NEW YORK CONVENTION OF 1958

INTRODUCTION

The principal multilateral arbitration conventions are reported on in Part V – A through V – D of the Yearbook. Part V – A contains the reporting on the 1958 New York Convention. Part V – B reports on the 1961 European (Geneva) Convention, Part V – C reports on the 1965 Washington (ICSID) Convention and Part V – D reports on the Inter-American (Panama) Convention of 1975. Court decisions in which more than one of these Conventions have been applied are included in the reporting on the Convention which has played the principal role in the decision. Thus, court decisions reported in Part V – A on the 1958 New York Convention may also contain references to the 1961 European (Geneva) Convention or the 1975 Inter-American (Panama) Convention. Likewise, court decisions in Part V – B, Part V – C or Part V – D may also contain a reference to the 1958 New York Convention. The list of subject matters will include the relevant Convention.

This Volume reports on 77 New York Convention decisions rendered in 23 countries and one jurisdiction, the European Court of Justice, bringing the total to 1,580 decisions from 61 countries and 2 jurisdictions. According to the Treaty Section of the United Nations, there are, as of 1 November 2009, 144 Contracting States (and 28 extensions) to the New York Convention.

In addition to publishing court decisions and up-to-date lists of Contracting States to these Conventions, the Yearbook also includes Commentaries. An updated version of the “Commentary on the European Convention on International Commercial Arbitration” by Mr. Dominique Hascher was published in Volume XX (1995). Yearbook XVIII (1993) contains in Part V – C the contribution by Dr. Aron Broches, “Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application”.


Also included in the present Volume is an Index of Cases reported in Volume XXXIV (2009), which facilitates research by both article and subject.
COURT DECISIONS ON THE NEW YORK CONVENTION 1958


In order to present the widely varied material contained in the Yearbook in a consistent manner, all decisions have been translated into English. The headings in the excerpts in some cases have been slightly modified or headings may have been added or deleted. The paragraphs of the excerpts are numbered to facilitate consultation and reference to the Commentary. Also, minor editorial changes have been made in the texts which in no way affect the substance of the decision.

As mentioned, almost 1,600 court decisions on the New York Convention have been reported in the Yearbook since its inception. It is important to emphasize the essential role played by the readers of the Yearbook in reaching this extraordinary number, by drawing our attention to, or sending copies of, new court decisions on the New York Convention. Our thanks go to all of them for their invaluable assistance.

The names of the contributors to this Volume are listed below according to the country on which they have informed us.

Antigua and Barbuda: Dr. Dirk Otto (Frankfurt am Main)
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Brazil: João Bosco Lee (Curitiba)
PR China: Richard Kreindler (Frankfurt am Main)
Yanhua Lin (Beijing)
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Germany: Stefan Kröll (Cologne)
Greece: Ioannis Vassardanis (Athens)
Hong Kong: Michael Marks Cohen (New York)
India: Dr. Dirk Otto (Frankfurt am Main)
Israel: Daphna Kapeliuk (Tel Aviv)
Italy: Chamber of National and International Arbitration of Milan
Benedetta Coppo (Milan)
<table>
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<tr>
<td>Jordan</td>
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<td>Venezuela</td>
<td>Alfredo De Jesús O. (Caracas)</td>
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</table>

The General Editor would like to call upon readers to assist him by sending copies of relevant court decisions, published or unpublished, for reporting in the forthcoming volumes of the Yearbook. Copies can be sent to either of the following addresses.

ICCA Publications

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E-mail: icca@pca-cpa.org E-mail: ajvandenberg@hvdb.com
## NEW YORK CONVENTION OF 1958

### LIST OF CONTRACTING STATES

(as of 1 November 2009)

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<td>Australian Antarctic Territory</td>
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1. This list is compiled by the Editorial Staff of the Yearbook Commercial Arbitration, in consultation with the United Nations Treaty Section. Countries that have acceded to the Convention in the course of the reporting year are indicated in **boldface type**. Extensions are indicated in *italics*.

2. Two reservations are contained in Art. 1(3). The 1st reservation is the so-called "reciprocity reservation" (at present made by 99 States including extensions). On 25 February 1988, the Government of Austria withdrew its reciprocity reservation; on 23 April 1993, the Government of Switzerland withdrew its reciprocity reservation; and on 31 August 1998, the Government of Germany withdrew its reciprocity reservation.

The 2nd is the so-called "commercial reservation" (at present made by 56 States including extensions). On 27 November 1989, the Government of France withdrew its commercial reservation.

3. Extension made by the United States of America upon acceding to the Convention.

4. Argentina declared that the present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution. In addition, upon signature, Argentina declared that "If another Contracting Party extends the application of the Convention to territories which fall within the sovereignty of the Argentine Republic, the rights of the Argentine Republic shall in no way be affected by that extension."

5. Extension made by Australia upon acceding to the Convention.
<table>
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<tr>
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</table>

6. With regard to awards made in the territory of non-Contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

7. Extension made by the United Kingdom on the date indicated in the List.

8. State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

9. The commercial reservation does not apply to the province of Quebec.

10. Upon resuming the exercise of sovereignty over Hong Kong, China gave notice that the Convention with the reservations made by China (“reciprocity” and “commercial”) will also apply to the Hong Kong Special Administrative Region.

On 19 July 2005, the Secretary-General received China’s declaration that the Convention shall apply to Macao, with the reservations made by China.
NEW YORK CONVENTION 1958

Cocos (Keeling) Island 26 Mar. 1975a –
Colombia 25 Sep. 1979a –
Comoro Islands 26 June 1959 1
Cook Islands 12 Jan. 2009a –
Costa Rica 26 Oct. 1987 –
Côte d’Ivoire 1 Feb. 1991a –
Croatia 26 July 1993s 1 - 2
Cuba 30 Dec. 1974a 1 - 2
Cyprus 29 Dec. 1980a 1 - 2
Czech Republic 30 Sep. 1993s 1
Denmark 22 Dec. 1972a 1 - 2
Djibouti 14 June 1983s –
Dominica 28 Oct. 1988a –
Dominican Republic 11 Apr. 2002a –
Ecuador 3 Jan. 1962 1 - 2
Egypt 9 Mar. 1959a –
Enderberry Island 3 Nov. 1970 1 - 2
El Salvador 26 Feb. 1998 –
Estonia 30 Aug. 1993a –
Faroe Islands 10 Feb. 1976 1 - 2
Finland 19 Jan. 1962 –
France 26 June 1959 1
French Polynesia 26 June 1959 1
Gabon 15 Dec. 2006a –
Georgia 2 June 1994a –

11. On 20 November 1990, Law no. 39 of 1990 was promulgated implementing the Convention in Colombia. This law filled a lacunae created by the decision of 6 October 1988, by which the Supreme Court declared the unconstitutionality of the Law no. 37 of 1979, implementing the New York Convention in Colombia.

12. Extension made by France on the date indicated in the List.

13. The Convention was signed by the former Czechoslovakia on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959. Czechoslovakia made the 1st reservation and declared that with regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which these States grant reciprocal treatment. On 28 May 1993, Slovakia and, on 30 September 1993, the Czech Republic deposited instruments of succession.

14. Extension made by Denmark on the date indicated in the List.

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### LIST OF CONTRACTING STATES

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**NEW YORK CONVENTION 1958**

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18. The Convention applies in Malta with respect to arbitration agreements concluded after the date of Malta’s accession to the Convention.
20. The Republic of Mozambique reserves the right to enforce the Convention on the basis of reciprocity, where the arbitral awards have been pronounced in the territory of another Contracting State.
21. Extension made by The Netherlands on the date indicated in the List.
LIST OF CONTRACTING STATES

Norfolk Island

Norway

Oman

Pakistan

Panama

Paraguay

Peru

Philippines

Poland

Portugal

Qatar

Puerto Rico

Romania

Russian Federation

Rwanda

San Marino

Saudi Arabia

Senegal

Serbia

Singapore

Slovakia

Slovenia

South Africa

Spain

Sri Lanka

22. State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

23. Poland made both reservations when signing the Convention. However, the Document of Ratification does not repeat the reservation and the Polish Government officially recognizes that Poland is bound by the Convention in its entirety.

24. The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

25. The former Yugoslavia had acceded to the Convention on 26 February 1982. On 12 March 2001, the Secretary-General received from the Government of Yugoslavia a notification of succession, confirming the declaration dated 28 June 1982 by the Socialist Federal Republic of Yugoslavia. On 3 February 2003, Yugoslavia changed its name to Serbia and Montenegro. As of 3 June 2006, upon the declaration of independence of Montenegro, the name was changed to Serbia.
On 25 November 1975, Surinam became independent. By letter of 29 November 1975, of the then Prime Minister, to the Secretary-General of the UN, Surinam has declared that it will remain bound to the Treaties and Conventions which The Netherlands has made applicable.

Viet Nam declared that interpretation of the Convention before the Vietnamese Courts or competent Authorities should be made in accordance with the Constitution and law of Viet Nam.
NEW YORK CONVENTION OF 1958
INDEX OF CASES REPORTED IN
VOLUME XXXIV (2009)

Albert Jan van den Berg


– Cumulative Indexes of Commentaries and Cases Volumes I – XV contained in Yearbook Key 1990, pp. 169-229, which accompanied Yearbook XV (1990);

The reporting of the court decisions in Part V – A includes the heading “Commentary Cases”. This heading links the court decisions to the numbered sections of the Consolidated Commentary on the New York Convention, by indicating where portions of the court decision will be discussed in the Commentary. For example, [1]-[5] = ¶ 101 indicates that paragraphs [1] through [5] of the court decision are discussed in section 101 of the Commentary.
INTERPRETATION OF THE CONVENTION

ARTICLE I

FIELD OF APPLICATION (ARBITRAL AWARDS)

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.
INDEX OF CASES VOLUME XXXIV (2009)

¶ 102 ARBITRAL AWARD NOT CONSIDERED AS DOMESTIC (PARAGRAPH 1)
Index Volume XXXIV: US 654 (sub 1-7); US 661 (sub 6-7)

¶ 103 NATIONALITY OF THE PARTIES NO CRITERION
Index Volume XXXIV: No new decisions are reported.

¶ 104 CONVENTION’S APPLICABILITY IN OTHER CASES
Index Volume XXXIV: Russian Federation 23; Russian Federation 24; US 654; US 660 (sub 1-2)

¶ 105 “PERSONS, WHETHER PHYSICAL OR LEGAL” (PARAGRAPH 1)
(including sovereign immunity)
Index Volume XXXIV: Hong Kong 23

¶ 106 PROBLEMS CONCERNING THE IDENTITY OF A PARTY
Index Volume XXXIV: No new decisions are reported.

¶ 107 SECOND RESERVATION (“COMMERCIAL RESERVATION”) (PARAGRAPH 3)
Index Volume XXXIV: Canada 28 (sub 4)

¶ 108 ARBITRAL AWARD: Arbitrato Irrituale (ITALY)
Index Volume XXXIV: No new decisions are reported.

¶ 109 ARBITRAL AWARD: “A-NATIONAL” AWARD
Index Volume XXXIV: No new decisions are reported.

¶ 110 ARBITRAL AWARD: TYPES
Index Volume XXXIV: Germany 116 (sub 5-6); Hong Kong 21 (sub 2-7 + 26-36); US 678 (sub 4-9)

¶ 111 PERMANENT ARBITRAL BODIES (PARAGRAPH 2)
Index Volume XXXIV: No new decisions are reported.

¶ 112 RETROACTIVITY
Index Volume XXXIV: No new decisions are reported.
ARTICLE II(1) AND (2)

ARBITRATION AGREEMENT

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

PARAGRAPH 1: AGREEMENT IN GENERAL

¶ 201 Scope of arbitration agreement
   Index Volume XXXIV: Austria 19; Netherlands 33 (sub 15-18); US 653 (sub 14); US 656 (sub 5-6 + 11-14); US 662 (sub 20-27)

¶ 202 Contents of arbitration agreement
   Index Volume XXXIV: No new decisions are reported.

PARAGRAPHS 1 AND 2: AGREEMENT IN WRITING

¶ 203 Uniform rule
   Index Volume XXXIV: Netherlands 33 (sub 1-14)

¶ 204 Formal validity and municipal law
   Index Volume XXXIV: No new decisions are reported.
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¶ 205 Signatures
Index Volume XXXIV: India 43

¶ 206 Exchange of letters or telegrams
Index Volume XXXIV: No new decisions are reported.

¶ 207 Telexes
Index Volume XXXIV: India 43

¶ 208 Sales or purchase confirmation
Index Volume XXXIV: No new decisions are reported.

¶ 209 Incorporation by reference and standard conditions
(Exclusive of Articles 1341 and 1342 Italian Civil Code; ¶ 210 below)
Index Volume XXXIV: Greece 20; Italy 179 (sub 7-8); Turkey 3

¶ 210 Articles 1341 and 1342 Italian Civil Code
Index Volume XXXIV: No new decisions are reported.

¶ 211 Bill of lading and charter party
Index Volume XXXIV: Jordan 2; UK 84 (sub 30-33)

¶ 212 Agent/Broker, etc.
Index Volume XXXIV: Italy 179 (sub 3-6)

¶ 213 Renewal agreement
Index Volume XXXIV: No new decisions are reported.

ARTICLE II(3)

REFERRAL BY COURT TO ARBITRATION

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
A. FIELD OF APPLICATION

¶ 214 Agreement providing for arbitration in another State
Index Volume XXXIV: US 653 (sub 15-21); US 656 (sub 1); US 657 (sub 27); US 659 (sub 1-6); US 671 (sub 1-11); US 672; US 674 (sub 7-8)

¶ 215 Agreement providing for arbitration within forum’s State
Index Volume XXXIV: Singapore 8

¶ 216 Agreement involving foreign party
Index Volume XXXIV: No new decisions are reported.

B. REFERRAL TO ARBITRATION

¶ 217 In general
Index Volume XXXIV: Antigua and Barbuda 1; Canada 27 (sub 6-54 + 59-63); Italy 179 (sub 1-2); Singapore 6; Singapore 7 (sub 63-64); Singapore 8; US 656 (sub 15-17); US 662 (sub 2); US 664; US 669; US 670; US 671 (sub 13-21); US 672; US 673; US 674 (sub 9-21); US 676 (sub 2); US 677

¶ 218 Referral is mandatory
Index Volume XXXIV: US 656 (sub 3); US 662 (sub 17)

¶ 219 There must be a dispute
Index Volume XXXIV: Singapore 7 (sub 51-62)

¶ 220 “Null and void”, etc.
Index Volume XXXIV: Brazil 10; Netherlands 33 (sub 19-27); Singapore 7 (sub 1-50); UK 84 (sub 5-25 + 34-39); UK 86 (sub 1-17); US 653 (sub 6-13 + 60-65); US 656 (sub 4 + 7-10); US 659 (sub 7-9); US 662 (sub 3-19); US 664 (sub 20-23); US 667; US 674 (sub 22-32); US 675; US 676 (sub 3-7); US 677; Venezuela 3

¶ 221 Law applicable to “null and void”, etc.
(For formal validity and applicable law, see Paragraphs 1 and 2 of Article II, ¶ 204 above)
Index Volume XXXIV: Netherlands 33 (sub 1-14); UK 84 (sub 26-29); UK 85 (sub 1-14)
INDEX OF CASES VOLUME XXXIV (2009)

¶ 222 Arbitrator’s competence and separability of the arbitration clause
Index Volume XXXIV: Canada 27 (sub 64-70); Netherlands 33 (sub 4-5)

¶ 223 Arbitrability
(See also Article V(2), sub Ground a. “Arbitrability”, ¶ 519 below)
Index Volume XXXIV: Canada 27 (sub 55-58); US 653 (sub 22-30 + 35-59); US 657; US 671 fn. 26; US 674 (sub 22-32); US 676 (sub 8-17); Venezuela 3 (sub 26-30)

¶ 224 C. DECLARATORY JUDGMENT ON VALIDITY ARBITRATION AGREEMENT
Index Volume XXXIV: UK 84

D. MULTI-PARTY DISPUTES

¶ 225 Related arbitrations (consolidation, etc.)
Index Volume XXXIV: No new decisions are reported.

¶ 226 Third parties
(See also Article I, sub F. “Problems Concerning the Identity of the Respondent”, ¶ 106 above)
Index Volume XXXIV: No new decisions are reported.

¶ 227 Concurrent court proceedings (“indivisibility”)
Index Volume XXXIV: Austria 19 (sub 10); Singapore 8; UK 86 (sub 18-23)

¶ 228 E. PRE-AWARD ATTACHMENT AND OTHER PROVISIONAL MEASURES
Index Volume XXXIV: US 656 (sub 18-26)

¶ 229 Measures in aid of arbitration
Index Volume XXXIV: European Union 2; India 42; UK 84 (sub 2); UK 85; US 662 (sub 28-29)
ARTICLE III

PROCEDURE FOR ENFORCEMENT

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

¶ 301 IN GENERAL
Index Volume XXXIV: Canada 26 (sub 55); China PR 5 (sub 9); Germany 116 (sub 8-10); Germany 117 (sub 1 + 9); Germany 119 (sub 14); Germany 120 (sub 2 + 14); Germany 121 (sub 1 + 10); Germany 122 (sub 1 + 13); Germany 123 (sub 1 + 4); Germany 124 (sub 2 + 24); Hong Kong 21 (sub 2-7 + 26-36); Hong Kong 21 (sub 77-78); Kenya 1 (sub 5-17 + 32-37); Netherlands 32 (sub 7); UK 87 (sub 3-12); US 655 (sub 2); US 679

¶ 302 DISCOVERY OF EVIDENCE
Index Volume XXXIV: No new decisions are reported.

¶ 303 ESTOPPEL/WAIVER
Index Volume XXXIV: Canada 26 (sub 5); Germany 117 (sub 5); Germany 119 (sub 7-9); Germany 120 (sub 3-8); Germany 124 (sub 5-6); UK 87 (sub 37-45 + 52-58); US 665; US 678 (sub 21-23)

¶ 304 SET-OFF/COUNTERCLAIM
Index Volume XXXIV: Germany 116 (sub 7)

¶ 305 ENTRY OF JUDGMENT CLAUSE
Index Volume XXXIV: US 660 (sub 15-17)

¶ 306 PERIOD OF LIMITATION FOR ENFORCEMENT
Index Volume XXXIV: US 658 (sub 17-23)
ARTICLE IV

CONDITIONS TO BE FULFILLED BY THE PETITIONER

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   (a) The duly authenticated original award or a duly certified copy thereof;

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

¶ 401 IN GENERAL

Index Volume XXXIV: Germany 120 (sub 3); Germany 124 (sub 3); Kenya 1 (sub 23-25); Netherlands 32 (sub 2-5)

¶ 402 ORIGINAL OR COPY ARBITRAL AWARD

Index Volume XXXIV: Canada 28 (sub 5); Germany 116 (sub 2); Germany 117 (sub 2-3); Germany 119 (sub 4); Germany 122 (sub 2); Germany 123 (sub 1-2); Italy 178; US 678 (sub 11)

¶ 403 ORIGINAL OR COPY ARBITRATION AGREEMENT

Index Volume XXXIV: Austria 20 (sub 12-17); Canada 28 (sub 5); Malaysia 3 (sub 38)
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

¶ 404 AUTHENTICATION AND CERTIFICATION
Index Volume XXXIV: Austria 20; Italy 178; Kenya 1 (sub 18-22)

¶ 405 “AT THE TIME OF APPLICATION”
Index Volume XXXIV: Italy 178

¶ 406 TRANSLATION (PARAGRAPH 2)
Index Volume XXXIV: Germany 116 (sub 2); Germany 117 (sub 2-3); Netherlands 32 (sub 2 + 6)

ARTICLE V

GROUNDS FOR REFUSAL OF ENFORCEMENT IN GENERAL

¶ 500 GENERAL
Index Volume XXXIV: Germany 121 (sub 2); Hong Kong 22 (sub 5); UK 87 (sub 46-50 + 59-76)

¶ 501 GROUNDS ARE EXHAUSTIVE
Index Volume XXXIV: Hong Kong 22 (sub 37-39); Israel 3 (sub 2-6 + 17); Switzerland 40 (sub 3); US 654 (sub 8-16); US 655 (sub 3); US 658 (sub 5-6); US 660 (sub 1-2); US 661; US 663 (sub 5-8); US 666 (sub 1); US 668 (sub 9); US 678 (sub 3 + 19-20); US 679 (sub 9)

¶ 502 NO RE-EXAMINATION OF THE MERITS OF THE ARBITRAL AWARD
Index Volume XXXIV: Germany 117 (sub 8); Germany 122 (sub 6-7); Hong Kong 21 (sub 8-24 + 37-64 + 74-85); Hong Kong 22 (sub 5 + 46-49); Kenya 1 (sub 29-31 + 38-39); US 654 (sub 35-36); US 655 (sub 5); US 666 (sub 1); US 678 (sub 3-9 + 19-20)

¶ 503 BURDEN OF PROOF ON RESPONDENT
Index Volume XXXIV: Canada 28 (sub 7); Germany 119 (sub 10); Israel 3 (sub 4); Italy 177 (sub 1); Switzerland 40 (sub 2); US 658 (sub 5-6); US 665 (sub 8); US 678 (sub 9)
ARTICLE V(1)

GROUNDS FOR REFUSAL OF ENFORCEMENT TO BE PROVEN BY THE RESPONDENT

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

GROUND a: INVALIDITY OF THE ARBITRATION AGREEMENT

¶ 504 Agreement referred to in Article II
Index Volume XXXIV: Brazil 11; Canada 28 (sub 5); Germany 123 (sub 2); Italy 177; Kenya 1 (sub 29-31 + 38-39); Netherlands 31 (sub 29)

¶ 505 Incapacity of party
Index Volume XXXIV: Turkey 4

¶ 506 Law applicable to the arbitration agreement
Index Volume XXXIV: UK 87 (sub 14-15)

¶ 507 Miscellaneous
Index Volume XXXIV: Kenya 1 [sub 26-28 (short-form arbitration clause)]; Malaysia 3 [sub 35-37 (non-signatory)]; UK 87 [sub 13-34 (non-signatory)]; US 668 [sub 2-8 (conflicting contracts)]

GROUND b: VIOLATION OF DUE PROCESS

¶ 508 In general
Index Volume XXXIV: No new decisions are reported.

