales contract of financial rights originated from registration rights of a football player. The buyer did not pay two instalments and the seller filed an arbitration request in the Swiss Court of Arbitration for Sport (CAS). There was a penalty clause in the contract, stipulating that if the buyer fails to pay any of the instalments agreed it has to pay double of the amount pending at the time of defaulting on the payment. The buyer did not pay 6,720,000 euros as the original amount agreed in the contract and the seller requested this amount with a further 6,720,000 euros in accordance with the penalty clause. The arbitral award rendered by CAS upheld the

request of the seller and ordered the buyer to pay the sum due plus interest and penalty. CAS, however, reduced the amount of the penalty pursuant to article 163.3 of the Swiss Code of Obligations which provides that "*the judge must reduce a contractual penalty considered excessive*". The buyer appealed the award to the supervisory court, i.e. the Tribunal Fédéral in Lausanne, which upheld the decision of CAS. The arbitral award was going to be enforced in England.

The High Court of England first recognized the "strong leaning towards the enforcement of foreign arbitral awards" and that circumstances in which enforcement could be refused were narrow. The Court granted permission to enforce the award, although in previous decisions penalty clauses were considered not to be enforceable under English law, on two significant grounds. First, enforcement must be refused if the award substantially offend the most basic and explicit principles of justice and fairness. While penalty clauses are a matter of public policy, the desirability of finality in international arbitration and upholding the arbitral awards outweighs the public policy of refusing to enforce penalty clauses. Second, the Swiss Code of Obligations as the applicable law empowered the arbitrators to amend and hence reduce the amount of the penalty. In other words, the arbitrators' power to reduce the amount of penalty led to the variation of the nature of the payment obligation, and as a result what was a penalty (an excessive payment) transformed into a non-penalty (a non-excessive payment). This modified obligation to pay a sum was considered under Swiss law as neither exorbitant nor unconscionable.

Therefore, the High Court held that the decision of CAS and the Tribunal Fédéral in Lausanne was to be respected and enforced.

Cases Relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)

Case 1724: MLEC [2(a)]; 9

Colombia: Constitutional Court, *consolidated case files D-11396 and D-11403*[2] — *José Salomón Blanco Gutiérrez (D-11396), Karen Viviana Suárez Ruiz and Andrés Guzmán Caballero (D-11403)*
2 November 2016
Original in Spanish
Text published in Spanish at http://www.corteconstitucional.gov.co

Article 10 of Act No. 527 of 1999, corresponding to article 9(1) MLEC, sets forth the principle of non-discrimination against electronic evidence. That article is complemented by the relevant provisions of the General Procedural Code (Act No. 1564 of 2012), including articles 243 and 247 of the General Procedural Code.

Article 243 of the General Procedural Code includes data messages (defined in article 2(a) of Act 527 of 1999, corresponding to article 2(a) MLEC) among documents for evidentiary purposes. Article 247 of the General Procedural Code indicates that documents that have been submitted in the same format in which they were generated, sent or received, or in a format that accurately reproduces that format, will have evidential weight as data messages. That article also indicates that a printout of a data message will not have the evidential weight of a data message but will be valued in accordance with the general rules on evidentiary weight of documents.

The petitioners asked the Constitutional Court to declare the second part of article 247 of the General Procedural Code unconstitutional for violation of due process. In particular, the petitioners suggested that the article made it a requirement to prove the integrity of the printout of a data message, which could be impossible on the basis of the information available on a paper-based document. The Constitutional Court explained that the printout of a data message was merely a paper-based copy of that message, the evidentiary weight of which should be assessed in light of the rules

[2] Information on this case was received from Jair Fernando Imbachí Ceròn, former CLOUT National Correspondent for Colombia.

applicable to paper-based documents and not of those applicable to data messages. The Court dismissed the case.