¶ 509 “Proper notice”
Index Volume XXXIV: Germany 119 (sub 10-11); Netherlands 32 (sub 8)

¶ 510 Time limits and notice periods
Index Volume XXXIV: Germany 121 (sub 3-4); Netherlands 32 (sub 8 + 10)

¶ 511 “Otherwise unable to present his case”
Index Volume XXXIV: Germany 124 [sub 12 (language of arbitration) + 13 (opportunity to react on document submitted)]; Germany 124 [sub 20-22 (failure to grant set-off)]; Kenya 1 [sub 40-44 (no proof of communication of arbitration documents; appointment of arbitrator on party’s behalf)]; Netherlands 31 [sub 27-28 (no postponement of hearing)]; Netherlands 32 [sub 9 (no filing of answer and counter-claim)]; US 654 [sub 17-36 (manifest disregard of the law)]; US 655 [sub 17-18 (no prior disclosure of terms of award)]; US 668 [sub 10-15
(withdrawal from arbitration to preserve right to challenge arbitral jurisdiction)]

¶ 512 GROUND c: EXCESS BY ARBITRATOR OF HIS AUTHORITY
Index Volume XXXIV: Canada 26 (sub 53-54 + 56); China PR 5 (sub 11-12); Germany 124 (sub 9-11); US 654 (sub 17-36); US 655 (sub 4 + 6-16); US 668 (sub 2-8); US 678 (sub 14-18)

¶ 513 GROUND d: IRREGULARITY IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL OR ARBITRAL PROCEDURE
Index Volume XXXIV: Germany 117 (sub 5); Germany 121 (sub 3-8); Hong Kong 22 (sub 40-45); US 660 (sub 3-8 + 12-14); US 678 (sub 21-23)

¶ 514 GROUND e: AWARD NOT BINDING, SUSPENDED OR SET ASIDE
1. "Binding"
Index Volume XXXIV: Germany 119 (sub 6); Germany 122 (sub 3-4); Germany 124 (sub 8); Switzerland 40 (sub 5-9); US 663 (sub 9-10)

¶ 515 2. Merger of award into judgment
Index Volume XXXIV: No new decisions are reported.

¶ 516 3. “Set aside”
Index Volume XXXIV: Germany 118; Germany 121 (sub 9); Netherlands 31 (sub 2-23); Netherlands Antilles 3; Turkey 2

¶ 517 4. “Suspended”
Index Volume XXXIV: Switzerland 40 (sub 10-20); US 658

ARTICLE V(2)

PUBLIC POLICY AS GROUND FOR REFUSAL OF ENFORCEMENT EX OFFICIO

Recognition and enforcement of an arbitral award may also be
refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

¶ 518 Distinction Domestic – International Public Policy

Index Volume XXXIV: Canada 26 (sub 7-38 + 48-52 + 57); Kenya 1 (sub 45-55)

¶ 519 Ground a: Arbitrability

(See also Article II(3) “Arbitrability”, ¶ 223 above)

Index Volume XXXIV: Hong Kong 21 (sub 68-69)

Ground b: Public Policy

¶ 520 Default of party

Index Volume XXXIV: No new decisions are reported.

¶ 521 Lack of impartiality of arbitrator

Index Volume XXXIV: Germany 121 (sub 7-8); Germany 124 (sub 16-19)

¶ 522 Lack of reasons in award

Index Volume XXXIV: Netherlands 32 (sub 11-12)

¶ 523 Irregularities in the arbitral procedure

(See also Article V(1)(b))

Index Volume XXXIV: Germany 119 (sub 12); Germany 120 (sub 3-8); US 678 (sub 24-26)

¶ 524 Other cases

Index Volume XXXIV: Brazil 11 (lack of valid arbitration agreement); Canada 26 [sub 7-38 + 48-52 + 57 (violation of domestic law)]; China
INDEX OF CASES VOLUME XXXIV (2009)

PR 5 [sub 13 (pre-existing domestic court decision)]; Germany 117 [sub 6-7 (contractual penalty; determination of own fees by arbitrators)]; Germany 122 [sub 5-11 (expert report disregarded; equitable determination of damages; award of costs and arbitrators’ fees; costs apportionment ratio)]; Germany 123 [sub 3 (award of costs and arbitrators’ fees)]; Germany 124 [sub 15 (issue of jurisdiction to be decided in interim award) + 20-22 (failure to grant set-off)]; Hong Kong 21 [sub 8-24 + 37-64 + 74-85 (impossibility of specific performance)]; Hong Kong 21 [sub 65-66 (mutual fulfillment of obligations)]; Hong Kong 22 [sub 6-35 (fraud)]; Israel 3 [sub 7-17 (agreement for execution of award in state other than enforcement state)]; Italy 176 (determination of broker’s fee); Kenya 1 [sub 45-55 (illegal contract)]; Netherlands 31 [sub 25-26 (illegal tax construction)]; US 654 [sub 17-36 (manifest disregard of the law)]; US 655 [sub 10-11 (manifest disregard of the law; interpretation of contract)]; US 660 [sub 9-11 (manifest disregard of the law)]; US 661 [sub 14-19 (corruption)]; US 666 [sub 2-7 (disclosure by arbitrator)]; US 668 [sub 16-21 (violation of international comity)]; US 678 [sub 12-13 (partial and final award in conflict)]

ARTICLE VI

¶ 601  ADJOURNMENT OF DECISION ON ENFORCEMENT

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Index Volume XXXIV: Germany 120 (sub 9); Netherlands 32 (sub 14-19); US 658 (sub 17-23)
ARTICLE VII(1)

MORE-FAVOURABLE-RIGHT PROVISION

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

¶ 701 MORE-FAVOURABLE-RIGHT PROVISION IN GENERAL

Index Volume XXXIV: No new decisions are reported.

¶ 702 DOMESTIC LAW ON ENFORCEMENT OF FOREIGN AWARD

Index Volume XXXIV: Austria 20 (sub 12-17); Germany 117 (sub 2-3); Germany 122 (sub 2); Germany 123 (sub 1-2); Netherlands 33 (sub 1-14)

¶ 703 BILATERAL AND MULTILATERAL TREATIES

Index Volume XXXIV: See entries below.

¶ 703(A) MULTILATERAL TREATIES

Index Volume XXXIV: No new decisions are reported.

¶ 704 EUROPEAN CONVENTION OF 1961

Index Volume XXXIV: Germany 117 (sub 2-4); Germany 118; Russian Federation 23; Russian Federation 24

See also Part V – B of this Yearbook.

¶ 704(A) PANAMA CONVENTION OF 1975

Index Volume XXXIV: US 661; US 673 (sub 3)

See also Part V – D of this Yearbook.

¶ 704(B) BILATERAL TREATIES

Index Volume XXXIV: No new decisions are reported.
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¶ 704(C) ROME TREATY OF 1958 AND EC JUDGMENTS CONVENTION OF 1968/1988

Index Volume XXXIV: No new decisions are reported.

ARTICLE VII(2)

¶ 705 RELATIONSHIP WITH GENEVA TREATIES OF 1923 AND 1927

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Index Volume XXXIV: No new decisions are reported.

ARTICLE XI*

¶ 911 FEDERAL STATE CLAUSE

In case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the

* The other Articles of the Convention are typical treaty provisions of a technical nature. They are not reproduced as they have not been subject to judicial interpretation in the court decisions reported to date.
federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Index Volume XXXIV: No new decisions are reported.

ARTICLE XIV

¶ 914 GENERAL RECIPROCITY CLAUSE

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Index Volume XXXIV: No new decisions are reported.
1. Eastern Caribbean Supreme Court, High Court of Justice (Civil), 13 July 2007, Claim No.: ANUHCV 0312/2005

Parties: Applicant/Claimant: VT Leaseco Limited (nationality not indicated)
Respondents/Defendants: (1) Fast Ferry Leasing Limited (nationality not indicated);
(2) Rapid Explorer Operations Inc. (nationality not indicated)

Published in: Available online at <www.eccourts.org>

Articles: II(3)

Subject matters: – nonsignatory defendant bound to arbitration clause (sub-charterer)
– abuse of process

Commentary Cases: ¶ 217

Facts

On 2 August 2001, VT Leaseco Limited (VTL) entered into an agreement with Fast Ferry Leasing Limited (Fast Ferry) and Fast Ferry’s parent company Neptune Worldwide Limited (Neptune) to build three ships to a design supplied by Fast Ferry (the Agreement). The Agreement provided that Fast Ferry would subsequently execute a bareboat charterparty for each ship for a period of three years on terms set out in a schedule. Clause 22.1 stated that the Agreement was governed by the laws of England; that claims against VTL would be subject to the exclusive jurisdiction of the English courts while claims against Fast Ferry or Neptune would be subject to the non-exclusive jurisdiction of those courts; that
disputes directly related to the operation or termination of the bareboat charterparty to be entered into by Fast Ferry in respect of each ship would be referred to arbitration in London.

The ships were built and the parties entered into two further agreements. On 24 March 2004, they concluded an Acceptance Agreement settling all their prior claims. On 26 March 2004, they executed the three bareboat charterparties provided for in the Agreement. Clause 21(a) of Part II of the charterparty provided in accordance with the Agreement that the charter “shall be governed by English law and any dispute arising out of this Charter shall be referred to arbitration in London”.

Disputes arose among the parties. On 20 July 2005, VTL commenced an action in the High Court of Antigua and Barbuda against Fast Ferry and Rapid, also a subsidiary of Neptune, to which Fast Ferry had sub-chartered the ships. VTL sought an order for the payment of sums allegedly owed and an order that possession of the three ships be returned to VTL. On 4 August 2005, 23 November 2005 and 31 May 2006, it filed Amended Notices of Application seeking a number of other orders. On 22 August 2005, VTL also commenced arbitration proceedings in London.

The High Court, per Errol L. Thomas, J, held that any dispute directly concerning the charterparty had to be decided by arbitration in London. As the bareboat charter provided that VTL’s rights under that charter would be the same in respect of a sub-charterer, the court had no jurisdiction over Rapid.

The court dismissed Fast Ferry’s argument that the proceedings in Antigua and Barbuda constituted abuse of process because of the arbitration commenced by VTL in London. The court noted that it had no reason to doubt VTL’s claim that while the present court proceedings related to possession of the vessels, arbitration dealt with the question of damages. The court added that the arbitration clause at issue was not broad but only concerned disputes directly related to the operation and termination of the charterparty, and that in any event the court proceedings had been filed first.

Only the relevant part of the decision is reported below.

Excerpt

[1] “... [T]he Agreement and the Acceptance Agreement are linked and specifically in terms of arbitration. And in this regard there are three regimes:
1. For Claims brought against VTL the laws of England is the jurisdictional law and the English Courts have exclusive jurisdiction.
2. For Claims against Fast Ferry or Neptune the English Courts have non-exclusive jurisdiction.
3. Any dispute arising from the Charter which are directly related to its operation or termination shall be referred to arbitration in London according to the terms set out in the Charter.

[2] “Based on the foregoing, actions against VTL can only be initiated in the English Courts based on the laws of England. It is an exclusive jurisdiction. However, with respect to claims against Fast Ferry or Neptune, the English Courts have a non-exclusive jurisdiction. These regimes are commented on in Russell on Arbitration (22nd ed.) at paragraph 2-027 thus:

‘A jurisdiction clause provides expressly for the courts of a particular country to have jurisdiction to deal with disputes arising under a contract. It may provide that the courts of a particular country have exclusive jurisdiction, in which case no other courts of a particular country have exclusive jurisdiction. Or it may provide that the courts of a particular country have non-exclusive jurisdiction, in which case the chosen court has jurisdiction but both parties also have the right to commence proceedings in any other court of competent jurisdiction.’

[3] “It means also that since there is provision for non-exclusive jurisdiction, there can be no question as to the forum convenience and an adjournment for this purpose, see: Spiliada Maritime Corporation v. Cansulex Ltd [1987] AC 460. Therefore, given the content of Clause 22.1 of the Agreement the Applicant/Claimant can lawfully begin proceedings against Fast Ferry in the High Court of Antigua and Barbuda.

[4] “Under Clause 7 of Part II of the Bareboat Charter prior written permission of the owner must be obtained before a sub-charter may be effected. The Clause goes on to state the following:

‘(i) The rights under the Charter of VTL as owners shall apply in full to the subcharter and the Owners shall have the express right to enforce the rights and obligations of the Charterer under the Contracts (Rights of Third Parties) Act 1999.'
(ii) The terms of any subcharter shall otherwise be the same as this Charter.’

[5] “Such prior written permission was granted to Fast Ferry by VTL by letter dated 30 April 2004. This letter therefore gives life and effect to Clause 21(a) of the Bareboat Charter. From this it means that ‘any dispute arising out of this Charter shall be referred to arbitration in London’.... The parties to such arbitration would be the Owners being VTL, Fast Ferry and Rapid. But there is another legal issue in that there is nothing to suggest that the sub-charter accords with the terms of the approval.

[6] “It follows that on all counts the Courts of Antigua and Barbuda have no jurisdiction in this regard and therefore no jurisdiction over the second Respondent/Defendant.

[7] “Given the various arbitration clauses analysed, it follows that the only matter properly before the High Court of Antigua and Barbuda is the matter involving VTL, the Applicant, and Fast Ferry, the First Respondent/Defendant. This in turn leads to a consideration of the orders sought in relation to the First Respondent/Defendant.”

[8] The High Court decided the issues between VTL and Fast Ferry and continued: “It is clear that the Agreement provides for arbitration with respect to disputes arising from the Charter which are directly related to its operation or termination.

[9] “References have been made to arbitration proceedings initiated. [It is stated in an affidavit filed on behalf of the Fast Ferry] that pursuant to clause 22 of the Agreement, the Claimant by notice dated 22 August 2005 has initiated arbitration proceedings in London. Prior to that date ... a claim form was filed on 20 July 2005 and an amended Claim Form filed on 4 August 2005. Therefore, as far as Mr. Kentish [counsel for Fast Ferry] is concerned this constitutes abuse of process.

[10] “The arbitration clause is not at large as it is limited to certain disputes directly related to operation and termination. There are no details before the Court as to the nature of the arbitration proceedings initiated but learned senior counsel [for VTL] has indicated that these proceedings relate to possession of the vessels while the question of damages must be determined in England. This is a clear distinction in the two proceedings. In any event, there is nothing before the Court to suggest the precise nature of the [disputes] before the arbitrator and whether any or both of them fall within the scope of the arbitration clause, see: *The ANGELIC GRACE* [[1995] 1 Lloyds Law Report 86].
“The Court has no reason to doubt what learned senior counsel [for VTL] has submitted on the issue, and, in any event, these proceedings were first in time. In all the circumstances the Court does not consider that these proceedings constitute an abuse of process.”
19. Oberster Gerichtshof [Supreme Court], 26 August 2008, no. 4Ob80/08f

Parties: Claimant: R GmbH (nationality not indicated)  
Defendants: (1) O B.V. (Netherlands);  
(2) O Co Ltd (Japan);  
(3) O Corporation (Japan)

Published in: Available online at <www.ris2.bka.gv.at>

Articles: II(3) (by implication)

Subject matters: – scope of arbitration clause and extra-contractual liability claim  
– connexity of claims

Commentary: ¶ 201; [10] = ¶ 227

Facts

On 12 October 1998, R GmbH (the claimant) entered into a contract with O B.V. (the first defendant) to market digital blood-pressure-measuring instruments in Austria. The instruments were produced by a Japanese group, led by O Corporation, to which the first defendant belonged. The contract provided for ICC arbitration of all disputes arising out of the contract. The seat of the arbitration would be in Amsterdam, The Netherlands.

A dispute arose between the parties when the first defendant sold the instruments at a lower price to a competitor of the claimant, which was mainly active in Germany but also operated in the Austrian market. The claimant commenced an action in Austria, seeking damages under the contract and also alleging extra-contractual liability for abuse of dominant position and unequal
treatment. The court of first instance dismissed the claim, finding that the Austrian courts lacked jurisdiction because of the arbitration clause in the contract. This decision was affirmed on appeal.

The Supreme Court held that the Austrian courts lacked jurisdiction in respect of the contractual claims raised by the claimant against the first defendant but had jurisdiction over the claims for extra-contractual liability. The Court set out at the outset the principles for the interpretation of arbitration agreements, which favor an interpretation affirming those agreements’ validity and applicability, within the limits of their literal text. Based on those principles, it concluded that an arbitration agreement in respect of “all disputes arising out of a contract” also applies to the extra-contractual claims when the event giving rise to those claims and the breach of contract are indissolubly connected.

This was not the case here, however, since the claimant based its claims on two separate events that were independently capable of supporting its claim, namely, the contract of 12 October 1998 and the first defendant’s contractual relationship with a competitor, which allegedly gave rise to extra-contractual liability under competition and fairness law. The connection between the two, though “broad and functional”, was merely “illustrative” and it could not be deemed that the two constituted one event only. Hence, the Austrian courts had jurisdiction over the non-contractual claims.

The Court dismissed the argument that a court has jurisdiction on all grounds underlying a claim if it has jurisdiction over at least one of them (the so-called vis atractiva). It reasoned that if it were so, parties would have an easy way out of their obligations under an arbitration agreement by simply alleging grounds that fall outside the agreement’s scope.

Excerpt

(....)

[1] “What disputes are covered by an arbitration agreement depends on the intention of the parties, which is to be interpreted within the limits set by the wording of the agreement (RIS-Justiz RS0018023). If no common intention of the parties can be determined, the purpose of the agreement is decisive. If the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favours the validity of the arbitration agreement and its applicability to a certain dispute is to be preferred (1 Ob 126/00m = ecolex 2001, 375; see also Hausmaninger [in Fasching/Konecny 2nd ed.], Sect. 581 ZPO no. 226 et seq. and references therein).
Since an arbitration agreement is a purely procedural contract, it must be interpreted primarily according to the principles applicable to procedural law. If these do not suffice for reaching an appropriate result, the interpretation rules of the Civil Code – particularly Sect. 914 – apply by analogy (Ob 2193/96y; 1 Ob 126/00m; Rechberger/Melis in Rechberger 3rd ed., Sect. 581 no. 5 and references therein).

It follows from the legal situation described above that arbitration agreements concluded in respect of ‘all disputes arising out of a contract’ also apply, for instance, to claims for damages based on an alleged breach of contract, claims for unjust enrichment or tort claims, as long as the (concretely) damaging behavior and a breach of contract are, in the narrowest sense, one event (accord, in general, Hausmaninger, op. cit., Sect. 581 ZPO no. 230 and references therein also to jurisprudence).

The claimant bases its claims not only on a breach of the sales contract concluded on 12 October 1998 with the first defendant, but also on the first defendant’s extra-contractual behavior, namely, its contractual relationship with a competitor – the subsidiary company of the Japanese companies, which operated particularly in the German but also in the Austrian market – to which the first defendant supplied digital instruments for measuring blood pressure at a considerably lower price than to the claimant. [The claimant alleges that] by so doing the first defendant breached not only its contractual obligations under the agreement, but also its extra-contractual legal obligations under competition and fairness law, in the light of the dominant position held by the group to which the defendants belong. This fact alone would support the claimant’s claims (also) against the first defendant even if the breach of contract, also asserted as (further) ground for claim, were ruled out. Hence, the claimant relies against the first defendant both on an alleged breach of contract and on an extra-contractual liability that is generally based on a behavior violating market regulations as the legally relevant fact.

Basically in agreement with the argumentation of the claimant, the arbitration agreement at issue, according to its wording, covers only claims arising out of the contract; it does not cover those extra-contractual claims that though broadly connected to [the contractual claims] do not have a close

1. Sect. 914 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB) reads:

"In the interpretation of agreements, one should not adhere to the literal meaning of the expression but one should ascertain the intention of the parties and interpret the agreement in such a manner that it is in accordance with honest business usage."
functional connection with them. This means that claims arising purely under competition and fairness law do not fall under an arbitration agreement that is limited to ‘all disputes out of this agreement’ – in the present case, the sales agreement of 12 October 1998.

[6] “The above considerations ... can be generally summarized as follows: an arbitration agreement in a contract that is limited to ‘all disputes [arising] out of this agreement’ does not cover extra-contractual claims arising purely under competition and fairness law that are broadly connected to the contractual claims but do not have a close functional connection with them. Hence, where there is no close functional connection between contractual claims and extra-contractual claims, it cannot be deemed that there is one event only, in respect of which an arbitration agreement limited to claims arising out of the contract can also cover purely extra-contractual claims.

[7] “It ensues from the above considerations that, notwithstanding the arbitration agreement relied on by the defendants, the court of first instance has jurisdiction (also) in respect of the first defendant (see in particular, on the arbitration agreement as a procedural impediment for the lack of jurisdiction of state courts: Hausmaninger, op. cit., Sect. 584 ZPO no. 2, 48 and references therein also to jurisprudence) to the extent that the claimant does not raise claims based on the contract, but rather the competing extra-contractual claims at issue, which on their own can support the request for a judgment in accordance with the arguments made, completely independent of any contractual agreements.

[8] “In the claimant’s opinion, the court seized has jurisdiction ‘when one and the same fact [can] be brought under various legal provisions’ and this court has jurisdiction ‘only in respect of one of the competing norms to be applied’, even when there is non-extendable jurisdiction’ in respect of one of the legal grounds relied on for the claim.

[9] “The appellant relies here on constant jurisprudence of this Supreme Court (RIS-Justiz RS045485; most recently, 4 Ob 1010/94), whose essential meaning, however, it misunderstands. The decisive fact is whether a decision is to be rendered on one subject matter only, in whose respect various legal grounds can be the basis for a judgment (see on this issue, for instance, Ballon in Fasching 2nd ed. I Sect. 41 JN no. 10; Mayr in Rechberger 3rd ed. Sect. 41 JN no. 4). Here the claimant relies on different grounds for its claim, that is, on different facts producing a legal effect (further on this issue, see Fasching in Fasching/Konecny 2nd ed. III Sect. 226 no. 88; Rechberger/Klicka in Rechberger 3rd ed. at Sect. 226 no. 15). Each of these grounds could per se make the request for judgment succeed.
“This Court does not agree with the opinion of Fasching (in Fasching/Konecny 2nd ed. Ill at Sect. 226 et seq. ZPO no. 62) – at least in respect of the boundary between state jurisdiction and arbitral jurisdiction referred to by agreement – that the court seized may hear and decide all grounds that support an identical claim if it has jurisdiction over at least one of them. It would be easy otherwise, as shown by this case, for the party bound by an arbitration agreement to avoid the legal consequences of such agreement by alleging a further ground not falling thereunder.

Hence, the court of first instance lacks jurisdiction over the contractual claims against the first defendant relied on in the claim that are covered by the arbitration agreement in the contract of 12 October 1998.”
20. Oberster Gerichtshof [Supreme Court], 3 September 2008, 3Ob35/08f

Parties: Claimants: (1) O Limited (Cyprus); (2) M Corp. (formerly A, Inc.) (US)  
Defendant: C Limited (UK)

Published in: Available online at <www.ris2.bka.gv.at>

Articles: IV(1)(a); IV(1)(b); VII(1)

Subject matters: – certified copy of arbitral award  
– certification of copy of award by LCIA registrar  
– original arbitration agreement or certified copy required (no) (Austrian law)  
– copy of non-authenticated arbitral award

Commentary Cases: ¶ 404; [12]-[17] = ¶ 403 + ¶ 702

Facts

On 28 April 2003, an arbitral tribunal of the London Court of International Arbitration (LCIA) rendered a partial award in a dispute involving O Limited, M Corp, and two other parties, as claimants, and C Limited as defendant. On 3 July 2003, the LCIA arbitral tribunal issued a final award. O Limited and M Corp. sought enforcement of the LCIA awards in Austria. A court of first instance granted enforcement and a court of appeal affirmed the enforcement decision.

On appeal, the Austrian Supreme Court reversed the appellate court’s decision and remanded the case to the court of first instance. The Court noted at the outset that the defendant did not doubt the existence of the awards and the arbitration agreement on which they were based but merely opposed enforcement on the ground that the copy of the awards submitted by the claimants together with the enforcement application did not comply with the formal conditions for requesting enforcement established in Art. IV(1) of the 1958 New York Convention.
The Supreme Court first reasoned that the New York Convention, which prevails over domestic law, does not explain clearly which law applies to the authenticity and certification requirements, either the law of the state of rendition or the law of the state of enforcement of the award, or both. In Austria, the Supreme Court’s jurisprudence has consistently held that domestic certification requirements do not apply exclusively: compliance with the requirements of the state of rendition can also be deemed to suffice; in particular, certifications issued by the secretary of the arbitral institution are acceptable, when the secretary is authorized under the applicable arbitration rules. Here, however, the Court found that the LCIA Rules do not provide that the registrar is authorized to issue certifications. Hence, his certifications in the present case did not comply with the conditions under the New York Convention.

The Supreme Court then held that it was unnecessary to examine whether the arbitration agreement was duly certified. It noted that the new Austrian arbitration law, which was introduced by the 2006 reform, does not require that the arbitration agreement be supplied unless the court so requests. As there was no doubt here as to the existence of the agreement, there was no need to order that it be submitted. The Supreme Court reasoned that the post-2006 legislation, with its less strict requirements, applied in the present case because the request for enforcement had been filed after the new law entered into force. The exception in that law that pending arbitrations and related court proceedings commenced before the entry into force of the 2006 law are governed by the earlier provisions did not apply as enforcement proceedings are not arbitration-related proceedings in the proper sense.

Finally, the Supreme Court held that, in addition to their copy not being duly certified, the original awards did not comply with the authenticity requirements under the New York Convention. The Court reversed its earlier holdings that on the basis of the English expression “certified” in the Convention, confirmation by “a neutral person closely associated with the parties to the arbitration in his official function” suffices for the authentication of the original award. The Court noted that those holdings were based on a misquotation from Schlosser (see below). The author’s statement in fact refers to the copy of the original award rather than the award itself. The Court agreed that it would go against common sense not to require some formal proof of the authenticity of the original award when a certified copy thereof is submitted. Here, the copy of the awards supplied by the claimants only certified (in an invalid manner, as seen above) the copy’s correspondence to the original, but lacked any certification, even indirect, of the authenticity of the arbitrators’ signatures.
Excerpt

(....)

1. “[The] claimants correctly point out, in their reply to this appeal, that again in this third instance the defendant does not claim that the arbitral awards are forged, that the copies do not correspond to the originals or that the arbitration agreement was not concluded, was concluded on different terms or that in this respect too the copy does not correspond to the original. Rather, [the defendant] merely argues that the certifications do not comply with the requirements of Art. IV(1)(a)-(b) of the [1958 New York Convention].

2. “The defendant rightly raises the ... legal question that there is no jurisprudence of the Supreme Court on the question whether, under the Convention, the arbitration agreement must be certified by the secretary or a similar officer of the (permanent) arbitral tribunal and whether both the arbitration agreement and the arbitral award must be certified by such person always or only when the applicable arbitration rules so provide.

3. “The defendant argues that the claimants do not deny that the arbitration agreement was certified only by a subordinate organ of the arbitral tribunal, and that the Supreme Court has not [yet] examined the question whether the applicable arbitration rules provide or allow for such certification. In fact, there is no provision on [certification] in the LCIA Arbitration Rules. Art. 26.5 of these Rules’ does provide that the LCIA shall transmit certified copies of the arbitral award to the parties; this however says nothing as to the form of the certification. The Rules do not mention a secretary of the arbitral tribunal, nor do they say that the ‘registrar’ is competent or authorized in any manner to certify arbitral awards or arbitration agreements. [The defendant] argues that therefore [the registrar’s] certifications cannot be deemed sufficient under the jurisprudence of the Supreme Court and the declaration of enforcement was wrongly granted. The claimants did not supply the original arbitration agreement (thus the original document), or a copy thereof that was certified by a person authorized thereto. Also, [argues the defendant,] a certified copy of a non-authenticated original document does not suffice under Art. IV Convention. The original document must namely be certified in one of the manners provided for

1. Art. 26.5 of the Arbitration Rules of the London Court of International Arbitration reads:

“The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit certified copies to the parties provided that the costs of arbitration have been paid to the LCIA in accordance with Article 28.”
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

legalization provided in Sect. 79 NO [Notariatsordnung – Notary Public Act]; the certification by a notary public [Vidimierung] under Sect. 77 NO is only provided for a copy of a certified original.

4 The enforcement court decides as follows.

1. CERTIFICATION REQUIREMENTS

5 “Pursuant to Sect. 86(1) EO, international law norms prevail over the provisions on the declaration of enforcement in Sect. 79 et seq. EO. This is also the case of the New York Convention, which came into force in Austria on 31 July 1961. According to Art. IV(1) Convention, recognition and enforcement require that the applicant supply, at the time of the application: (a) the duly authenticated (legalized) original award or a duly certified copy thereof and (b) the original agreement referred to in Art. II Convention or a duly certified copy thereof.

6 Schlosser (in Stein/Jonas, ZPO, 22nd ed., annex to Sect. 1061 German ZPO no. 65) calls these formal conditions an elaborate exaggeration that has no meaningful function unless the defendant relies on a lack of authenticity. Schlosser is of the opinion on this point that the certification requirements of the recognition state apply. [He writes that] it cannot be deduced from the New York Convention that the certification requirements of the state of rendition of the arbitral award suffice in the alternative, or that only [those latter requirements] apply. If this were the case, the domestic court could find it very difficult to ascertain whether the person who issued the certification was authorized to do so. Schlosser concedes that it would be more sensible to accept the forms [of certification] provided in general for the submission of documents in court proceedings (op. cit., no. 66).

7 Based on the consideration that the New York Convention does not explain clearly whether only the authenticity or accuracy requirements in the state of rendition of the award apply to the arbitral award and the arbitration agreement or to their copies, or whether also the requirements for the certification of foreign documents in the recognition state must be complied with, the Supreme Court consistently supports the opposite opinion that the

2 Sect 86(1) of the Austrian Enforcement Act (Exekutionsordnung – EO) reads:

“(1) The provisions above do not apply insofar as otherwise provided under public international law or in the legal acts of the European Union.”
Austrian certification requirements do not apply exclusively (3 Ob 62/69 = SZ 42/87 = EvBl 1969/432; RIS-Justiz RS0075355). This jurisprudence is to be adhered to, particularly because it does not at all lead to holding that only the certification requirements of the state of rendition of the award apply, an opinion so vehemently opposed by Schlosser.

[8] “On the basis of this jurisprudence, the Supreme Court accordingly deemed that certifications according to the law of the state in which the arbitral award was rendered suffice; in particular, [certifications] issued by the secretary of the arbitral institution, when this is in accordance with the arbitration rules applied to the arbitration (3 Ob 320/97y = SZ 70/249 = RdW 1998, 340 = ZfRV 1998/23; 3 Ob 196/02y = RdW 2003, 385). In the latter decision it was also made clear that reliance on the lack of the formal conditions under Art. IV(1) Convention is no violation of the prohibition of raising new arguments before the Supreme Court [Neuerungsverbot]; hence, it is irrelevant that in the case at issue the defendant did not raise [this objection] in the appeal against the declaration of enforcement. Courts in other states also accept a confirmation made by an arbitrator or by the secretary of the arbitral institution (examples in Schlosser, op. cit., no. 67 in fn. 312).

[9] “Though this is not expressed clearly in all decisions rendered on this issue, however, a duly legalized or certified document in the sense of Art. IV(1) Convention requires that the person – closely associated with the arbitral tribunal – who issues the certification is authorized thereto under the applicable arbitration rules. The parties have submitted after all to those arbitration rules, so that acceptance of such certifications as are provided by those rules, for the purpose of the requirements for recognition and enforcement, is justified. Also decisions 3 Ob 2097/96w and 3 Ob 2098/96t = ZfRV 1996, 199 start from the assumption that, according to the arbitration rules applicable [in those cases], the signatures of the arbitrators were certified by the signatures of the president and the secretary of the arbitral tribunal. On the contrary it clearly appears from the reasons for decision 3 Ob 320/97y that the mere certification by a secretary of an arbitral institution does not suffice, when the applicable arbitration rules do not provide for such certification.

[10] “The defendant rightly argues that the Arbitration Rules of the LCIA (reproduced many times in Austrian literature, for example in Fasching/Konecny, ZPO, 2nd ed. IV/2 annex XIV 971 et seq.) do not provide that the so-called ‘registrar’ is authorized to issue certifications.


"Recognition and Order of Enforcement of Foreign Awards."

(1) The recognition and order of enforcement of foreign awards shall be made in accordance with the provisions of the Enforcement Act (Exekutionsordnung), unless otherwise provided in international law or in legal instruments of the European Union. The form requirement for the arbitration agreement shall also be regarded as fulfilled if the arbitration agreement complies both with the provisions of Article 583 of this Law and with the form requirements of the law applicable to the arbitration agreement.

(2) The presentation of the original arbitration agreement or a certified copy thereof as under Article IV paragraph 1(b) of the New York (UN) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shall only constitute a requirement if requested by the court."

II. SUBMISSION OF ARBITRATION AGREEMENT (NO)

[13] “Further on the last remarks, it must be said that also the Austrian legislator has taken advantage of this possibility by introducing Sect. 614(2) ZPO4 through the 2006 Austrian Arbitration Act (SchiedsRÄG 2006 BGBl I 2006/7). This provision applies to the case at issue because of the following considerations. According to its Clause VII(1), the 2006 Act entered into force on 1 July 2006, that is, before (the request [for enforcement] and thus before) the first instance..."
AUSTRIA NO. 20

decision on the declaration of enforcement [in the present case]. Para. 2 of [Clause VII], however, provides for an exception, in that the earlier provisions shall apply to arbitration proceedings which are commenced prior to 1 July 2006. According to the Explanatory Note (Erläuterung (1158 BglNR 22. GP, 31)), pending arbitration proceedings and related court proceedings shall be conducted in accordance with the earlier provisions until their conclusion, so that there will be no change of applicable law – which concerns not only purely procedural aspects but also closely connected issues of substantive law – in pending arbitration proceedings. Arbitration agreements concluded before the entry into force of the Act shall also not be subject to a modified and thus unforeseeable regime.

[14] “Court proceedings related to the arbitration are surely only the proceedings mentioned in Sect. 615(1) ZPO; it does not make sense to deem that proceedings for the recognition and enforcement of foreign arbitral awards, which are related to the execution of such titles in Austria, are related to the arbitration proper. Nor does the purpose stated in the Explanatory Note require that the easing of formal conditions in Sect. 614(2) ZPO be applied only to proceedings for the enforcement of arbitral awards rendered in arbitrations commenced after 30 June 2006.

[15] “No issues of substantive law are involved here, nor does the immediate application of Sect. 614(2) ZPO restrict the principle according to which the actual arbitration proceedings are to be conducted until their conclusion [in accordance with the earlier provisions]. Hence, the present proceeding for the declaration of enforcement of the LCIA arbitral award against the defendant cannot be deemed to be an arbitration proceeding that according to Clause VII(2) Arbitration Act is excepted from the immediate application of the new provisions. Therefore, as regards the entry into force, para. 1 leg. cit. applies

5. Sect. 615(1) ZPO reads:

"Jurisdiction. (1) For the action for setting aside an arbitral award and for the action for declaration of existence or non-existence of an arbitral award, as well as for proceedings under the Third Title, the Superior Court of First Instance (Landesgericht) having jurisdiction in civil law matters that was specified in the arbitration agreement, respectively the jurisdiction of which was agreed upon in accordance with Article 104 of the Austrian Judicature Act (Jurisdiktionsnorm), or in the absence of such a specification or agreement, the Superior Court of First Instance (Landesgericht) in whose district the arbitral tribunal has its place of arbitration, shall have jurisdiction in first instance, regardless of the amount in dispute. Where the place of arbitration is not yet determined, or in the case of Article 612 if it is not within Austria, then the Commercial Court Vienna (Handelsgerecht Wien) shall have jurisdiction."
(accord, Reiner, *Das neue österreichische Schiedsrecht SchiedsRÄG* 2006, 60 et seq. fn. 244 [who takes into account proceedings for the declaration of enforcement commenced after 1 July 2006, which is also the case here]; Öhlberger, *Vollstreckung ausländischer Schiedssprüche in Österreich und deren Formvoraussetzungen nach dem New Yorker Übereinkommen*, SchiedsVZ 2007, 77 [80 et seq]).

[16] “According to Sect. 614(2) ZPO, the submission of the original arbitration agreement or a certified copy thereof in accordance with Art. IV(1)(b) Convention shall only constitute a requirement if requested by the court. According to the Explanatory Note (p. 29), submission shall be requested only when the existence of the arbitration agreement is in doubt. It is correctly maintained on this point that submission shall not be ordered [just] because the defendant explicitly requests it; rather, the enforcement court has discretion (in accordance with its duties) to order it (Rechberger/Melis in Rechberger 3rd ed., Sect. 614 ZPO no. 5; Hausmaninger in Fasching/Konecny 2nd ed., Sect. 614 ZPO no. 79; accord, Öhlberger, op. cit., 80).

[17] “As we said by way of introduction, the defendant does not argue in a substantiated manner that the arbitration agreement, which was taken as a fact by the arbitral tribunal, does not in fact exist; it merely contests the existence of the necessary certifications. Under these circumstances no justified doubts have been raised as to the existence of an arbitration agreement between the parties, and the court does not need to request submission thereof. Hence, it is unnecessary to ascertain whether the arbitration agreement is duly certified.”

III. CERTIFICATION OF AWARD

[18] “As already explained, Art. IV(1)(a) Convention requires the submission of the duly certified (legalized) original arbitral award or a copy whose correspondence with such original is duly certified.

[19] “In identically worded passages in its decisions 3 Ob 2097/96w, 3 Ob 2098/96t, 3 Ob 320/97y and 3 Ob 196/02y, the Supreme Court has quoted other doctrinal opinions of Schlosser (*Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, 2nd ed. no. 928), according to which the English expression ‘certified’ allows for the conclusion that confirmation by a neutral person closely associated with the parties to the arbitration in his official function suffices.…

[20] “Examination of [Schlosser’s] work shows however that the words ‘for the copy of the original arbitral award’ are missing from the above quotations. Schlosser’s statement therefore concerns – a conclusion in respect of which there can be no doubt, having regard to the English text of the Convention – the copy
of the original arbitral award, particularly because he subsequently emphasizes that the certified copy must be of an original whose signature is certified. It would go against common sense not to require any formal proof of the authenticity of the [original’s] signature, not even through indirect certification, when a certified copy thereof is submitted.

[21] “The original English text (that is clearer than the German) actually mentions two clearly distinguished forms of certification in Art. IV(1)(a) Convention: ‘duly authenticated’ (for the original) and ‘duly certified’ (for the copy). Consequently, legalization of the signatures of the arbitrators is required for the original (accord, correctly, Schlosser, op. cit.). The more limited form of certification is provided only for copies, for which also Schlosser does not require that they be certified according to the strict form provided for the authenticity of handwritten documents, as regulated in Austria by Sect. 79 NO. Schlosser must also be followed [in his opinion] that the possibility to supply copies does not mean that one can do without the formal confirmation of the authenticity of the signatures of the arbitrators on the original for the purposes of recognition and enforcement. In this sense, the Supreme Court already required in its decisions 3 Ob 320/97y and 3 Ob 196/02y that when certified copies [are supplied] the authenticity of the signatures on the original document must also be certified, at least indirectly.

[22] “In the present case, the supplied copy of the arbitral award only bears the confirmation that [the copy] corresponds to the original arbitral award. In this Court’s opinion, this does not amount to an even indirect certification of the authenticity of the signatures of the arbitrators on the arbitral award in the sense of Art. IV(1)(a) Convention.

[23] “It ensues from the above that the declaration of enforcement should not have been granted on the basis of the documents supplied.”

(....)
BRAZIL

Accession: 7 June 2002
No Reservations

10. Tribunal de Justiça [Court of Justice], State of São Paulo, Private Law Section, 25th Chamber, 26 February 2008

Parties: Claimants: (1) Carlos Alberto De Oliveira Andrade (Brazil);
        (2) CA De Oliveira Andrade Comércio Importação e Exportação Ltda (Brazil)
Defendants: (1) Renault S/A (France);
        (2) Renault do Brasil Comércio e Participações Ltda (Brazil)

Published in: Diário da Justiça (DJ), 3 March 2008

Articles: II(3)

Subject matters: – arbitration clause v. submission agreement (compromisso arbitral)
– arbitration agreement “null and void” because award invalid or not enforced (no)

Commentary Cases: ¶ 220

Facts

On 13 March 1992, Renault S/A (Renault) and CA De Oliveira Andrade Comércio Importação e Exportação Ltda. (CAOA) concluded a contract for the import, sale and maintenance of Renault vehicles in Brazil until 31 December 1994. The contract was later extended to 31 December 1995.

In the second half of 1995, Renault informed CAOA that it did not intend to extend the contract further because of alleged breaches by CAOA; it subsequently carried on its activities in Brazil through Renault do Brasil S/A and Renault do
Brasil Comércio e Participações Ltda (collectively, Renault Brazil). CAOA claimed damages from Renault in respect of the expenses it had occurred.

On 27 January 1996, CAOA, its representative Carlos Alberto de Oliveira Andrade and two related companies (collectively, the CAOA Group) concluded a Protocol of agreement with Renault and Renault Brazil (collectively, the Renault Group); the Protocol provided for a phased-out termination of the relationship between the parties according to an agreed schedule. Performance under the Protocol, however, gave rise to disputes. On 25 August 1998, the parties concluded a Particular Instrument for the Settlement [of Differences] and Other Agreements (Instrumento Particular de Transação e Outras Avenças – the Instrument), by which they agreed to obtain an accounting expert report in the form of an award (the accounting award) determining their respective financial obligations. Clause 3.6 of the Instrument provided that any controversy in respect of the accounting award be referred to ICC arbitration.

The parties disagreed as to the questions to be answered in the accounting award. On 6 April 1999, the Renault Group filed a request for arbitration with the ICC. Arbitration proceedings were held in New York; on 6 June 2002, the ICC arbitrators issued an award in favor of the Renault Group, finding that its unilateral termination of the contract was justified by CAOA Group’s breaches.

In turn, the CAOA Group commenced three separate actions in the Brazilian courts. By the first proceedings (the submission proceedings) it sought from the court a decision having the effect of a submission agreement (compromisso arbitral) appointing the arbitrators and constituting the arbitral tribunal, arguing that arbitration could not be based merely on the arbitration clause in the Instrument. The 25th Chamber of the São Paulo Court of Justice eventually denied the request, unanimously holding that the parties had concluded a “full” arbitration clause allowing them to commence arbitration directly without seeking the assistance of the courts. On 26 February 2002, the Superior Court of Justice affirmed this decision.

On 30 January 2003, the CAOA Group commenced a second proceeding, seeking a declaration that the ICC award rendered in New York was legally non-existent. The court of first instance dismissed the action; on 20 June 2006, the 25th Chamber of the São Paulo Court of Justice unanimously affirmed the decision below.

By the third action, in which the present decision was rendered, the CAOA Group sought material and moral damages from the Renault Group. It argued that the New York award had no legal effect in Brazil as it had not been recognized by the Superior Court of Justice; hence, the Brazilian courts could examine the merits of the action for damages.

The Court of Justice of São Paulo disagreed and dismissed the action. The court noted that it had already held in the submission proceedings that the Instrument contained a full arbitration clause on which the New York arbitration could be
validly based. Also, the fact that no accounting award had been issued was no obstacle to arbitration between the parties, as matters referred to arbitration under the arbitration clause concerned all controversies in respect of the accounting award, that is, also the possibility that there was no such award. The court added that the parties signed terms of reference for the arbitration and waived all objections to the jurisdiction of the ICC arbitral tribunal, and that the CAOA Group’s attempt at having the award declared legally non-existent failed.

On this premiss, the court found that the Brazilian courts could not hear the present claim for compensation of damages, as the existence of a “full”, valid and effective arbitration clause prevented examination of the merits. The court noted that it was irrelevant that the arbitral award was not recognized in Brazil, or were even declared to be non-existent: the “non-existence, invalidity or inefficacy of the arbitral award” does not affect the arbitration clause

Excerpt

(.....)

[1] Humberto Theodoro Júnior writes that by a free agreement between interested parties capable of contracting ‘... it is possible to take the matter in dispute from the courts and refer it to a person or body unconnected to the official administration of justice. Such agreement ... can be in two forms, both binding on the parties and fully excluding the submission of the dispute to the state courts. These are: (a) the arbitration clause and (b) the submission agreement [compromisso arbitral] (Law no. 9.307/96, Art. 3)’\(^1\) (in Curso de Direito Processual Civil, Vol. III, 38th ed., 2007, p. 316).

[2] “The difference between the two forms of arbitration agreement is clear: the arbitration clause is an agreement in respect of future disputes (Law no. 9.307/96, Art. 4(1)-(2); the submission agreement concerns present disputes (Art. 9(1)-(2)).”\(^1\)

1. Art. 3 Brazilian Law No. 9.307 of 23 September 1996 reads:

“The interested parties may submit the settlement of their disputes to an arbitral tribunal by virtue of an arbitration agreement, which may be in the form of either an arbitration clause or a submission to arbitration (acte de compromis).”

2. Art. 4 of the 1996 Law reads:

“The arbitration clause is the agreement whereby contracting parties oblige themselves to settle through arbitration all disputes that may arise relating to the contract.

First Paragraph: The arbitration clause shall be in writing contained in the contract itself or in a
In sum, the submission agreement is distinguished from the arbitration clause because the former concerns an already existing dispute whereas in the latter the intention of the parties is to refer to arbitrators the settlement of a dispute yet to arise (non-existing).

3. Art. 9 of the 1996 Law reads:

"The submission to arbitration is the judicial or extrajudicial agreement through which parties submit a dispute to arbitration by one or more persons.
First Paragraph: The judicial submission to arbitration shall be entered into by a written deed entered in the case record, at the Court where the motion has been heard.
Second Paragraph: The extrajudicial submission to arbitration shall be entered into by a private written deed, executed by two witnesses, or by a notarial act."

4. Art. 5 of the 1996 Law reads:

"If the parties, in the arbitration clause, select the rules of an arbitral institution or specialized entity, the arbitral proceedings shall be commenced and conducted pursuant to such rules; it being also possible that the parties determine in the arbitration clause itself, or in a separate document, the agreed procedure for instituting the arbitral proceedings."

5. Art. 8 of the 1996 Law reads:

"The arbitration clause is autonomous from the contract in which it is included, meaning that the nullity of the latter does not necessarily imply the nullity of the arbitration clause.
Sole Paragraph: The arbitrator is competent to decide, ex officio or at the parties’ request, the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause."
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

6. Art. 7 of the 1996 Law reads:

“If there is an arbitration clause but resistance as to the commencement of the arbitral proceedings, the interested party may request the Court to summon the other party to appear in Court so that the submission to arbitration may be signed; the Judge shall order a special hearing for this purpose.

First Paragraph: The plaintiff shall specify, in detail, the subject matter of the arbitration, attaching to its motion the document containing the arbitration clause.

Second Paragraph: If the parties attend the hearing, the Judge shall first try to conciliate their dispute. If he does not succeed, the Judge shall try to persuade them to sign, by mutual agreement, the submission to arbitration.

Third Paragraph: If the parties disagree on the terms of the submission to arbitration, the Judge, after hearing the defendant, shall decide on the contents thereof, either at the same hearing or within ten days, in accordance with the provisions of the arbitration clause, and taking account of the provisions of Articles 10 and 21, second paragraph, of this Law.

Fourth Paragraph: If the arbitration clause fails to provide for the appointment of arbitrators, the Judge, after hearing the parties, shall rule thereon, being allowed to appoint a sole arbitrator to decide the dispute.

Fifth Paragraph: If the plaintiff, without good cause, fails to attend the hearing designated for the drafting of the submission to arbitration, the case will be terminated without judgment on the merits.

Sixth Paragraph: If the defendant fails to attend the hearing, the Judge shall have the authority, after hearing the plaintiff, to establish the contents of the submission to arbitration, and to appoint a sole arbitrator.

Seventh Paragraph: The judgment granting the motion shall have the force of a submission to arbitration.”

[422 Yearbook Comm. Arb’n XXXIV (2009)]

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Sixth Paragraph: If the defendant fails to attend the hearing, the Judge shall have the authority, after hearing the plaintiff, to establish the contents of the submission to arbitration, and to appoint a sole arbitrator.

Seventh Paragraph: The judgment granting the motion shall have the force of a submission to arbitration.”

[5] “If the arbitration clause is full, as ascertained by the 25th Private Law Chamber [in the submission proceedings], it must be deemed that the parties waived the intervention of the courts for the institution of the arbitration, and it is exactly for that reason that the claim of CAOA Group was not successful in that proceeding...

[6] “Note the important remark made in that decision:

‘… the lack of an accounting award is no obstacle to the arbitration; if there is no agreement, [arbitration] can arise out of possible disputes as to the content or conclusion of the accounting award, or precisely out of the fact that none was made. What remains is the lack of agreement, which must be solved by arbitration…. The lack of an accounting award equals lack of agreement, which may trigger the arbitration….’

[7] “The arbitral proceeding was commenced with the signing of the acte de mission (terms of reference to arbitration) by both Groups; on 31 August 2001, they waived
all objections to the jurisdiction of the arbitral tribunal constituted in accordance with the Rules of the International Chamber of Commerce (ICC), whose seat was established in New York, USA. On 6 June 2002, after the usual procedures, an award was issued against the CAOA Group. Note [the tribunal’s holding]:

‘… the Arbitral Tribunal holds that CAOA was liable for serious breaches and that consequently Renault had just reasons to terminate the contractual relationships between the parties on 4 April 1997.’

[8] “Dissatisfied, the CAOA Group commenced a new action on 30 January 2003 … seeking a declaration that the decision of the international arbitral tribunal was legally non-existent. However, the decision [in first instance] terminated the action without deciding on the merits … because of the existence of the arbitration clause…. On appeal, the 25th Private Law Chamber of the São Paulo Court of Justice unanimously affirmed the decision [below] on 20 June 2006.…

[9] “Having established these facts, it is not hard to conclude that the claim for compensation of damages, which is covered by a full arbitration clause, may not be submitted to the examination of the courts, as correctly held by [the decision in the submission proceedings], because of the impact of the negative procedural precondition of the existence of the arbitration agreement (…Law no. 9.307/96, Art. 3).

(…..)

[10] “A (full) arbitration clause exists, is valid and effective and since it is relied on by the Renault Group in this proceeding … it is a fatal obstacle to the examination of the merits of this action, even if … the arbitral award were declared non-existent, as argued unsuccessfully by the CAOA Group … and, furthermore, even if it were not recognized by the Superior Court of Justice…. In order [for the court to be able] to examine the merits of this action, it would be necessary that the parties had not concluded that clause or that it were deemed null and void (Law no. 9.307/96, Art. 32(1)). The non-existence, invalidity or inefficacy of the arbitral award is no obstacle to the possibility to reject the arbitration clause, since the latter (the arbitration clause) is not the same as the former (the arbitral award).”

(…..)

7. Art. 32(1) of the 1996 Law reads:

"An arbitral award is null and void if:
1 - the submission to arbitration is null and void...."
11. Superior Tribunal de Justiça [Superior Court of Justice], 17 December 2008, SEC no. 978-EX

Parties:
Plaintiff: Indutech SpA (nationality not indicated)
Defendant: Algocentro Armazéns Gerais Ltda (nationality not indicated)

Published in: Diário da Justiça (DJ), 5 March 2009

Articles: V(1)(a); V(2)(b)

Subject matters:
– arbitration agreement “in writing”
– lack of express acceptance of arbitration agreement as ground for violation of public policy

Commentary Cases: ¶ 504 + ¶ 524 (lack of valid arbitration agreement)

Facts

Indutech SpA (Indutech), the buyer, and Algocentro Armazéns Gerais Ltda (Algocentro), the seller, negotiated the sale and purchase of cotton in the context of an ongoing business relationship. Algocentro sent Indutech an offer; Indutech returned a signed confirmation of order, which contained a clause referring disputes to arbitration at the Liverpool Cotton Association (LCA).

A dispute arose between the parties in respect of an alleged lack of performance by Algocentro. Indutech commenced LCA arbitration proceedings. Algocentro sent Indutech an offer; Indutech returned a signed confirmation of order, which contained a clause referring disputes to arbitration at the Liverpool Cotton Association (LCA).

Indutech then sought enforcement of the LCA award in Brazil. Algocentro, through its curator as it was by then in liquidation, argued in reply that the court should ascertain that the award had been rendered on the basis of a valid arbitration clause, as there appeared to be no signed document containing Algocentro’s acceptance of that clause.

The Superior Court of Justice agreed with Algocentro and denied enforcement of the LCA award. It reasoned that a valid submission to arbitration requires that the parties expressly manifest their intention to refer their dispute to arbitrators and that they do so in writing; tacit or implicit acceptance does not suffice. While
there was indeed a valid contract between the parties – since no legal principle or commercial practice requires, as alleged by Algocentro, that a confirmation of order following a valid offer be countersigned by the offeror – Algocentro had not made apparent its intention to accept the arbitration clause in the confirmation either by signing the confirmation itself or by any other written manifestation of intent. Even the appointment of an arbitrator in the LCA arbitration, made on behalf of Algocentro, was not signed or otherwise approved by Algocentro.

The court referred to two of its earlier decisions and to a decision of the Federal Supreme Court reaching the same result in similar cases.

Excerpt

[1] The court noted that Indutech supplied, together with its petition for recognition of the LCA award, the sale contract containing the arbitration agreement, a consular certification of the award and its translation by a sworn translator.

[2] The court then quoted the relevant provisions of the Brazilian Law on Arbitration, Art. 3, Art. 4 and Art. 5,¹ and continued: “Thus, [Brazilian]

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¹ Arts. 3, 4 and 5 of Brazilian Law no. 9.307 of 23 September 1996 read:

Article 3
“The interested parties may submit the settlement of their disputes to an arbitral tribunal by virtue of an arbitration agreement, which may be in the form of either an arbitration clause or a submission to arbitration (acte de compromis).”

Article 4
“The arbitration clause is the agreement whereby contracting parties oblige themselves to settle through arbitration all disputes that may arise relating to the contract. First Paragraph: The arbitration clause shall be in writing contained in the contract itself or in a separate document referring thereto. Second Paragraph: In adhesion contracts, the arbitration clause will only be valid if the adhering party initiates arbitral proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type.”

Article 5
“If the parties, in the arbitration clause, select the rules of an arbitral institution or specialized entity, the arbitral proceedings shall be commenced and conducted pursuant to such rules; it being also possible that the parties determine in the arbitration clause itself, or in a separate document, the agreed procedure for instituting the arbitral proceedings.”
legislation provides for arbitration as a means for the settlement of disputes, but requires as a condition for its efficacy that the parties expressly manifest in writing their choice therefor. This manifestation can be either in a separate document or in the contract itself, as long as there is an express and specific agreement in respect of the arbitration clause; a tacit or implicit agreement is not admitted, since this is an exception to the rule of state [court] jurisdiction.

[3] “This said, the (non-)existence of the contract that is the subject matter of the foreign award is not to be discussed, because this goes beyond the scope of the recognition proceedings, as correctly argued by claimant. In fact, the existence of the sale contract was affirmed and recognized in the arbitral award, because

‘... there is no legal principle or commercial practice deeming that countersignatures are essential for establishing a valid contractual relationship, as long as it can be determined that there was a valid offer and acceptance. In this case, taking into account in particular the negotiations between the parties and their still-continuing commercial relationship, I deem that the sellers’ denial of the existence of the contract contradicts the existing evidence.’

[4] “Here, however, it appears from the file that neither the arbitration clause in the contract for the supply of cotton ... nor the appointment of an arbitrator in the name of the defendant ... bears the signature or any form of approval [visto] of Algocentro; hence, there is no consent to the arbitration agreement.

[5] “As a consequence, since there is no proof in the file of the manifest autonomous declaration of the defendant’s intention to waive court jurisdiction in favour of arbitration, the request [for recognition] leads to a violation of Art. 4(2) of Law no. 9.307/96, the principle of [party] autonomy and Brazilian public policy. Recognition [homologação] must fail in accordance with Art. 5(I) and Art. (6) of Resolution no. 9 of 4 May 2005 of the Superior Court of Justice, which reads:

‘Art. 5. The essential requirements for the recognition of a foreign decision are:
1 - that it was issued by a competent judge;....

Art. 6. No foreign decision shall be recognized and no letter rogatory shall be granted exequatur if they violate sovereignty or public policy.’
“The jurisprudence of this Superior Court of Justice is no different; we refer on this point to the well-formulated grounds given ... in case SEC [Sentença estrangeira contestada – Impugned foreign award] no. 866/EX,2 which was similar to the present one:

‘Brazilian law does require that the arbitration clause be stipulated in writing in the contract; however, the arbitration clause can also be contained in a separate document that refers to the contract. This is the meaning of Art. 4 First Paragraph of Law no. 9.307/96 [text omitted]. Furthermore, Art. II(2) of [the 1958 New York Convention], incorporated into the Brazilian legal system by Decree no. 4.311/02, provides that “agreement in writing” shall mean an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Hence, the fact that the contracts concluded between the parties were concluded orally would not hinder by itself the stipulation of an arbitration clause, provided that this clause was expressly agreed in writing in another document referring to the original contract or in an [exchange of] correspondence.

In the present case, the claimant argues that although the contracts were concluded orally, the telexes that the parties exchanged to confirm the sale and purchase transaction contain an arbitration clause referring expressly to the GAFTA arbitration rules.

[However], the telexes supplied by the claimant ... although they do refer to the GAFTA arbitration clause, do not contain the defendant’s signature or any other form of approval of [the claimant’s] proposal, as they were sent to broker Cereagro S/A by a third company, Argentinian broker Mercoplate S/A, which represented the claimant.

(....)

There is no sure evidence here that the defendant agreed to the arbitration clause, [thereby] waiving [its right to] court proceedings. Hence, the arbitration [tribunal] lacked jurisdiction.’ (in Diário da Justiça (DJ), 16 October 2006).

(....)

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[7] “See also, in the same sense, the following decision of this Superior Court of Justice:

‘1. Plexus Cotton Limited, [a UK company], seeks recognition of the foreign arbitral award rendered by the Liverpool Cotton Association (LCA), which directed Santana Têxtil Ltda to pay [a certain sum] to the claimant....
2. In the case at issue, as it appears from the file, there is neither expression nor intent of the defendant in favour of arbitration, since the contracts containing the arbitration clause do not bear its signature.
3. The equivocal manifestation of the party’s intent to adhere to and commence arbitration violates public policy, because it violates the principle, engraved in our legal system, that express acceptance of the parties is required to submit the settlement of disputes arising out of private contractual relationships to arbitration.
4. In the case at hand, there was no express manifestation by the defendant in respect of the choice of arbitration; hence, this judicial means may not be used in the present dispute.
5. The request for recognition is denied.’ (SEC no. 967/GB ... in Diário da Justiça (DJ), 20 March 2006).

[8] “[See also the decision] of the Federal Supreme Court:

‘1. The request for the recognition of a foreign arbitral award must be accompanied by the arbitration agreement, without which the jurisdiction of the court rendering the decision cannot be ascertained (Law no. 9.307, Art. 37(II) and Art. 39(II); RISTF, Art. 217(I)).”

3. Art. 37(II) of the 1996 Law reads:

“The request for homologation of a foreign arbitral award shall be submitted by an interested party; this written motion shall comply with the procedural law requisites of Art. 282 of the Code of Civil Procedure, and must be accompanied by:

....
II - the original or a duly certified copy of the arbitration agreement, as well as a sworn translation.”

Art. 39(II) of the 1996 Law reads:

“The request for homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court ascertains that:

....
II - the decision is offensive to national public policy.”
BRAZIL NO. 11

2. [There is here] a sale and purchase contract not signed by the buyer, whose terms do not lead to conclude that an arbitration clause was agreed on; [there are] also no other documents in writing to this aim. [Hence, there is] no proof of the manifest autonomous declaration of intent of the defendant to waive state [court] jurisdiction in favour of [arbitration].

3. Since it is not proved that the court rendering the foreign award had jurisdiction, [the award] cannot be recognized by the Federal Supreme Court.

Request denied.’ (SEC no. 6753/UK … Plenary Session, in Diário da Justiça (DJ), 4 October 2002).

[9] “On the above grounds, I deny the request for recognition of the present foreign award….”

4. Art. 217 of the Internal Rules of the Brazilian Federal Supreme Court (Regimento Interno do Supremo Tribunal Federal – RISTF) reads:

“The essential requirements for the recognition of a foreign arbitral award are:
I - That it was issued by a competent judge;
II - That the parties were duly summoned or that default was legally ascertained;
III - That it has become final and binding and that it complies with the necessary formalities for execution in the place where it was rendered;
IV - That it is by the Brazilian consul and accompanied by an official translation.”
CANADA

Accession: 12 May 1986
2nd Reservation (not applicable to Québec)

26. Court of Queen’s Bench, Alberta, Calgary Registry, 26 September 2007 and 2 July 2008, docket no. 0501 12165

Parties: Plaintiff: Bad Ass Coffee Company of Hawaii Inc. (US)
    Defendants: (1) Bad Ass Enterprises Inc. (Canada);
    (2) Attitude Coffee Corporation (Canada);
    (3) Ron Plucer also known as Ronald Plucer (Canada)

Published in: Available online on <www.canlii.org>

Articles: III; V(1)(c); V(2)(b)

Subject matters: – narrow concept of public policy
    – public policy and violation of domestic law of enforcement state (no)
    – enforcement of court decision confirming award in state of rendition

Commentary Cases: [5] = ¶ 303; [7]-[38] + [48]-[52] + [57]= ¶ 518 + ¶ 524 (violation of domestic law); [53]-[54] + [56] = ¶ 512; [55] = ¶ 301

Facts

Bad Ass Coffee Company of Hawaii Inc. (BAH) entered into a series of agreements with Bad Ass Enterprises Inc. (Enterprises) and Attitude Coffee Corporation (Attitude) in respect of a franchise arrangement under which the latter companies became master franchisees, that is, developers of franchise operations and distributors of Bad Ass brand coffee products in stores in Alberta. The present dispute concerned a franchise agreement dated 16 February 2000 (the First Franchise Agreement), a franchise agreement dated 29 December 2000
Ron Plucer, a director of Attitude and Enterprises, provided personal guarantees for payment under all three agreements. The guarantees were executed before a lawyer in Alberta and were not notarized; they incorporated the arbitration clause contained in the agreements to which they referred.

A dispute arose among the parties over, inter alia, the payment of royalties by Enterprises, Attitude and Plucer (collectively, the defendants). BAH filed a request for arbitration with the AAA International Center for Dispute Resolution. When the defendants resisted arbitration, BAH petitioned the United States District Court for the District of Utah for an order compelling arbitration of the dispute. On 14 September 2004, the defendants filed a response to the petition, in which they objected to the jurisdiction of the AAA and stated that they would not arbitrate their dispute with BAH “unless ordered to do so by a Court of competent jurisdiction”. On 6 December 2004, the Utah district court ordered the arbitration to proceed.

Arbitration proceedings in Utah followed before an AAA sole arbitrator. The defendants participated in the pre-hearing conference and submitted a list of witnesses and copies of hearing exhibits. By letter of 19 January 2005, however, they informed the arbitrator that they did not intend to participate in the arbitration hearing because they disputed his jurisdiction. On 28 February 2005, the sole arbitrator found in favor of BAH. On 15 April 2005, the award was confirmed by the Utah district court at the request of BAH. BAH sought enforcement of the judgment confirming the award in Canada.

By the first decision reported below, the Alberta Court of Queen’s Bench, per J.B. Hanebury, Q.C., Master in Chambers, held that the requirements for enforcement were met, since the defendants submitted to the jurisdiction of the Utah court and Utah arbitrator by filing statements on the merits of the dispute and the case had a substantial connection to Utah. The Master then considered whether she should nonetheless deny enforcement on public policy grounds. The defendants argued that enforcement would violate public policy because the award violated the Alberta Franchises Act, which provides that Alberta law applies to franchise agreements.
The Master first held that the principles set out for the enforcement of judgments in the decision of the Supreme Court of Canada in *Beals* (see below) – that is, a foreign judgment will not be enforced when the foreign law is contrary to “our view of basic morality” and this “is not a remedy to be used lightly – apply also in respect of the enforcement of foreign arbitral awards. While no definition of public policy is found in the International Commercial Arbitration Act, a commentary on the UNCITRAL Model Law states that the term public policy, as used, inter alia, in the 1958 New York Convention, covers “fundamental principles of law and justice in substantive as well as procedural respects”. This definition is not in conflict with the common law in relation to the enforcement of foreign judgments; on the contrary, “the intent of the legislation appears to be to extend to foreign arbitral awards the common law recognition and enforcement rights already extended to foreign judgments”.

Further, though *Beals* concerned the fundamental morality of the application of foreign law, the Master noted that earlier case law considered the public policy defence in relation to the fundamental morality of a violation of internal law (such as was alleged here) and applied similar principles to *Beals*.

As a consequence, the Master held that enforcement of the Utah judgment confirming the award in Alberta would not violate fundamental morality, because the application of Utah law rather than Alberta law by the Utah court did not suffice to meet the *Beals* standard. The Master added that if society expects to attract international commerce, of which franchising is one aspect, principles of international comity must be respected and the defence of public policy must be narrowly defined.

Finally, the Master dismissed Plucer’s argument that enforcement would violate public policy because his guarantees were not notarized and therefore were not in compliance with the Guarantees Acknowledgment Act of Alberta (GAA). Plucer admitted in the proceedings that he executed the guarantees in Alberta before a lawyer and that he was aware that he was executing personal guarantees. Hence, there was “no public policy reason not to enforce these guarantees”. This is the first decision reported below.

By the second decision reported below, the Alberta Court of Queen’s Bench, per C.A. Kent, J., dismissed the defendants’ appeal against the decision above. It agreed with the Master that there had been no breach of the Franchises Act and that the violation of the GAA was not a violation of public policy. It reasoned in respect of the latter that the GAA’s purpose is to ensure that unsophisticated guarantors understand the personal liability that they are undertaking. This purpose is indeed “a fundamental value” of Alberta, but whether it affords a defence to enforcement depends on the facts. In the present case, Pulcer was a
businessman who admittedly knew what obligation he was undertaking. This conclusion, noted the court, also applied in the context of the public policy argument raised by the defendants under Art. V(2)(b) of the 1958 New York Convention.

The court then dealt with an issue that was not expressly before the Master, namely, whether the dispute at issue fell under the exemption from arbitration made in the agreements for disputes regarding franchise fees, product purchase costs, advertising fees and all other fees charged by BAH. In the defendants’ opinion, “other fees” included royalties, which were the subject matter of the dispute before the arbitrator. The court disagreed, reasoning that the dispute was not simply over royalties and fees but dealt with a complete breakdown of the business relationship between the parties, including the improper use of BAH’s name and trademark. This argument was also raised under the New York Convention (Art. V(1)(c)); the court dismissed it on the same grounds.

The court finally dismissed the defendants’ argument that BAH should have sought to enforce the award by an application to the court, rather than filing a Statement of Claim to enforce the court decision confirming the award. The court held that BAH followed the correct process: once the award became a judgment in Utah, the correct method of enforcement was by Statement of Claim. This is the second decision reported below.

Excerpt

Decision of 26 September 2007

(....)
[1] “The following issues were raised by the parties:

(1) did the defendants submit to the jurisdiction of the Utah courts and the Utah arbitrator;
(2) is there a substantial connection between Utah and the matters in issue;
(3) should the defence of public policy be applied;
(4) and are the guarantees of Ron Plucer enforceable?”
1. REQUIREMENTS FOR ENFORCEMENT

1. Submission to Jurisdiction


[3] “The Alberta Court of Appeal has followed this approach. In British American Oil Co. Ltd. v. Born Engineering Co. [1964] 44 D.L.R. 569, the court found that the defendant attorned to the jurisdiction of the foreign court when it entered a conditional appearance and put on the record allegations of fact, which, if true, would have met the plaintiff’s claim on the merits. The court, relying on earlier authorities, agreed that ‘where a question of jurisdiction arises a man cannot both have his cake and eat it’. He cannot fight on the merits and preserve the right to say, if he loses on the merits, that the court has no jurisdiction to decide against him. Therefore, he cannot take any step ‘unequivocally referable to the issue on the merits’. Once he does so, he has lost the right to raise the issue of the court’s jurisdiction.

[4] “The defendants rely on the decision of Dovenmuehle v. Rocca Group Ltd. [1980] 34 N.B.R.(2d) 444 (leave to appeal to the S.C.C. refused: 1982 no citation provided) which considered a provision of the Foreign Judgments Act, R.S.N.B. 1973, c. F-19. That section provided that a foreign court had jurisdiction when a defendant appeared in the action without protest. While this case is distinguishable, as it deals with legislation not found in Alberta, it does not contradict the approach of the texts cited and the Alberta Court of Appeal decision in British American Oil. At paragraph 14 of Dovenmuehle, the court found that it is ‘well settled in English jurisprudence that if a litigant voluntarily submits his case to a foreign tribunal for determination, that tribunal has jurisdiction to decide the case [and] the same would appear to be true where a defendant, as well as pleading to the merits of the case, contests the jurisdiction of the foreign court’.

[5] “The law appears settled that if the defendants addressed the merits of their case before the Utah courts, they attorned to the jurisdiction of that court. The responses of the defendants to the application to compel arbitration contained numerous submissions on the merits. The defendants clearly submitted to the jurisdiction of the Utah courts. The September 2004 letter of their Alberta
counsel alleged that they would not accept the jurisdiction of the International Center for Dispute Resolution unless ordered to do so by a court of competent jurisdiction. By attorning to the jurisdiction of the Utah court, the Utah court became a court of competent jurisdiction that could order the parties to arbitration. It did so, and the defendants were then subject to the jurisdiction of the arbitrators. Furthermore, by filing their witness list and exhibit list in the arbitration, the defendants acknowledged the arbitrator’s jurisdiction over them.”

2. **Substantial Connection**

[6] The Master examined whether the second requirement for enforcement of a foreign decision was met, namely, whether there was a substantial connection between Utah and the matters in issue. She found that there was substantial connection because the parties agreed to the jurisdiction of the Utah courts and arbitrators and submitted to their jurisdiction. She added that however, even when these initial requirements are met, a foreign judgment will not be enforced if one of certain defences is successfully raised. In the present case, the defendants relied on the defence of public policy, which she then turned to examine.

II. **PUBLIC POLICY: VIOLATION OF THE FRANCHISES ACT**

[7] “The defendants argue that the public policy of concern in this case is the violation of the provisions of the Franchises Act, and in particular Sects. 7, 16 and 17. They say that it would be against public policy to permit the registration

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1. Sect. 7 of the Franchises Act of Alberta, R.S.A. 2000, c. F-237, reads:

   “Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.”

Sect. 16 Franchises Act reads:

   “The law of Alberta applies to franchise agreements.”

Sect. 17 Franchises Act reads:

   “Any provision in a franchise agreement restricting the application of the law of Alberta or restricting jurisdiction or venue to any forum outside Alberta is void with respect to a claim otherwise enforceable under this Act in Alberta.”
and enforcement of a foreign judgment determined under Utah law rather than pursuant to these provisions of the Alberta Franchises Act. Before considering the public policy argument, the initial question to address is whether there has been a violation of these provisions of the Franchises Act.”

[8] The court examined the relevant provisions of law and the file of the case and concluded: “From a review of the Act and the documents filed in the Utah proceedings, and as there is no evidence that the claim of BAH is one that is enforceable under the Act, I am satisfied that the arbitral award and subsequent judgment do not result from a claim to which Sect. 17 is applicable. This analysis leads to the conclusion that Sect. 17 of the Act has not been triggered and therefore, it has not been violated by the decision of the Utah arbitrator. As a result, Sect. 16 is the only section of the Act that may have been violated by the claim and resultant arbitral award and judgment in Utah.

[9] “Is this sufficient for the court to refuse to enforce the judgment on the basis of public policy? BAH relies on the decision in Beals [v. Saldanha [2003] S.C.J. No. 77] to argue it is not. Beals explains that a foreign judgment will not be enforced when the foreign law is contrary to our view of basic morality. In paragraph 72, the court said that a judgment would not be enforced if it is ‘founded on a law contrary to the fundamental morality of the Canadian legal system’ or ‘rendered by a foreign court proven to be corrupt or biased’. At paragraph 75, the court warned that refusing to enforce a foreign judgment ‘is not a remedy to be used lightly’ and ‘[t]he expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted’. It is a defence that ‘should continue to have a narrow application’.

[10] “The defendants argue that Beals is distinguishable on two grounds. First, the International Commercial Arbitration Act R.S.A 2000 C. I-5 applies to the registration of the Utah judgment and the definition of public policy under that legislation should be different than that discussed in Beals. Second, the court in Beals considered the situation where the amount of the award and the external law, i.e., the foreign law, were argued to be contrary to fundamental public policy. The defendants say the situation here is quite different as there has been a violation of internal law, in this case the statute law of Alberta.”

1. **Public Policy in the Context of the International Commercial Arbitration Act**

[11] “The International Commercial Arbitration Act applies to the enforcement of an arbitral award in Alberta, a fact the defendants say is admitted by all of the parties. That Act refers to the [1958 New York Convention]. Art. V(2) of that Convention is reproduced in a Schedule to the Act and it states that the
recognition and enforcement of an arbitral award may be refused, if the competent authority in the country where recognition and enforcement is sought, finds that to do so would be ‘contrary to the public policy of that country’.

12. “No definition of ‘public policy’ is found in the International Commercial Arbitration Act. No case law was cited that distinguishes between the use of the ‘public policy’ defence in the Act and its use in the common law.

13. “A commentary on the meaning of ‘public policy’ as found in the Model Law, (Schedule 2 to the Act) is found in the Report of the United Nations Commission on International Trade Law, 3-21 June 1985: It was understood that the term ‘public policy’, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording ‘the award is in conflict with the public policy of this State’ was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

14. “This commentary does not indicate a definition of public policy that is in conflict with the common law in relation to the enforcement of foreign judgments. In fact, the intent of the legislation appears to be to extend to foreign arbitral awards the common law recognition and enforcement rights already extended to foreign judgments. See: Grow Biz International Inc. v. D.L.T. Holdings Inc. 2001 PEISCTD 272 and the cases cited therein; and Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al, [2004] 364 A.R. 272 (Master). As a result, I see no reason why the guidance given by the Supreme Court of Canada on the definition and use of the public policy defence found in Beals cannot be turned to when deciding whether to enforce an arbitral award.”

2. Applicability in Case of Violation of Internal Law

15. “The defendants also seek to distinguish Beals on the basis that it considered the fundamental morality of the application of foreign law, rather than the fundamental morality of the violation of internal law. This is correct. However, other case law that pre-dates Beals has considered the public policy defence in relation to internal law and applied similar principles.”

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a. **Boardwalk Regency**

[16] "In *Boardwalk Regency Corp. v. Maalouf* [1992] O.J. No. 26 (Ont. C.A.), the defendant borrowed money and built up a gambling debt at the plaintiff’s casino in Atlantic City, New Jersey. The plaintiff obtained a judgment in New Jersey and brought an action on that judgment in Ontario. The defendant argued that the provisions of the Ontario Gaming Act R.S.O. 1980 ch. 183, should be applied. It provided that '[e]very contract or agreement by way of gaming or wagering is void, and no suit shall be maintained for recovering any sum of money on which a wager has been made'.

[17] “The court found that '[t]he legal issue to be addressed is whether the language of the Gaming Act is to be taken as an expression by the legislature which bears the mantle of public policy to the point of making it offensive to participate in enforcement of the foreign judgment'.

[18] "Finding that the public policy defence did not operate to stop the enforcement of the New Jersey judgment, the court said at paragraphs 9 and 10:

‘The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. [It] must be more than the morality of some persons and run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred. If that be so, the Gaming Act must be viewed in the context of the community’s sense of morality. An important element of that sense of morality is what the community has consensually determined is not to be tolerated, as found in the Criminal Code. The Gaming Act may reflect that general morality or may, upon analysis, appear to have a very narrow focus related to the recovery of debts with no present relevance as a moral statement. If this case concerned enforcement of a judgment based upon a contract relating to the corruption of children, our instinctive moral repugnance would find confirmation in the Criminal Code, declaring such corruption a criminal offence.’

The court found support for its view of the issue in a judgment of the New York Court of Appeals, *Intercontinental Hotel Corp (Puerto Rico) v. Golden*, 203 N.E.2d 210, at pp. 212 and 213:

‘Public policy is not determinable by mere reference to the laws of the forum alone. Strong public policy is found in prevailing social and moral attitudes of the community.’
[19] “The decision in Boardwalk was relied upon by Master Quinn of this court in MGM Grand Hotel Inc. (c.o.b. MGM Grand Hotel/Casino) v. Kiani [1997] A.J. No. 1084, when he granted a summary judgment application of MGM Grand Hotel to register a Nevada judgment for a gambling debt.”

b. Saunders
[20] “In Society of Lloyd’s v. Saunders [2001] O.J. No. 3403 (C.A.), one of the test cases to decide the liability of parties who had contracted as ‘names’ with Lloyd’s, the court considered whether it should enforce judgments of the English courts when the party seeking enforcement acknowledged, for the purposes of the court’s decision, that it had breached the Ontario Securities Act prospectus requirements. At issue was whether the breach had the ‘necessary moral opprobrium traditionally required for the application of the public policy exemption’.

[21] “The court pointed out that in many of the cases before the courts where enforcement was being sought, including Boardwalk Regency, the obligation underpinning the judgment arose outside of the enforcing court’s jurisdiction. Those cases held that if every provincial statutory enactment were treated as an expression of Canadian public policy for the purpose of defeating foreign judgments, little would be left of the principle of judicial comity. In Saunders, the basis for the judgment was an obligation within the jurisdiction of the enforcing court, an illegal trade in securities that occurred in Ontario. The court emphasized that it had also been admitted by the parties that if the action had been brought in Ontario, it would have been unsuccessful due to the failure to meet the disclosure obligations under the Securities Act.

[22] “The court looked at the legislative objectives of the Ontario Securities Act as described in the case law: the regulation of the operation of capital markets in Ontario for the protection of all who use them. It noted the fundamental importance of a prospectus for the ‘orderly, fair and reliable operation’ of financial markets and the protection of the investing public. That protection, the court said, was basic to the well-being of society and the economy. At paragraph 65, the court said:

‘However, to view the disclosure obligation provisions of the Securities Act, such as the prospectus requirement, as akin to a moral imperative may be to stretch the concepts unnecessarily. Public policy has been universally described as “fundamental values” and “essential principles of justice”. In my view, it is appropriate at this stage in the development of our society, to characterize the protection of our capital markets and of the public who
invest in and depend on the confident and consistent operation of those markets as such a fundamental value.’

[23] “However, despite finding that it offended a fundamental moral value to enforce a judgment that would not be granted in Ontario, due to a breach of the Securities Act, the court found that the public policy defence did not apply for two reasons. First, it found that the argument of public policy had been foreclosed by the court when the court initially referred the case to the British courts for a determination. At that time the court was aware of the breach of the Act and, regardless, permitted the action to be heard in England. Second, the court found that the principles of international comity required the judgment be enforced. The court referred to the decision of La Forest J. in Hunt v. T&N plc, 1993 CanLII 43 (S.C.C.), [1993] 4 S.C.R. 289 where he said at p. 321:

‘A central idea in that judgment [Morguard Investments Ltd. v. De Savoye] was comity. But as I stated, at p. 1098, “I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience” that underlie them. In my view, the old common law rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.’

[24] “The court in Saunders pointed out that the United States’ courts and other Canadian courts have faced the same public policy argument in similar Lloyd’s actions and have almost uniformly rejected it on the basis of principles of international comity. The court in Lipcom v. Lloyd’s [1998] CA11-QL 402 (11th Cir.) upheld the British decisions despite their violation of American securities legislation and was quoted at para. 84:

‘we believe that to invalidate the choice [of law] provisions for that reason in effect would be to conclude that “the reach of the United States securities laws [is] unbounded” and to ignore the Supreme Court’s caveat that “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts”’.

The court also noted the comments of the United States’ courts about the significant financial effects if Lloyd’s was required to comply with American securities legislation.

[25] “The court concluded that while the breach of the Securities Act provisions went against fundamental and essential values, the earlier recognition by the Ontario court of the authority of the English courts to hear and decide the Lloyd’s litigation and the important principles of international comity were important considerations. The court held the judgments could be enforced in Ontario.

[26] “While this case preceded Beals, it is not at odds with that decision. The definition of public policy in Beals can be applied when there is a violation of internal law. Both cases rely on the same earlier decision of the Supreme Court in Morguard Investments. The court in Saunders recognized that a consideration of the public policy defence involves a resolution of the tension between the upholding of internal laws, important to the moral fabric of society, and the attraction, acceptance and encouragement of international commerce. The question is when the importance of the former should act as a barrier to the latter. The court in Saunders balanced these competing concerns by way of a two-step analysis. The court in Beals made it a single-step test when it held that the ambit of the public policy defence should be narrowly construed: to succeed, the registration of the foreign judgment must be ‘contrary to the fundamental morality of the Canadian legal system’.”

3. The Present Case

[27] “Making the determination when to enforce a foreign judgment can involve a difficult decision on where the line should be drawn, as can be seen by the divided courts found in Beals and Boardwalk Regency, and the two-step analysis undertaken in Saunders. However, I see no reason why this determination cannot be made in this case on a summary basis. The facts are not in dispute.

[28] “Until 1995, franchises were regulated by the Alberta Securities Commission. The Franchises Act replaced the legislative franchise regime that had been in place since 1972. This change represented a significant shift toward self regulation by the industry. The purposes and philosophy of the Act are set out in Sect. 2: (a) to assist prospective franchisee in making informed investment decisions by requiring the timely disclosure of necessary information, (b) to provide civil remedies to deal with breaches of this act, and (c) to provide a means by which franchise stores and franchisees will be able to govern themselves and promote fair dealing among themselves.
“The purpose of the Act was explained to the legislature as ‘to provide a new framework to assist prospective franchisees in making informed investment decisions by requiring timely disclosure of necessary information and to provide a means by which franchisors and franchisees will be able to govern themselves and promote fair dealing among themselves’ (Hansard, 2 May 1995). Disclosure requirements, not securities commission oversight, were the primary source of protection for prospective franchisees. Sects. 16 and 17 of the new Act had no equivalent in the former regime, as the Alberta Securities Commission had jurisdiction over all complaints.

Sect. 16 of the Alberta Franchises Act provides that the law of Alberta applies to franchise agreements. It would appear this section was inserted to ensure that the provisions in the new regime applied to Alberta franchisees. Sect. 17 builds on Sect. 16 and is the sanction provision that applies to claims made pursuant to the specific remedies and provisions of the Act.

The Utah judgment is based on a contractual breach by the franchisee of three franchise agreements, at least one of which appears to provide that only Utah law applies. The claim does not come within the remedies described in the Act. The arbitrator who made the decision upon which the foreign judgment is based, acknowledged that he applied Utah law and noted that the same determination would have been made under Alberta law.

Unlike Saunders, there is no admission, or even argument, that the claim could not have been pursued in Alberta due to a violation of Alberta law. The violation of Sect. 16 of the Franchises Act does not have criminal or quasi-criminal implications or overtones. I cannot find that permitting the enforcement of the Utah judgment in Alberta would be offensive to fundamental morality as that term has been described in the case law. The application of Utah law rather than Alberta law by the Utah court is not sufficient to meet the test described in Beals. In balancing the tension between the principles underlying the internal legislation, the Franchises Act, and the principles of international comity, I agree with the approach of the American court quoted in Saunders. If a society expects to attract international commerce, of which franchising is one aspect, principles of international comity must be respected. The defence of public policy must be narrowly defined to allow the increasingly global marketplace to operate.

The application for summary judgment is granted against Enterprises and Attitude.”
III. PUBLIC POLICY: VIOLATION OF THE GUARANTEES ACKNOWLEDGMENT ACT

[34] “The final question is whether the judgment based on the guarantees of Ron Plucer should be enforceable in Alberta despite their noncompliance with the Guarantees Acknowledgment Act R.S.A. 2000 c. G-11 [GAA]. BAH relies on Emerald [Developments Ltd. v. 768158 Alberta Ltd. 2001 ABQB 143 (CanLII), (2001) 287 A.R. 151 (Q.B.)] for the proposition that 'mere technical noncompliance does not void the guarantee in the absence of evidence by the guarantor that he did not understand the guarantee’. Plucer argues that the cases cited in support of that proposition all involved substantial compliance with the Act. He says that, in his case, there was no attempt to comply with the legislation.

[35] “BAH, in the course of arbitration proceeding in Utah, relied on two Alberta cases to argue that Alberta courts would apply Utah law relating to the guarantee: Bank of Montréal v. Snoxell [1982] A.J. No. 1018 (Q.B.) and Associate Capital Services Corp. v. Multi Geophysical Services Inc. [1987] A.J. No. 643 (Q.B.). Plucer argues that the Bank of Montréal case can be distinguished because the plaintiff and the defendant both carried on business in British Columbia and the guarantee, while executed in Alberta, provided that the contract would be governed by British Columbia law. Judgment was obtained in British Columbia and an application brought to enter it in Alberta. The court held that entering a judgment in Alberta in that situation would not be void on grounds of public policy.

[36] “In Associate Capital, a case more on point, the Alberta Court of Queen’s Bench found that the guarantee was valid despite noncompliance with Alberta legislation, because it was governed by California law. Plucer argues that this case can be distinguished on the basis that Sect. 16 of the Franchises Act is applicable and the law of Alberta would apply to the franchise agreements guaranteed by Plucer. This attempt to distinguish Associate Capital misses a vital point. Ronald Plucer chose to have the law of Utah apply to proceedings taken to enforce his guarantee. He was free to do this regardless of whether the law of Utah or the law of Alberta applied to the franchise agreements. The choice of law in those arguments is not relevant.

[37] “The court in Snoxell makes it clear that the choice of the law to govern the guarantee will be upheld by the Alberta courts unless it is void on public policy grounds. The case of Associate Capital demonstrates that the Alberta courts have allowed guarantees to be governed by American law where it has been by agreement.
[38] “The three guarantees in issue are in relation to the two franchise agreements and the MUDA. The guarantees signed in relation to the franchise agreements are short and incorporate the arbitration provisions which set Utah as the jurisdiction for, and the law governing, the arbitration. A notary public acknowledges the signature of Ron Plucer. The guarantee signed in relation to the MUDA is more lengthy and provides that the law of Utah shall apply. In the cross-examination on affidavit of Mr. Plucer he confirmed that he executed the guarantees in Alberta before an Alberta lawyer. He also confirmed that he knew that he was executing personal guarantees and that they were a requirement of BAH entering into their business arrangements. There is no public policy reason not to enforce these guarantees. On the basis of the above case law, BAH is entitled to judgment against Ron Plucer.”

(…..)

**Decision of 2 July 2008**

[39] “The Defendants raise several arguments why the arbitration judgment ought not to be enforced. These were all dealt with in some detail by the Master. Specifically, I am in agreement with her findings that the Defendants attorned to the jurisdiction of the Utah Court and the Utah arbitrator for the reasons set out in her decision. I will say no more. I also agree with her reasoning with respect to the question of a real and substantial connection between Utah and the matters in issue. There is a real and substantial connection between Utah and the matters in issue.

[40] “In my view, two matters which merit some analysis here are whether or not the defence of public policy should be applied and the correct interpretation of certain sections of The Franchises Act, R.S.A. F-23. Furthermore, the Appellants made an argument with respect to the exemption in the arbitration clause. Finally, the Defendants have refined their argument with respect to The International Commercial Arbitration Act, R.S.A. I-5. That also requires consideration.

[41] “Dealing first with the issue of public policy, there are two pieces of Alberta legislation that are relevant. The first is The Franchises Act. 4 The second

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4. “It provides:

15. The rights of action conferred by this Act are in addition to and do not derogate from any other right the franchisee or the franchisor may have at law.

[Sects. 16 and 17 quoted at fn. 1 above]
piece of legislation which is relevant is The Guarantees Acknowledgment Act [GAA], R.S.A. G-11. Sect. 3 GAA requires that no guarantee has any effect unless the person who signs the guarantee appears before a notary public, acknowledges that he or she has executed the guarantee and signs a statement at the foot of the Notary Public’s Certificate. The certificate of the notary public must state that the notary is satisfied that the person entering into the guarantee is aware of the contents of the guarantee and understands it.

[42] “The Defendants approach the public policy argument in several ways. The Defendants argue that neither of the guarantees to the first and second franchise agreement contain a choice of laws clause. They both incorporate the arbitration clause but not clause 19 [on the applicable law]. Thus, since the guarantees were executed in Alberta, the obligations guaranteed arose in Alberta and the primary debtors are Alberta corporations, the laws of Alberta apply. Since there is no certificate as required by Sect. 3 GAA, the guarantees are unenforceable.

[43] “With respect to the MUDA, the Defendants acknowledge that the guarantee does state that it is governed by the laws of Utah. However, they rely on Cardel Leasing Ltd. v. Maxmenko 1991 CarswellOnt 633 (Ont. C.J. Gen. Div.) for the proposition that such a clause will not be enforced where it is contrary to public policy or is illegal in the jurisdiction where the contract is to be performed.

[44] “In Cardel, Cardel leased a vehicle to Maxmenko. The lease agreement provided that the agreement would be governed by the laws of Ontario. There was a proviso that any provision which contravened the laws of the jurisdiction where the contract was to be performed would be deemed not to be part of the agreement. In B.C. [British Columbia], where Mr. Maxmenko resided, there was a seize or sue provision. Mr. Maxmenko argued that because Cardel had repossessed the car, it could not sue. Adams, J. held that because the contract was performed in B.C., the proviso in the agreement made the ‘sue’ provisions of the agreement unenforceable. He said the following at para. 7:

‘Where the parties to a contract expressly stipulate that an agreement shall be governed by a particular law, that law will generally be the proper law of the contract. See Vita Food Products Inc. v. Unus Shipping Co., supra, at p. 290. This freedom of choice, however, is subject to certain limitations. As Lord Wright in the Vita Food Products case observed, the selection must be
bona fide and legal and there must be no reason for avoiding the choice on the ground of public policy. As an example, Professor Castel points out in his treatise that where a law is expressly chosen to evade the provisions of the system of law with which the transaction, objectively, is most closely connected, that choice will be disregarded. See J.G. Castel, *Canadian Conflict of Laws* (2nd ed., 1986), at p. 531. The learned author also notes at page 554 that there is substantial weight of authority in support of the proposition that a contract illegal by the law of the country where it is to be performed will not be enforced notwithstanding the explicit choice of law of the contracting parties. Examples of this exception are: *Ralli Bros. v. Compania Variosa Sota y Aznar*, [1920] 2 K.B. 287, [1920] All E.R. Rep. 427 (C.A.); *Kleinwort Sons & Co. v. Ungarische Baumwolle Industries A.G.*, [1939] 2 K.B. 678 at 697; *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1958] A.C. 301 at 319, [1957] 3 All E.R. 286 (H.L.).

[45] “The Defendants say that here the principal debtors carry on business in Alberta, the franchises were to be operated in Alberta, the agreements were executed in Alberta and the obligations were to be incurred in Alberta. Thus, the choice of Utah laws was not bona fide. The guarantee was most closely connected to Alberta. Under Alberta law, the guarantee is void. Alternatively, the Defendants argue that all three agreements are subject to Alberta law because of The Franchises Act. Sects. 16, 17 and 18 all mean that any provisions purporting to apply the laws of Utah are void. It follows, they argue, that since The Franchises Act says the laws of Alberta apply, the requirements of the GAA mean that the guarantees are void. The Defendants say that it would offend notions of justice and morality if this court enforced a judgment when under Alberta law the guarantees are void.

[46] “The Defendants then argue that since by Alberta law, the guarantees are void, a court in Alberta should not enforce the Utah judgment. The Defendants say that if public policy does not demand that this judgment not be enforced, then a new defence should be recognized. In *Beals v. Saldanha*, 2003 S.C.C. 72, some of the judges noted that what may be a defence to enforcement of a judgment should be flexible. For the majority, Major, J. said at para. 42 that ‘[u]nusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment’. The new defence which the Defendants propose centres around the principle that residents of Alberta should be protected. It appears to be based in an assumption that [BAH] had intentionally chosen a forum that would circumvent Alberta law which protects guarantors.
“BAH argues that the refusal to enforce a foreign judgment on the basis that the judgment was founded on law that offends the fundamental morality of the Canadian concepts of justice should be used sparingly. The provisions of the GAA do not meet the requisite threshold. This is particularly so since Mr. Plucer admitted that he understood the significance of the guarantees. Likewise the provisions of The Franchises Act cannot be said to reflect principles of fundamental morality which need to be enforced.”

“Dealing with the guarantees in the first and second agreements, the Defendants are correct that clause 19 [on the applicable law] is not incorporated. The arbitration clause is incorporated. It provides that the law of Utah applies substantively. Because of that reference, the guarantees are not void, unless the defence of public policy applies.

“The Defendants say that Sect. 16 of The Franchises Act says that the law of Alberta governs which means the GAA governs. The Master nicely summarized the state of the law, citing the Ontario Court of Appeal decision in Society of Lloyd’s v. Saunders [2001] O.J. No. 3403. The issue in Saunders was whether the Ontario courts should enforce English judgments against Lloyd ‘names’ even though the applicant for judgment had breached the prospectus requirements of The Ontario Securities Act. Although the court found that the disclosure obligation was aimed at protecting the integrity of the capital markets which in turn was a fundamental value, the court permitted enforcement of the judgment for two reasons. First, the English courts knew of the breach but permitted the actions to be heard and secondly because international unity required enforcement.

“Here, there has been no breach of The Franchises Act. There has been a breach of the GAA The purpose of the GAA is to ensure that guarantors understand the personal liability that they are undertaking. Unsophisticated borrowers may not understand that they are taking on a potential financial burden. The GAA insures that they do understand. Given the Act’s intention to protect unsophisticated borrowers from unexpected debt, it is a fundamental value of this province. However, as in Saunders, whether that affords a defence to enforcement of a foreign judgment depends on the facts. Here, the borrower was a businessman who knew what obligation he was undertaking. The defence of public policy does not apply.

“The Defendants say that I can and should create a new defence. I do not know what that would be. The way the Defendants frame it – residents of Alberta should be protected – is simply restating the public policy defence. I decline to create any new defence.
“The next issue in the interpretation of Sect. 17 of The Franchises Act. The Franchises Act contains provisions all of which are intended for the protection of the parties, but particularly the franchisees. Indeed, Sect. 2 provides that the purpose of the Act is to assist prospective franchisees in making decisions and to ensure fair dealing between franchisees and franchisors. The Act then deals with obligations of disclosure, franchisees’ right to associate and misrepresentation. Then it provides remedies with respect to breaches of the provisions regarding the issues listed above. Sect. 17, which limits jurisdictional choice, contains the words ‘with respect to a claim otherwise enforceable under the Act’. BAH’s claims are not claims under The Franchises Act. Accordingly, the Master’s conclusion that Sect. 17 is irrelevant to this claim is correct.

“The second issue is one that was not expressly before the Master. Clause 14 specifically exempts disputes regarding franchise fees, product purchase costs, advertising fees and all other fees charged by the franchisor. The Defendants say that other fees includes royalties. The Defendants argue that the dispute between the parties is exactly what is exempted. Accordingly the Arbitrator did not have jurisdiction.

“I do not accept the argument that the dispute is exempt. The dispute was not simply over royalties and fees. It dealt with a complete breakdown of the business relationship between the parties. It included the improper use of BAH’s name and trademark. I reject that argument.

“The final issue deals with The International Commercial Arbitration Act. The Defendants make three arguments. First they say that Sect. 3 requires an application to this Court to enforce an arbitral award. BAH did not do that but rather proceeded by way of claim to enforce its judgment. The process followed by BAH was the correct process. The arbitral award became a judgment in Utah. Once that happened, the correct method of enforcement was by Statement of Claim.

“The second argument is that Art. V of the New York Convention provides that enforcement may be refused if the award deals with something beyond what was submitted to arbitration. The Defendants say that this dispute involved issues that were exempt under the arbitration clause. I have held above that the dispute did not deal with exempt issues.

“Finally, Art. V says that enforcement may be refused if the award is contrary to public policy of the jurisdiction concerned. Again, that argument has been dealt with above.

“In the result, the appeal of the Master’s decision is dismissed.”
27. Supreme Court, British Columbia, Vancouver Registry, 16 July 2008, Docket no. L050143
Court of Appeal, British Columbia, 13 March 2009, Docket no. CA036299

Parties: Plaintiff: Michelle Seidel (nationality not indicated)
Defendant: TELUS Communications Inc. (Canada)

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Articles: II(3) (by implication)

Subject matters: – stay of court proceedings
– arbitration clause “inoperative” because of pending class action certification (no)
– estoppel from seeking stay of court proceedings (no)
– competence-competence

Commentary Cases: [6]-[54] + [59]-[63] = ¶ 217; [55]-[58] = ¶ 223; [64]-
[70] = ¶ 222

Facts

In 2000, Michelle Seidel became a customer of the cellular phone services of TELUS Communications Inc. (TELUS). No contract was supplied before the courts and it was not known with certainty whether a contract had been signed and whether it contained an arbitration clause. In February 2003, Seidel entered into a “renewal” contract with TELUS. The renewal contract contained a clause providing for arbitration of disputes.

On 21 January 2005, Seidel commenced an intended class action against TELUS for breach of contract and for deceptive and unconscionable practices in violation of the Business Practices and Consumer Protection Act (BPCPA). She alleged that, in addition to charging for the time during which her cellular phone had a connection with another phone, TELUS charged for the time it took to make the connection with the other phone. Over the next two and a half years, the parties took steps in connection with the intended application.
The present decisions concern TELUS’s application for a stay of court proceedings on the basis of the arbitration clause in the contract. This application was filed shortly after the Supreme Court of Canada rendered decisions in the Dell and Rogers cases (see below), in which it held that challenges to the validity of an arbitration clause must be decided by the arbitrator prior to the certification hearing. In TELUS’s opinion, these holdings overruled the 2004 decision of the Court of Appeal for British Columbia (McKinnon 2004, see below), which held that the certification of a class action makes arbitration agreements “inoperative” and that pending a decision on the certification application it is premature to grant a stay of proceedings.

By the first decision reported below, the Supreme Court of British Columbia, per Masuhara, J., denied TELUS’s application for a stay of proceedings. The court held that Dell (and Rogers), which was rendered in proceedings concerning Quebec law, was “Quebec-specific” and did not apply in British Columbia because of the significant differences between Quebec and British Columbia class action and arbitration law. In respect of the arbitration provisions in the two Provinces, the court noted that the court’s power under Quebec law to deny referral to arbitration on the grounds that the arbitration agreement is “null” is narrower than the provision in the British Columbia Commercial Arbitration Act (CAA) that, like the 1958 New York Convention and the UNCITRAL Model Law on International Commercial Arbitration, uses the expression “null and void, inoperative or incapable of being performed”. The court added that while the Quebec legislation was expressly “inspired” by the Convention and the Model Law, the British Columbia CAA was enacted for the purpose of governing domestic arbitration. Accordingly, Dell was inapplicable and the court was still bound under McKinnon 2004 to deny the stay until a decision was rendered in respect of Seidel’s certification application, because a certification would render the arbitration agreement “inoperative”.

The court finally held that even if Dell were applicable in British Columbia it would not affect TELUS’s application. It reasoned that Dell did not clarify the meaning of “inoperative”; thus, it did not displace the finding in McKinnon 2004 that an arbitration agreement becomes inoperative when an application for class action is filed. This is the first decision reported below.

By the second decision reported below, the Court of Appeal for British Columbia, before Finch, Chief Justice, Rowles, Newbury, Tysoe and Neilson, JJ, in an opinion by Tysoe, reversed the lower court’s decision and granted a stay on the basis of the arbitration clause.

The court first held that, contrary to the opinion of the lower court, Dell overruled McKinnon 2004, reasoning that the arbitration and class action
legislation of Quebec and British Columbia show broad similarities and that their technical differences “are not material to the analysis of whether the reasoning in *Dell* and *Rogers* extends to British Columbia”. The court referred to its 2009 decision in the same case, *McKinnon 2009*, where it concluded that the Supreme Court of Canada held in *Dell* that a class action is a “procedural vehicle” that does not modify or create substantive rights. Procedural provisions may not affect arbitration clauses which – though dealing with a procedure for resolving disputes – create substantive rights.

The court of appeal dismissed Seidel’s argument that the Business Practices and Consumer Protection Act makes the arbitration clause inoperative because it provides for the jurisdiction of the courts in respect of unconscionable and deceptive practices of the nature Seidel was alleging against TELUS. The court noted that the two provisions Seidel relied on, respectively, applied to mortgage loans (which was not the case here) and identified the Supreme Court as the court in which applications for declarations and injunctions can be made. In the court’s opinion, this does not exclude arbitral jurisdiction or render arbitration agreements inoperative.

The court of appeal then dealt with Seidel’s claim that TELUS was estopped from seeking a stay because it allowed the action to continue for over two-and-a-half years before applying for a stay. The court noted that TELUS did not take any step in the proceedings that could estop it from seeking a stay and promptly filed its application as soon as the issuance of *Dell* and *Rogers* cast doubt on the correctness of *McKinnon 2004*, which was until then binding authority and held that an application for a stay prior to the certification application of an intended class proceeding was premature.

Finally, the court examined whether it should also grant a stay in respect of the claims under the 2000 rather than the 2003 “renewal” contract. The court held that the competence-competence principle required this issue to be first determined by an arbitrator. This is the second decision reported below.

*Excerpt*

**Supreme Court, 16 July 2008**

[1] “TELUS applies for a stay of this intended class action on the basis that two recent judgments of the Supreme Court of Canada, *Dell Computer Corp. v. Union*...

[2] “TELUS submits that Dell and Rogers have overtaken McKinnon v. Money Mart Co., 2004 BCCA 473 (CanLII), 2004 BCCA 473, 50 B.C.L.R. (3d) 291 (McKinnon 2004), a decision of a five member panel of the court. In that case, the court found that Sect. 15 of the Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (CAA) and Sect. 4 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 (CPA) were in mutual conflict and held that it is the duty of the court to consider under Sect. 4 of the CPA whether a class action proceeding is the preferred method of resolving the parties’ dispute having regard to all circumstances including the presence of an arbitration clause. If a class action proceeding is preferred under Sect. 4 of the CPA, then the arbitration agreement is rendered ‘inoperable’ and the court should refuse to stay proceedings under Sect. 15 of the CPA.

[3] “TELUS submits further that the subsequent ruling by Madam Justice Brown in McKinnon v. Money Mart Co., 2008 BCSC 710 (CanLII), 2008 BCSC 710 (McKinnon 2008), where she held that Dell and Rogers decisions were not applicable to this province’s CAA and CPA because the Court in those decisions dealt solely with the law of Quebec, was based on findings of fact with respect to Quebec law which are not binding on this Court, and which are not supported in this application. In McKinnon 2008, Brown J. found that the relevant law of Quebec was significantly different than the law of this province. Specifically, she found at para. 36 that the purpose of the arbitration provisions in the Quebec law were to ‘displace judicial intervention’ and to ‘oust the usual jurisdiction of the judiciary’. In essence, she held that since Dell considered the interpretations of sections of the Quebec Code of Civil Procedure and not sections of B.C.’s CAA or CPA, it had no bearing on McKinnon 2004.

[4] “In response, the plaintiff submits the following:

(1) Dell and Rogers decisions do not affect McKinnon 2004 and therefore this Court is bound by McKinnon 2008;
(2) the defendant is estopped by issue estoppel from bringing the instant motion on the basis that the defendant has already taken a substantive step in this action; and
(3) even if Dell and Rogers are found to be applicable,
(a) the reach of those decisions extends only to the period during which the arbitration provision was in existence, which means from 2003, when Ms. Seidel renewed her contract, onwards; and

(b) they do not preclude the plaintiff’s action under the Business Practices Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA], which invalidates any waiver of consumer rights given by this Act.

(....)  

[5] “Based on the parties’ submissions, the following issues are addressed: (1) What is the effect of Dell and Rogers on McKinnon 2008 and McKinnon 2004, and, in accordance with that effect, if any, should these proceedings be stayed and the matter referred to arbitration? (2) Does Sect. 3 of the BPCPA preclude the application of the arbitration clause in this case staying the proceedings.”

1. ARBITRATION CLAUSE “INOPERATIVE”

[6] “Because the Rogers decision was issued contemporaneously with Dell and simply applied the rules set out in the latter, throughout these Reasons I will only refer to Dell.

[7] “Addressing the issue of the effect of Dell on the law of British Columbia, and specifically on the rules elucidated by the five-member panel of our Court of Appeal in McKinnon 2004, two possible outcomes are evident.

[8] “First, as held by Brown J. in McKinnon 2008, Dell may be Quebec-specific such that the significant differences between Quebec and British Columbia law preclude its application in this province. In this case, this Court is bound to follow McKinnon 2004 and, if it is decided that certification of this action is appropriate under Sect. 4 of the CPA, I am bound to refuse TELUS’s stay until the certification application is heard and decision issued as a certification would render the arbitration agreement between the plaintiff and TELUS ‘inoperative’ under Sect. 15 of the CAA.

[9] “Second, if Dell is applicable to the law of British Columbia, either because the law of Quebec is sufficiently similar to the law of this province, or because the case has Canada-wide application, this Court must determine the actual effect of Dell on TELUS’s application. In other words, this Court must determine whether Dell requires a stay to be granted and this particular matter to be referred to an arbitrator for a decision regarding the applicability of the arbitration clause.

[10] “I will address each of these scenarios below.
1. **Applicability of Dell Ruling in British Columbia**

   a. **De novo review**

      [11] “In essence, TELUS and the plaintiff disagree on whether the laws of the two provinces are sufficiently similar to extend the apparently Quebec-specific conclusions reached in *Dell* to the law of British Columbia and by necessary implication overturn *McKinnon* 2004. Although Brown J. has rejected this conclusion in *McKinnon* 2008, TELUS submits that this Court is not bound by her conclusion for two reasons. First, it submits that Madam Justice Brown’s conclusion is a finding of fact which is not binding on non-parties to the proceeding in which it was made: *Halsbury’s Law of England*, 4th ed., para. 575; *Lazard v. Midland Bank*, [1932] All E.R. 571 (H.L.) and *Pacific Press v. Attorney General (British Columbia)*, 2000 BCSC 248 (CanLII), 2000 BCSC 248, 73 B.C.L.R. (3d) 264 (S.C.). Second, it submits that those findings of fact were made on the basis of evidence which was incorrect and which is disputed in this application.

      [12] “Although I am not persuaded that I cannot heed to the findings of fact with respect to foreign law made by a fellow judge, I do not need to decide this issue here as I will analyze the issue of applicability of *Dell* anew in these Reasons and will consider the expert evidence on Quebec law adduced by the parties.”

   b. **Insufficient similarities between British Columbia and Quebec law**

      [13] The court concluded that there is no fundamental difference with respect to certification of class action proceedings between British Columbia and Quebec law. It then examined the provisions on arbitration in the two Provinces.

      i. **As to the meaning of “inoperative”**

      [14] “Sect. 15 of the CAA [of British Columbia] provides that a court, in the face of an arbitration agreement, must grant a stay of court proceedings unless it determines that the arbitration agreement falls under one of three prescribed exceptions. The plain language of the provision indicates that the court has the

2. “(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings. (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.”
jurisdiction to determine whether there is a problem with the arbitration agreement such that it is void, inoperative or incapable of being performed.

[15] “In McKinnon 2004, a five-member panel of our Court of Appeal considered the meaning of ‘inoperative’ and held that an arbitration agreement becomes inoperative when a court finds that a class action proceeding is preferable and certifies it accordingly under Sect. 4 of the CPA. At para. 15, the court summarized: ‘[A]nalytically, the arbitration agreement can only be “inoperative” if the class proceeding is in fact certified, because it is the “preferable procedure” and has met the other requirements for certification.’ To arrive at this conclusion, the court analyzed the inherent conflict between Sect. 4 of the CPA and Sect. 15 of the CAA ‘in the context of their schemes and underlying policies’; paras. 20 and 22-24.

[16] “Focusing on the word ‘inoperative’ in Sect. 15 of the CAA, the court found at paras. 34-36 that although it has been previously considered and ascribed a narrow meaning, it has not been previously considered in the context of Sect. 4 of the CPA:

‘34. The cases that have considered the meaning of “inoperative” in the context of Sect. 15(2) of the Commercial Arbitration Act make it clear that matters such as inconvenience, multiple parties, intertwining of issues with disputes which will not be arbitrated, possible increased cost and potential delay do not render an arbitration agreement “inoperative” (see Prince George (City) at para. 37, Kaverit Steel and Crane Ltd at para. 48). Courts have found that arbitration agreements do not conflict with builders’ lien legislation and have not found arbitration agreements “inoperative” but have granted stays of builders’ lien actions: see Sandbar Construction Ltd. v. Pacific Parkland Properties Inc. (reflex-logo) reflex, (1992), 66 B.C.L.R. (2d) 225 (S.C.); Automatic Systems Inc. v. Bracknell Corp. 1994 CanLII 1871 (ON C.A.), (1994), 18 O.R. (3d) 257 (C.A.); BWV investments Ltd. v. Saskferco Products Inc. 1994 CanLII 4557 (SK C.A.), (1994), 119 D.L.R. (4th) 577 (Sask. C.A.).


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agreement that, in law, has ceased to have effect for the future or is for some reason no longer enforceable. Some of the reasons given are frustration, discharge by breach or subsequent agreement of the parties, or a declaration by a court.

36. Thus, the court’s jurisdiction to refuse a stay of an action in favour of arbitration is limited. The approach of the courts has been deferential to arbitration agreements in the interests of freedom of contract, international comity and expected efficiency and cost-savings. “Inoperative” has been given a narrow interpretation in the context of commercial arbitration agreements. None of the authorities which have considered the meaning of ‘inoperative’, however, has done so in the context of a class proceeding....'

[17] “The court found neither Ontario nor US precedents helpful in analyzing the issue as the respective tests for granting a stay or refusing a referral to arbitration did not consider whether the arbitration agreement is ‘inoperative’. However, given the statutory imperative for certifying a class action proceeding when the requirements of Sect. 4 of the CPA are met, including the court’s necessary conclusion that the class action proceeding is preferable over arbitration as the ‘other means for resolving the claims’, the court, at paras. 48-49, upheld Brown J.’s decision that once a proceeding is certified, the arbitration clause becomes inoperative. Commenting on the sequence of events, the court concluded at paras. 52-53:

52. It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration agreement is “inoperative”. It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the “preferable procedure” and the other requirements for certification have been met.

53. Thus, the applications for a stay and for certification of the class proceeding must be dealt with together. The outcomes of the two applications are interdependent: the mandatory terms of the Class Proceedings Act mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute. On the other hand, if the proceeding is not certified as a class proceeding, there may be no basis for saying that the arbitration agreement is “inoperative” ....'

“In Quebec, a comparable provision dealing with the interplay between arbitration and court proceedings is found in Art. 940.1 QCCP. While Art. 940.1 also provides for an exception from a referral to arbitration (and thus a stay of the court proceedings), this exception appears to be much narrower, being limited to a situation when the arbitration agreement is null. As indicated by the plain language of the provision, and confirmed by [the expert report on Quebec law], the court retains the jurisdiction to determine whether the arbitration clause is null. However, this conclusion must be juxtaposed to an arbitrator’s authority to decide the question of his or her own competence under Art. 943 [of the Quebec Code of Civil Procedure – QCCP], which provides: ‘The arbitrators may decide the matter of their own competence.’

“This interrelationship between the court’s and arbitrator’s jurisdiction was explained by [the expert report] as follows:

‘This must be understood in conjunction with the competence-competence principle giving the arbitrator competence to determine his or her own competence, but also the Court’s powers to review that decision (see below);

The arbitrator’s decision as to his or her own competence pursuant to Art. 943 QCCP can be appealed to the Court (QCCP 943.1). The Court’s decision in this regard is final and without appeal (QCCP 943.2);

Thus, where the Court is said not to have “jurisdiction”, this is in reference to that portion of an arbitration that is properly within the arbitrator’s competence.’

4. “Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.”
[21] “The statutory scheme of Arts. 940.1 and 1003 QCCP and the proper place of arbitration within Quebec’s civil justice system was considered by the Supreme Court of Canada in *Dell*:

‘2. This appeal relates to the debate over the place of arbitration in Quebec’s civil justice system. More specifically, the Court is asked to consider the validity and applicability of an arbitration agreement in the context of a domestic legal dispute under the rules of Quebec law and international law, and to determine whether the arbitrator or a court of law should rule first on these issues…..’

[22] “As Madam Justice Deschamps noted at paras. 38 and 41, Quebec’s arbitration law is based on the New York Convention, infra, and the Model Law, infra, derived from it:


(…) 41. The final text of the Model Law was adopted on 21 June 1985 by the United Nations Commission on International Trade Law (UNCITRAL). In its explanatory note on the Model Law, the UNCITRAL Secretariat states that it: “reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.” (Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, at para. 2)


[23] “As the Court explained at paras. 44-46, while incorporating the principles of the New York Convention and the Model Law, Quebec’s implementation did
not copy them, but rather was ‘inspired’ by these documents, and established their roles as formal sources for interpretation:

‘44. Although Bill 91 was the Quebec legislature’s response to Canada’s accession to the New York Convention and to UNCITRAL’s adoption of the Model Law, it is not identical to those two instruments. As the Quebec Minister of Justice noted, Bill 91 was (translation) “inspired” by the Model Law and (translation) “implement[ed]” the New York Convention: Journal des débats, 1st Sess., 33rd Leg., 30 October 1986, at p. 3672. For this reason, it is important to consider the interplay between Quebec’s domestic law and private international law before interpreting the provisions of Bill 91.

45. This Court analysed the interplay between the New York Convention and Bill 91 in *Scierie Thomas-Louis Tremblay inc. v. J.R. Normand inc.* [2005] 2 S.C.R. 401, 2005 SCC 46 (S.C.C.), at paras. 39 et seq. After noting that there is a recognized presumption of conformity with international law, the Court mentioned that Bill 91 “incorporate[s] the principles of the New York Convention” and concluded that the Convention is a formal source for interpreting the provisions of Quebec law governing the enforcement of arbitration agreements: para. 41. This conclusion is confirmed by Art. 948(2) Q CCP, which provides that the interpretation of Title II on the recognition and execution of arbitration awards made outside Quebec (Arts. 948 to 951.2 Q CCP) “shall take into account, where applicable, the [New York] Convention”.

46. The same is not true of the Model Law. Unlike an instrument of conventional international law, the Model Law is a non-binding document that the United National General Assembly has recommended that states take into consideration. Thus, Canada has made no commitment to the international community to implement the Model Law as it did in the case of the New York Convention. Nevertheless, Art. 940.6 Q CCP attaches considerable interpretive weight to the Model Law in international arbitration cases….’

[24] “With respect to Arts. 940.1 and 943 Q CCP, the Court noted at para. 80 that they contain the ‘essence’ and ‘principle’ of the relevant New York Convention and Model Law provisions:

‘80. It should be noted from the outset that Art. 940.1 Q CCP incorporates the essence of Art. II(3) of the New York Convention and of its
Article 8. Arbitration agreement and substantive claim before court.

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed...."

Article 16. Competence of arbitral tribunal to rule on its jurisdiction.

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipsa jure* the invalidity of the arbitration clause...."
arbitration when the arbitration agreement is ‘null and void’, i.e., invalid. Notably, Art. 16(1) does not indicate that an arbitrator can find, as part of deciding his or her own competence, that an arbitration agreement is inoperative or incapable of being performed.

[28] “Recognizing that Art. 940.1 QCCP appears to be much narrower than Art. II(2) of the New York Convention, but that it must be interpreted under the auspices of that international document, the Court in Dell found at paras. 83-85 and 87 that it should not be read literally, but rather that a general rule – ‘the Quebec test’ – should be derived from it in accordance with existing Quebec case law and Art. 943 QCCP:

‘83. Art. 940.1 QCCP refers only to cases where the arbitration agreement is null. However, since this provision was adopted in the context of the implementation of the New York Convention (the words of which, in Art. II(3), are “null and void, inoperative or incapable of being performed”), I do not consider a literal interpretation to be appropriate. It is possible to develop, in a manner consistent with the empirical data from the Quebec case law, a test for reviewing an application to refer a dispute to arbitration that is faithful to Art. 943 QCCP and to the prima facie analysis test that is increasingly gaining acceptance around the world.

84. First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator’s jurisdiction is based solely on a question of law. This exception is justified by the courts’ expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator’s decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator’s jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator’s jurisdiction, consider the facts leading to the application of the arbitration clause.

85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the
referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

(....)

87. Thus, the general rule of the Quebec test is consistent with the competence-competence principle set out in Art. 16 of the Model Law, which has been incorporated into Art. 943 Q CCP. As for the exception under which a court may rule first on questions of law relating to the arbitrator’s jurisdiction, this power is provided for in Art. 940.1 Q CCP, which in fact recognizes that a court can itself find that the agreement is null rather than referring this issue to arbitration. ....

[29] “Thus, the Court drafted ‘the Quebec test’ for interpreting the arbitration provisions found in Arts. 940.1 and 943 Q CCP. While the Court did briefly note at para. 82 the approach of the common law provinces to applicability of arbitration clauses, it expressly developed the Quebec test ‘in a manner consistent with the empirical data from the Quebec case law…. faithful to Art. 943 Q CCP’ (para. 83).”

ii. British Columbia and Quebec legislation

[30] “As discussed above, the arbitration provisions of the Quebec Code of Civil Procedure were expressly based on the New York Convention and the Model Law. They were inspired by these international documents and incorporated their essence and principles. In British Columbia, the same could be said about the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 (ICAA), the preamble to which and Sect. 6 plainly indicate that it was enacted to implement the New York Convention as well as the Model Law and must be interpreted in accordance with these international documents.”

7. “AND WHEREAS disputes in international commercial agreements are often resolved by means of arbitration; AND WHEREAS British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations; AND WHEREAS there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations; AND WHEREAS the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of views on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations;....


In construing a provision of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the
8. "Sect. 8 Stay of legal proceedings.
(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

1. In this Act: ‘arbitration agreement’ means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the International Commercial Arbitration Act applies...."

(1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

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preparation of the UNCITRAL Model Arbitration Law and must give those documents the weight that is appropriate in the circumstances.”

8. “Sects. 8(1) and (2) of the ICAA incorporate the referral provisions, including exceptions for when the agreement is found to be null and void, inoperative or incapable of being performed, and Sect. 16(1) incorporates Art. 16(1) of the Model Law with respect to the arbitrator’s power to rule on his or her own jurisdiction.8

32. “In contrast to the ICAA, the CAA does not contain any indications that it was legislated under the auspices of the New York Convention or the Model Law. Rather, it is a statute enacted for the purpose of governing domestic arbitration and specifically excludes arbitration agreements which fall under the scope of the ICAA.9

33. “Moreover, while Sect. 22 of the CAA envisions that arbitrations thereunder will benefit from the arbitration rules established by the International Commercial Arbitration Centre, it also expressly provides that in case of inconsistency between the provisions of the CAA and these rules, the former hold supreme.10
(2) If the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.

(3) If the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails…"
the New York Convention or the Model Law.\textsuperscript{11} [Quotation of Art. II(1) Convention omitted.]

[37] "Thus, the statutory regimes of the two provinces dealing with the interplay between domestic arbitration and court proceedings are inimically different: enacted for different purposes and within different legislative contexts, and substantially differing in their provisions, both in the text of some provisions and in the absence of others. Accordingly, there appear to be three reasons, each standing on its own, why Dell is inapplicable to the interpretation of the CAA and in particular Sect. 15 of that Act.

[38] "First, the language of Sect. 15 of the CAA is substantially different from that of Art. 940.1 QCCP. Specifically, the former provides for much broader exceptions from the referral of a matter to arbitration under an arbitration agreement. A referral can be refused (by refusing to grant a stay) not only when an arbitration agreement is found to be void (which is arguably similar to the word ‘null’ used in Art. 940.1 QCCP), but also when the agreement is found by the court to be inoperative. In McKinnon 2004, a five-member panel of our Court of Appeal held that an arbitration agreement becomes inoperative when a court prefers a class action proceeding under Sect. 4 of the CPA. This conclusion is not affected by Dell as the meaning of the word inoperative was not addressed by the Court. Thus, the Quebec test elucidated in Dell, on the basis of a provision of the QCCP dictating that a referral may only be refused if the arbitration agreement is found to be null, is not applicable to Sect. 15 of the CAA where referral may be refused when the agreement is inoperative, as that term has been interpreted in McKinnon 2004.

[39] "Second, the CAA does not give an arbitrator the jurisdiction to decide the question of his or her own competence. By the plain language of Sect. 15 of the CAA, and not displaced by any other sections, that jurisdiction belongs solely to the court. The Quebec test from Dell, the general rule by which an arbitrator must first be given the chance to decide his or her own competence, is expressly authorized by Art. 943 QCCP, but has no statutory basis in the CAA. This point is further reinforced by the fundamentally different nature of arbitration agreements under the CAA and the QCCP, discussed above. Thus, the Quebec test is prima facie inapplicable to B.C., the CAA, and McKinnon 2004.

\textsuperscript{11} "Article 7. \textit{Definition and form of arbitration agreement.}

(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."
“Third, the CAA, unlike the ICAA, is not based on the New York Convention and the Model Law. Although it contains a provision with similar exceptions from an otherwise mandatory referral to arbitration, it lacks the jurisdictional provisions discussed above and a legislative directive to be interpreted in accordance with these international documents. Thus, the Court’s decision in Dell, interpreting Quebec’s implementation of these international obligations in accordance with the ‘prima facie analysis test that is increasingly gaining acceptance around the world’, while possibly informative in regards to interpretation of the ICAA, has no bearing on the interpretation of the purely intra-provincial CAA statute.

“In conclusion, I refer to the following passage from Smith Estate, paras. 237-238, which I believe is applicable to British Columbia:

‘237. In Dell Computer, Justice Deschamps, who writes the majority judgment, focuses her remarks exclusively to the Civil Code of Quebec. There is no mention anywhere in her judgment of [McKinnon 2004]; Smith v. National Money Mart Co., [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528. In their factum and in their material for the motions now before the court, the Defendants make much of the fact that because of the presence of several intervenors from across Canada, the law from across Canada was before the Supreme Court. However, in Dell Computer, although the intervenors inundated the Supreme Court with the law from other provinces, the court did not comment and cannot be taken to have ruled on the Ontario legislature’s design for the relationship between arbitration agreements and class proceedings, which is, of course, a moving target because the Ontario legislature and the legislatures of the other provinces are free to do something different from Quebec.

238. The Supreme Court did not purport to address the legislative choices of other provinces. Justice Deschamps does not refer to the law in other provinces or to the submissions of the intervenors. The statutory and common law underpinning of the law in other parts of the country is not mentioned, and I do not understand how it can be that Justice Deschamps’ judgment can overturn settled case law in those provinces without actually mentioning it. The Defendants, therefore, develop a thesis at a doctrinal level to ‘effectively overrule’ the case law that the Supreme Court does not mention. As I have demonstrated in this section, the doctrine does not prove their thesis....’
2. **Dell Ruling Does not Define “Inoperative”**

[42] “As set out above, there are three strong reasons why Dell is not applicable to the law of British Columbia. However, if I am wrong in this respect, I must consider the effect of Dell on TELUS’s application for a stay of proceedings under Sect. 15 of the CAA. For the two reasons set out below, even if Dell is applicable to British Columbia law, it does not by necessary implication or effectively overrule McKinnon 2004.

[43] “The Quebec test, expressed by the Court at paras. 84-85, is a ‘general rule’ of systematic referral of challenges to an arbitrator’s jurisdiction to the arbitrator and two exceptions for questions of law and questions of mixed fact and law [see for the text of paras. 84-85, above at [28]].

[44] “The first conclusion to be drawn from the Quebec test, which indicates that Dell has no bearing on the instant application, was lucidly explained by Perell J. in Smith Estate at para. 226:

‘226. The precise point is that the principle drawn from Dell Computer and Rogers Wireless that a challenge to the arbitrator’s jurisdiction or to the validity or applicability of the arbitration agreement should be resolved by the arbitrator is not relevant because the genuine dispute before the court is not about the arbitrator’s jurisdiction, which will be subject to the competence-competence principle, but rather the genuine dispute is about the court’s jurisdiction to grant a stay, which is a matter of interpreting Sect. 7 of the Arbitration Act, 1991. The conclusion that the invalidity (or not) of the arbitration agreement should be determined at the certification hearing does not offend the “competence-competence” principle because that conclusion is about the court’s jurisdiction to stay under the Arbitration Act, 1991 and the “competence-competence” principle is about the arbitrator’s jurisdiction to arbitrate under an arbitration agreement, which is not the same thing….‘

In other words, where a court certifies a proceeding under Sect. 4, it effectively loses the jurisdiction to grant a stay under Sect. 15 because the arbitration agreement is rendered inoperable.

[45] “The second such conclusion to be drawn from the Quebec test is that it is subject to two exceptions, namely, when the issue is a question of law or ‘mixed law and fact [where] … the questions of fact require only superficial consideration of the documentary evidence in the record’.
“In McKinnon 2004, our Court of Appeal established two important principles: (1) An arbitration agreement is inoperative when a class action proceeding is preferred by the court under Sect. 4 of the CPA; (2) The proper sequence of events is for the court to first decide the certification question and then consider the stay application in accordance with the first decision.

“Even assuming that the Court in Dell at para. 82 intended for its directive not to take the word ‘null’ in Art. 940.1 QCCP literally to mean that it must be interpreted as including the full spectrum of ‘null and void, inoperative, or incapable or being performed’, the Court said nothing about the interpretation or meaning of those distinct categories. Thus, it did not in any way displace the first conclusion from McKinnon 2004 with respect to an arbitration agreement becoming inoperative when a class action proceeding is preferred. However, ignoring for the moment the first conclusion to be drawn from the Quebec test discussed above, for the second McKinnon 2004 principle to stand in the face of the Quebec test, it must be determined whether the determination that an arbitration agreement is inoperative because a class action proceeding is preferred is a question of law or a question of mixed law and fact which ‘require[s] only superficial consideration of the documentary evidence in the record’.

“There can be little doubt that the issue falls under one of these two categories. Fundamentally, the question of certification of a class action proceeding, including the decision whether a class action proceeding is preferred in the face of available and otherwise mandated arbitration, is within the court’s exclusive jurisdiction: Sect. 4 of the CPA. The arbitrator is neither given the legal authority to make such a determination nor possesses the necessary expertise to evaluate the multiplicity of factors listed in Sect. 4 of the CPA, including such legal issues as whether ‘the pleadings disclose a cause of action’, ‘whether questions of … law common to the members of the class predominate over any questions affecting only individual members’, and ‘whether the class proceeding would involve claims that are or have been the subject of any other proceedings’. Moreover, this conclusion fits squarely within the Court’s analysis of the reasons for this exception, including ‘the courts’ expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral’: Dell, para. 84. While the decision requires consideration of documentary evidence, it is not evidence that could be properly put before the arbitrator as it goes beyond the parties to the particular arbitration and the scope of the arbitration itself. Thus, it could be said the determination involves only superficial consideration of the documentary evidence in the record before the arbitrator.
“Accordingly, the question of whether an arbitration agreement is inoperative because a class action proceeding is preferred falls under the exceptions from the general rule of systematic referral of competency question to arbitrators. Dell has not by necessary implication or effectively overturned either of the two conclusions from McKinnon 2004.”

Court of Appeal, 13 March 2009

“...”

“...”

“In addition to the principal issue of whether McKinnon 2004 has been effectively overruled, the three issues raised on this appeal are as follows:

(a) is the arbitration clause inoperative by virtue of Sect. 3 of the Business Practices and Consumer Protection Act?
(b) is TELUS estopped from making an application for a stay of proceedings under Sect. 15 of the Commercial Arbitration Act?
(c) should the stay of proceedings apply to the claims of Ms. Seidel that pre-date the February 2003 contract containing the arbitration clause?”

I. DELL APPLIES

“As explained by Madam Justice Newbury in McKinnon 2009, it was held by the Supreme Court of Canada in Dell and Rogers (and in its earlier decision in Bisaillon v. Concordia University, 2006 SCC 19 (CanLII), 2006 SCC 19, 2006 SCC 19 (CanLII), [2006] 1 S.C.R. 666), that a class action is a procedural vehicle that does not modify or create substantive rights. While an arbitration clause in a contract deals with a procedure for resolving disputes between the parties to the contract, it nevertheless creates substantive rights and cannot be modified by the procedural provisions applicable to class actions. There are broad similarities between the arbitration and class action legislation of Quebec and British Columbia, and the technical differences between the laws of the two provinces are not material to the analysis of whether the reasoning in Dell and Rogers extends to British Columbia.

“In the present case, the chambers judge found three differences between the arbitration laws of British Columbia and Quebec – namely, (i) different wording in Sect. 15 of the CAA and its Quebec counterpart, (ii) unlike the
situation in Quebec, the CAA does not give an arbitrator the jurisdiction to
decide the question of his or her own competence, and (iii) unlike the Quebec
domestic arbitration provisions, the CAA is not based on the New York
Convention and Model Law referred to in *McKinnon 2009*.

53 “In *McKinnon 2009*, Madam Justice Newbury, for the Court, discussed the
differences between the laws of British Columbia and Quebec, and concluded
that the differences that do exist are not material to the analysis of whether the
reasoning in *Dell and Rogers* extends to British Columbia. The differences do not
impact on the proposition accepted by the Supreme Court of Canada in *Bisaillon, Dell
and Rogers* that procedural provisions applicable to class actions cannot
modify the substantive rights created by an arbitration clause. Also, the chambers
judge failed to address this proposition when he reasoned that *Dell and Rogers* did
not effectively overrule *McKinnon 2004* if they did apply to British Columbia law.

54 “As *McKinnon 2004* was effectively overruled by the Supreme Court of
Canada, the chambers judge could not properly rely on it as the basis for denying
TELUS’s application for a stay of proceeding.”

II. NON-ARBITRABILITY OF CLAIMS UNDER BUSINESS PRACTICES AND CONSUMER
PROTECTION ACT

55 “Ms. Seidel argues the arbitration clause is inoperative because Sect. 3 of
the Business Practices and Consumer Protection Act renders void any waiver or
release of any rights, benefits or protections under the Act. Two of those rights
or benefits, submits Ms. Seidel, are contained in Sects. 10(2) and 172(1) of the
Act, which give jurisdiction to the court in respect of unconscionable and
deceptive practices of the nature she is alleging against TELUS.”

12 “Sect. 10(2) reads as follows:

(2) If a court determines that an unconscionable act or practice occurred in respect of a consumer
transaction that is a mortgage loan, as defined in section 57 [definitions], the court may do one or
more of the following:
(a) reopen the transaction and take an account between the supplier and the consumer or
guarantor;
(b) despite any statement or settlement of account or any agreement purporting to close previous
dealings and create a new obligation, reopen any account already taken and relieve the consumer
from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
(c) order the supplier to repay any excess that has been paid or allowed by the consumer or
guarantor;
(d) set aside all or part of, or alter, any agreement made or security given in respect of the
transaction and, if the supplier has parted with the security, order the supplier, to indemnify the
[56] “The fallacy of the argument in relation to Sect. 10(2) is apparent on the face of the provision. Sect. 10(2) applies to ‘a consumer transaction that is a mortgage loan’ (‘mortgage loan’ is defined in Sect. 57 as ‘a loan of money secured by an interest in real property …’). The transaction between Ms. Seidel and TELUS was not a mortgage loan.

[57] “A similar argument was made in Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17 (CanLII), 2003 SCC 17, 2003 SCC 17 (CanLII), [2003] 1 S.C.R. 178. In that case, Sect. 37 of the Copyright Act, R.S.C. 1985, c. C-42, provided that the Federal Court had concurrent jurisdiction with provincial courts to deal with proceedings relating to the Act, and it was argued that Sect. 37 prevented an arbitrator from ruling on the question of copyright. Mr. Justice LeBel, on behalf of the Court, disposed of the argument in the following manner:

‘42. The purpose of enacting a provision like Sect. 37 of the Copyright Act is to define the jurisdiction ratione materiae of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states.’

[58] “In the case at bar, Sect. 172(1) identifies the Supreme Court as the court in which applications for declarations and injunctions can be made. It does not exclude arbitral jurisdiction and does not render inoperative the arbitration agreement between Ms. Seidel and TELUS.”
III. ESTOPPEL

[59] “Ms. Seidel submits TELUS allowed the action to continue for over two and a half years before applying for a stay and cites Maracle v. Travellers Indemnity Co. of Canada, 1991 CanLII 58 (S.C.C.), [1991] 2 S.C.R. 50, 80 D.L.R. (4th) 652, in support of her position that TELUS is estopped from making a stay application before determination of the preferable procedure under Sect. 4 of the Class Proceedings Act.

[60] “The facts in Maracle are not relevant to this case, and it is cited for the following summary of the doctrine of promissory estoppel at p. 57:

‘The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.’

[61] “In the case at bar, there is no evidence that TELUS made a promise or assurance that it would not apply for a stay of proceedings on the basis of the arbitration clause. Ms. Seidel points to the fact that the list of defences provided by TELUS did not make mention of the arbitration clause. However, the provision of the list of defences did not constitute a promise or assurance that TELUS would never apply for a stay of proceedings. The list of defences cannot be construed in the circumstances to have been intended to be an exhaustive list. TELUS was entitled to supplement the list of defences in the same fashion as defendants normally have the ability to amend statements of defence.

[62] “Sect. 15(1) of the CAA specifically deals with the timing of stay applications. It provides that the application may be made by a party to legal proceedings ‘before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings’. TELUS has not delivered a statement of defence, and the provision of the list of defences did not constitute a step in the proceeding. TELUS did apply to strike out certain of Ms. Seidel’s claims but such an application is not a step in the proceedings: see Fathers of Confederation Buildings Trust v. Pigott Construction Co. (1974), 44 D.L.R. (3d) 265 (P.E.I.S.C.).

[63] “It must be remembered that when Ms. Seidel commenced her action, McKinnon 2004 was binding authority in this province, and it held that an application for a stay under Sect. 15 prior to the certification application of an
intended class proceeding was premature. TELUS delivered its stay application promptly after the issuance of Dell and Rogers cast doubt on the correctness of McKinnon 2004. TELUS cannot be faulted for its failure to make an earlier application when such an application was bound to fail pursuant to McKinnon 2004.”

IV. SCOPE OF ARBITRATION CLAUSE

[64] “Under the authority of Dell and Rogers, the court is required to grant a stay of proceedings in respect of Ms. Seidel’s claims that are covered by an arbitration agreement between the parties. It is clear that the claims arising after Ms. Seidel signed the ‘renewal’ contract in February 2003 are covered by the arbitration clause contained in that contract. What is less clear is whether her claims arising before February 2003 are covered by an arbitration agreement. Should this issue be determined at first instance by the court or the arbitrator?

[65] “In Dell, the Court considered the two schools of thought regarding the degree of judicial scrutiny of an arbitrator’s jurisdiction, one favouring the ‘interventionist judicial approach’ and the other advocating the ‘competence-competence principle’. Under the former, it is the court that should settle any challenge to the arbitrator’s jurisdiction at first instance (para. 69). Under the latter, the court is required to limit itself to a prima facie analysis and ‘to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable’ (para. 75).

[66] Madam Justice Deschamps, on behalf of the majority in Dell, accepted the competence-competence principle as the general rule [see for paras. 84-85, above at [28]]. In her preceding comments, Deschamps J. indicated that the general rule should apply to issues regarding the validity of the arbitration agreement as well as issues relating to its applicability (para. 82).

[67] “The ability of an arbitrator to decide his or her own competence was one of the three areas in respect of which the chambers judge found the laws of British Columbia to be different from the laws of Quebec. He was in error in this regard. He stated that the Commercial Arbitration Act does not give an arbitrator the jurisdiction to decide competence, but Sect. 22 of the Act makes the domestic commercial rules of the British Columbia International Commercial Arbitration Centre applicable to arbitrations unless the parties otherwise agree. Rule 29(1) of the Centre’s Domestic Commercial Arbitration Rules provides that an arbitration tribunal may rule on its own jurisdiction.

TELUS says that the following facts and issues will have to be determined in order to decide whether Ms. Seidel’s pre-February 2003 claims are covered by an arbitration agreement between the parties: (1) What were the terms of the 2000 agreement? (2) Does the 2003 agreement amend the 2000 agreement (it deals with the same phone number) or are they completely separate contracts? (3) If there are two completely separate contracts, what is the proper interpretation of the arbitration clause? (4) If there is an ambiguity, should extrinsic evidence be heard to resolve the ambiguity?

In my opinion, these matters do not solely involve a question of law and require more than a superficial consideration of the relevant documents. It follows that the competence-competence principle requires the issue of the applicability of an arbitration agreement to the pre-February 2003 claims to be first determined by an arbitrator. If the arbitrator rules that the pre-February 2003 claims are not covered by an arbitration agreement, then Ms. Seidel may apply to continue with her court action.”
28. Court of Queen’s Bench, Saskatchewan, 5 May 2009, Docket no. Q.B.G. No. 135 of 2009

Parties: Applicant: West Plains Company (nationality not indicated)  
Respondent: Northwest Organic Community Mills Co-Operative Ltd. (nationality not indicated)

Published in: Available online at <www.canlii.org>

Articles: I(3); III; IV(1); V

Subject matters: – requirements for enforcement (in general)  
– burden of proof on respondent


Facts

On 26 June 2007, West Plains Company (West Plains) and Northwest Organic Community Mills Co-Operative Ltd. (Northwest Organic) entered into a purchase contract under which West Plains bought 85,700 bushels of rye from Northwest Organic. Northwest Organic was to ship two railcars of rye per month for twelve months commencing September 2007 and ending August 2008. The purchase contract contained a clause referring disputes to arbitration at the United States National Grain and Feed Association (NGFA).


The Court of Queen’s Bench for Saskatchewan, per Popescul, J. granted enforcement. It reasoned at the outset that the “gist” of the New York Convention and the UNCITRAL Model Law, which have both been adopted in
Saskatchewan, “is to require that arbitration awards made in accordance with arbitration rules mutually agreed to between the parties are universally recognized and enforceable by the courts of participating jurisdictions”.

In the present case, the requirements for enforcement of the award were met since the arbitration concerned a commercial dispute, the contract between the parties was undisputedly an agreement in writing within the meaning of the Convention and West Plains filed a certified copy of the award and a certified copy of the contract.

The court noted that the grounds for refusing enforcement contained in Art. V of the Convention must be raised and proved by the party resisting enforcement. Here, Northwest Organic did not participate in the enforcement proceeding.

Excerpt


(....)

[2] “The Legislature of Saskatchewan, by the enactment of The Enforcement of Foreign Arbitral Awards Act, 1996, has adopted the New York Convention and by the enactment of The International Commercial Arbitration Act, has adopted the Model Law. The gist of both of these pieces of legislation is to require that arbitration awards made in accordance with arbitration rules mutually agreed to between the parties are universally recognized and enforceable by the courts of participating jurisdictions. The important commercial public policy objectives of both The Enforcement of Foreign Arbitration Awards Act, 1996 and The International Commercial Arbitration Act was recognized by the Saskatchewan Court of Appeal in BWV Investments Ltd. v. Saskferco Products Inc., 1994 CanLII 4557 (SK C.A.), [1995] 2 W.W.R. 1.

[3] “The applicant must establish that it has met the statutory requirements for obtaining a recognition of a foreign arbitration award.
[4] “The arbitration proceeding giving rise to the Arbitration Award was an international commercial arbitration that arose out of a legal, contractual relationship which was commercial in nature as contemplated by Art. I of the New York Convention.

[5] “There is no question that the contract between the applicant and the respondent constitutes an agreement in writing within the meaning of the New York Convention and it is further clear that the parties undertook to submit disputes to arbitration by the NGFA. The applicant has, as required, filed a certified copy of the Arbitration Award and a certified copy of the contract.

[6] “Accordingly, I find that all of the procedural requirements for the enforcement of the Arbitration Award have been satisfied.

[7] “There are circumstances, as outlined in Art. V of the New York Convention, where the court can refuse to enforce an arbitration award. However, the applicable section requires that the party resisting enforcement of the award prove the applicability of one of the exceptions to enforcement. In this case, the respondent has not participated in the application. I find that there are no grounds for refusing recognition or enforcement of the Arbitration Award and that the Arbitration Award should be recognized and the applicant is entitled to enforce it.”

(....)
5. Intermediate People’s Court of Shangdong Province, Jinan, 27 June 2008

Parties: Applicants: (1) Hemofarm DD (Serbia); (2) MAG Intertrade Holding DD (Serbia); (3) Suram Media Ltd. (Liechtenstein)
Respondent: Jinan Yongning Pharmaceutical Co. Ltd. (China, PR)

Published in: No information available at time of publication

Articles: I(1); III; V(1)(c); V(2)(b)

Subject matters: – scope of arbitration clause
– public policy and pre-existing domestic court decision on same dispute

Commentary Cases: \[9\] = ¶ 301; \[10\] = ¶ 101; \[11\]-\[12\] = ¶ 512; \[13\] = ¶ 524 (pre-existing domestic court decision)

Facts

On 22 December 1995, Hemofarm DD, MAG Intertrade Holding DD and Jinan Yongning Pharmaceutical Co. Ltd. (Yongning) entered into a Joint Venture Contract (the JV contract) establishing Jinan-Hemofarm Pharmaceutical Co., Ltd. (Jinan-Hemofarm). Suram Media Ltd. joined the joint venture in April 2000. The JV contract was governed by Chinese law and provided that disputes

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1. The General Editor wishes to thank Richard Kreindler and Christina Cathey Schütz, Shearman & Sterling LLP, Frankfurt am Main, and Ms. Yanhua Lin, Fangda Partners, Beijing, for their invaluable assistance in translating this decision from the Chinese original.
“arising from the execution of, or in connection with the JV contract” be settled by ICC arbitration in Paris.

Disputes arose between Yongning and Jinan-Hemofarm in respect of property and land that Yongning had leased to the joint venture. Yongning commenced two actions in respect of property leases and one action in respect of a land lease in the Chinese courts. It was successful in all of them and also obtained property-preservation orders against Jinan-Hemofarm, freezing part of its bank deposits and sealing up some of its property. The Chinese courts dismissed Jinan-Hemofarm’s motions to refer the disputes to arbitration.

The Jinan-Hemofarm joint venture subsequently closed its operations, allegedly as a result of the Chinese litigation and orders. Hemofarm DD, MAG Intertrade Holding DD and Suram Media Ltd. (the Applicants) filed a request for ICC arbitration, arguing that Yongning breached the JV contract by making it impossible for the joint venture to continue its operations through its actions in the Chinese courts, and seeking compensation.

On 7 March 2007, the ICC arbitrators rendered a final award in the Applicants’ favor, holding that the adverse impact of the property-preservation orders obtained by Yongning in China led to the suspension and eventual closure of the joint venture’s operation; that by seeking and obtaining those orders Yongning committed a breach of the JV contract; and that the commencement of the land-lease litigation in the Chinese courts was a violation of the JV contract as the dispute should have been submitted to ICC arbitration pursuant to the arbitration agreement in the JV contract. The Applicants sought enforcement of the ICC award in China.

The Intermediate People’s Court of Shandong Province in Jinan denied enforcement under two of the grounds in the 1958 New York Convention. The court first held that the arbitration clause in the JV contract only applied to disputes concerning the joint venture and arising among the joint-venture partners. As the Chinese actions and property-preservation orders concerned the land- and property-lease relationship between Yongning and the joint venture, they did not fall within the scope of the arbitration clause.

The court further held that the arbitral tribunal’s decision on the lease disputes was at odds with and violated the earlier decisions of the Chinese courts on the same disputes; enforcement of the award would therefore violate public policy.
“This court formed a panel under the law after acceptance of this case on 10 September 2007; on 22 October 2007, this panel heard the application for recognition of the foreign arbitral award of Hemofarm DD, MAG Intertrade DD and Suram Media Ltd. (Applicants) against Jinan Yongning Pharmaceutical Co. Ltd. (Yongning or Respondent).... The trial of this case is now concluded.

According to the joint application (i.e., by Hemofarm DD, MAG Intertrade DD and Suram Media Ltd.), the Applicants brought an arbitration pursuant to the arbitration agreement previously entered into [by and among the Applicants and the Respondent] relating to disputes arising from the Joint Venture Contract [establishing] Jinan-Hemofarm Pharmaceutical Co., Ltd. (Jinan-Hemofarm). The ICC issued a final arbitral award (No. 13464/MS/JB/JEM) on 7 March 2007. Respondent, however, has not performed its payment obligation under the arbitral award. The Applicants have applied to this court for the recognition of the arbitral award pursuant to the PRC Civil Procedure Law, the Notice on China’s Accession to the [1958] New York Convention issued by the Supreme People’s Court, and other applicable laws.

Respondent argued that the arbitral award should not be recognized on the grounds that:

1. The arbitration agreement contained in the JV [Joint Venture] contract applies only to the disputes arising from the joint venture among the joint-venture partners, but it does not govern disputes between Yongning and the joint venture. The arbitral award, however, resolved disputes between Yongning and the joint venture, and this decision exceeded the scope of the arbitration agreement.

2. The arbitral tribunal adjudicated issues beyond those submitted to arbitration by the parties. Yongning was unable to defend on the issue whether the property-preservation orders [at the center of the dispute] were lawful and whether they fell within the scope of arbitration. Therefore, the arbitration proceedings were conducted inappropriately.

3. It is within the People’s Courts’ jurisdiction to issue property-preservation orders. Under PRC laws, the issue regarding the legitimacy of the property preservation is not capable of being settled by arbitration.

4. The arbitral tribunal concluded that the application for property preservation was unlawful and breached the JV contract, while the competent [Chinese] courts have held that said application was lawful. As for the land-lease litigation, the JV did not file a motion to challenge jurisdiction during the litigation, and the
court upheld [Yongning’s] claims. However, the arbitral tribunal stated in its final award that this dispute should have been submitted to the ICC pursuant to the arbitration agreement in the JV contract. Thus it concluded that the [land-lease] litigation initiated by Yongning breached the JV contract, which is obviously contrary to the court’s judgment. Therefore, recognition of the arbitral award would be contrary to Chinese public policy.

[4] “After adjudicating this case, this court finds [the following]. On 22 December 1995, Hemofarm DD, MAG Intertrade DD and Yongning entered into a JV contract, in which the parties agreed to establish Jinan-Hemofarm. [The JV contract provides that] the formation of the contract, its validity, interpretation and execution shall be governed by PRC laws. [It further states that] any disputes arising from the execution of, or in connection with the JV contract, shall be settled through friendly negotiations among the parties; in the event no settlement can be reached through negotiations, the dispute shall be submitted to the ICC in Paris; the arbitration proceedings shall be conducted in accordance with ICC rules; the language of the arbitration shall be English; the arbitral award shall be final and binding upon all the parties. Suram Media Ltd. joined the JV and became a new shareholder in April 2000. Because of disputes between Yongning and Jinan-Hemofarm, Yongning initiated two litigations regarding property leases as well as a litigation regarding a land lease, requesting Jinan-Hemofarm to pay the lease fees, etc. Yongning won these three litigations, with its claims upheld by the competent courts. During the litigations, Yongning applied to the court for property-preservation orders. The court granted Yongning’s applications; [it] then froze part of Jinan-Hemofarm’s bank deposits and sealed up some of its products. During the two property-lease litigations, Jinan-Hemofarm had filed motions to challenge jurisdiction, reasoning that such litigations were governed by the arbitration agreement in the JV contract and were not subject to the court’s jurisdiction. Jinan-Hemofarm’s motions to challenge jurisdiction were dismissed by the competent courts.

[5] “The three Applicants filed their request for arbitration at the ICC, seeking compensation from Yongning for their investment and losses, etc. The underlying grounds of the request for arbitration were: that differences arose between the three Applicants and Yongning during the JV’s operation; and that Yongning breached the JV contract for the reason that the JV was unable to maintain its operations as a result of the litigations initiated by Yongning against the JV, as well as Yongning’s application for the property-preservation orders during the litigations. Yongning put forward its defense and counterclaim. Upon the ICC’s acceptance of the case, it was decided that the arbitration would be
conducted in Paris, the arbitrators were confirmed, and the scope of arbitration was also determined. Hearings proceeded thereafter. The matters within the scope of the arbitration included the causes for the failure and the eventual termination of the JV's operation.

[6] “During the hearing, the parties debated several issues, such as whether there were breaches of the JV contract. Yongning also presented its opinions on whether it was appropriate to adopt property-preservation measures. The [arbitral tribunal] held that Yongning obtained from the PRC courts property-preservation orders during the litigations, and the enforcement of these property-preservation orders had a direct, material and adverse impact upon the rights and interests of the three Applicants under the JV contract; this eventually led to the suspension of the JV’s operation and the closure of its business. As a result of the property-preservation orders, Yongning committed a breach of the JV contract, in response to which the three Applicants were entitled to submit their claims for damages against Yongning to ICC arbitration pursuant to the arbitration agreement in the JV contract. The commencement of the land-lease litigation was a violation of the JV contract as the dispute should have been submitted to ICC arbitration pursuant to the arbitration agreement in the JV contract.

[7] “The ICC issued final arbitral award No. 13464/MS/JB/JEM [holding that]:

‘(1) Yongning shall bear its own legal and other costs;
(2) Yongning shall pay the three Applicants compensatory damages in the amount of US$ 6,458,708.40, litigation expenses in the amount of US$ 9,509.55, legal and other costs incurred by the Applicants in the amount of US$ 1,270,472.99, and 50% of the costs of arbitration fixed by the ICC Court in the amount of US$ 295,000;
(3) The total amount awarded in the sum of US$ 8,033,690.94 shall earn interest at the rate of 5% per annum from the date of notification of the Final Award to Yongning until the date of payment;
(4) The three Applicants are directed to turn over to Yongning the JV’s corporate and financial seals;
(5) Yongning’s counterclaims are dismissed;
(6) All other claims and counterclaims not disposed of above are dismissed.’

[8] “Since Yongning has not performed its obligations under the arbitral award, the three Applicants have applied to this court for the recognition of the arbitral award.
“This court finds: Pursuant to Art. 267 of the PRC Civil Procedure Law, a party seeking recognition and enforcement of an award rendered by a foreign arbitral institution must apply to the Intermediate People’s Court of the place where the party subject to enforcement is domiciled or where its property is located. Since Yongning is the Respondent in this case and its domicile is in Jinan, Shandong Province, this court has jurisdiction over this case.

“The arbitral award at issue in this case was rendered in France. France and China are both parties to the [1958 New York Convention]. Pursuant to PRC Civil Procedure Law and the Notice on China’s Accession to the New York Convention issued by the Supreme People’s Court, PRC [courts] shall apply the New York Convention to determine the recognition and enforcement of arbitral awards made in the territory of a State party other than China.

“Pursuant to the New York Convention, recognition and enforcement of an arbitral award may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. The arbitration agreement in the JV contract provides that: ‘Any disputes arising from the execution of, or in connection with the contract, shall be settled through friendly negotiations among the parties. In case no settlement can be reached through negotiations, the disputes shall be submitted to the ICC in Paris. The proceedings shall be conducted in accordance with its rules. . . .’

“This case concerns a joint-venture dispute, and [the court] shall apply PRC law to interpret the arbitration agreement of the JV contract. According to the arbitration agreement, the arbitral tribunal has jurisdiction only over disputes of a ‘joint-venture’ nature among the joint-venture partners. Matters irrelevant to the joint venture would not fall within the scope of the arbitration agreement. The litigations and the property-preservation orders, which arose from the lease relationship between Yongning and the JV, should be deemed as disputes between the JV and its shareholder Yongning, which are irrelevant to the three Applicants (i.e., Yongning’s joint-venture partners). Such disputes are purely domestic disputes inside China; they are not disputes related to the joint venture among the joint-venture partners. The matters governed by the arbitration agreement in the JV contract are limited only to those related to the joint venture among the joint-venture partners, but the lease disputes between Yongning and the JV cannot be governed by the arbitration agreement. The ICC arbitral award was issued based on Yongning’s breach of the JV contract by [applying for] property-preservation orders, which obviously fell outside the scope of the arbitration agreement, and thus shall not be recognized.
“PRC courts had previously decided to issue property-preservation orders and also had their final judgments with regard to the lease disputes. Given this, when the ICC tribunal adjudicated these disputes between Yongning and the JV a second time, it infringed China’s judicial sovereignty, as well as the PRC courts’ appropriate jurisdiction. Therefore, the ICC award shall not be recognized.

Pursuant to Art. 267 of the PRC Civil Procedure Law and Art. V(1)(c) and V(2)(b) of the New York Convention, the court rules as follows: ‘Order to deny recognition of the ICC arbitral award No.13464/MS/JB/JEM. The Applicants (Hemofarm DD, MAG and Suram) shall bear the case-acceptance fee of RMB 500. This order is a final order.’”
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

2. Court of Justice of the European Communities, Grand Chamber, 10 February 2009, Case C 185/07

Parties:
Claimants: (1) Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA (Italy);
(2) Generali Assicurazioni Generali SpA (Italy)
Defendant: West Tankers, Inc. (nationality not indicated)

Published in:
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Articles: II(3)

Subject matters:
– anti-suit injunction (injunction enjoining foreign lawsuit)
– EU Council Regulation (EC) no. 44/2001
– referral to arbitration

Commentary Cases: ¶ 229

Facts

The facts of this case are also reported in Yearbook XXX (2005) at pp. 717-746 (UK no. 69) and Yearbook XXXIII (2008) at pp. 710-720 (UK no. 78). West Tankers Inc. (West Tankers) and Erg Petroli SpA (Erg), an Italian company, entered into a charterparty for the vessel FRONT COMOR, owned by West Tankers. The charterparty was governed by English law and contained a clause providing for arbitration of disputes in London.

In August 2000, the FRONT COMOR collided with a jetty owned by Erg at the Italian harbour of Syracuse. Erg sought reimbursement of the damage from its insurers, Ras Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA (the insurers) up to the limit of its insurance cover and commenced
arbitration proceedings against West Tankers in London for the amount in excess of the insurance cover. Court proceedings also ensued both in Italy and England.

On 30 July 2003, the insurers commenced proceedings against West Tankers before the court of first instance (Tribunale) in Syracuse to recover the amounts which they had paid Erg under the policies.

On 10 September 2004, West Tankers commenced proceedings in the High Court in London against the insurers, seeking a declaration that the dispute which was the subject of the proceedings in Syracuse arose out of the charterparty and that the insurers were therefore bound to refer it to arbitration in London. West Tankers also sought an injunction to restrain the insurers from taking any further steps in relation to the dispute except by way of arbitration and to discontinue the proceedings in Italy.

On 21 March 2005, the High Court, per Colman, J, granted both the declaration and the injunction. This decision is reported in Yearbook XXX at (2005) pp. 717-746 (UK no. 69).

On 21 February 2007, the House of Lords held that the question of the injunction involved the application of EU Council Regulation (EC) no. 44/2001 (the Regulation) and had no obvious answer. It therefore requested the European Court of Justice to issue a preliminary ruling on the question whether it is consistent with the Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement. Lord Hoffmann stated the opinion of the House of Lords on the question referred, concluding that the Regulation’s prohibition of anti-suit injunctions does not apply to arbitration and to court proceedings in which the subject matter is arbitration because the Regulation expressly excludes arbitration from its scope of application.

On 4 September 2008, Advocate General Juliane Kokott issued an opinion reaching the opposite conclusion that the Regulation precludes the courts from issuing anti-suit injunctions on the basis of an arbitration agreement.

The European Court of Justice, in an opinion by Ján Klučka, agreed with the Advocate General’s conclusion. The Court reasoned that the proceedings before the Syracuse court, which concerned a claim for damages, came within the scope of the Regulation. Consequently, the preliminary objection of lack of jurisdiction of the court because of the arbitration agreement in the charterparty – and the related issue of the validity and applicability of that agreement – came within the scope of the Regulation and was “exclusively for that court to rule on”.

The Court added that the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under the
Regulation, from ruling on the very applicability of the Regulation to the dispute “amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No. 44/2001”.

In the Court’s opinion, this conclusion was supported by Art. II(3) of the 1958 New York Convention, which provides that referral to arbitration shall be ordered, on certain conditions, by the court seized with the dispute.

Excerpt


[2] “The reference was made in the context of proceedings between, on the one hand, Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, and Generali Assicurazioni Generali SpA (Allianz and Generali) and, on the other, West Tankers Inc. (West Tankers) concerning West Tankers’ liability in tort.”

1. LEGAL CONTEXT


[4] “According to recital 25 in the preamble to Regulation No. 44/2001:

‘Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.’

Art. 1(1) and (2) of that Regulation provides:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

....

(d) arbitration.’
Art. 5 of that Regulation provides:

‘A person domiciled in a Member State may, in another Member State, be sued:

....

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.’

[Sect. 37(1) of the Supreme Court Act 1981 provides:

‘The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so.’

Sect. 44 of the Arbitration Act 1996, entitled ‘Court powers exercisable in support of arbitral proceedings’, provides:

‘(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are:

....

(e) the granting of an interim injunction....’

II. THE QUESTION REFERRED FOR A PRELIMINARY RULING

[6] “In August 2000 the FRONT COMOR, a vessel owned by West Tankers and chartered by Erg Petroli SpA (Erg), collided in Syracuse (Italy) with a jetty owned by Erg and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London (United Kingdom). Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision. Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on 30 July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory
right of subrogation to Erg’s claims, in accordance with Art. 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

[7] “In parallel, West Tankers brought proceedings, on 10 September 2004, before the High Court of Justice of England and Wales, Queen’s Bench Division (Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa (the anti-suit injunction).

[8] “By judgment of 21 March 2005, the High Court of Justice of England and Wales, Queen’s Bench Division (Commercial Court), upheld West Tankers’ claims and granted the anti-suit injunction sought against Allianz and Generali. The latter appealed against that judgment to the House of Lords. They argued that the grant of such an injunction is contrary to Regulation No. 44/2001.

[9] “The House of Lords first referred to the judgments in Case C-116/02 Gasser [2003] ECR I-14693 and Case C-159/02 Turner [2004] ECR I 3565, which decided in substance that an injunction restraining a party from commencing or continuing proceedings in a court of a Member State cannot be compatible with the system established by Regulation No. 44/2001, even where it is granted by the court having jurisdiction under that regulation. That is because the regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States which must trust each other to apply those rules correctly.

[10] “However, that principle cannot, in the view of the House of Lords, be extended to arbitration, which is completely excluded from the scope of Regulation No. 44/2001 by virtue of Art. 1(2)(d) thereof. In that field, there is no set of uniform Community rules, which is a necessary condition in order that mutual trust between the courts of the Member States may be established and applied. Moreover, it is clear from the judgment in Case C-190/89 Rich [1991] ECR I 3855 and the exclusion in Art. 1(2)(d) of Regulation No. 44/2001 applies not only to arbitration proceedings as such, but also to legal proceedings the subject-matter of which is arbitration. The judgment in Case C-391/95 van Uden [1998] ECR I-7091 stated that arbitration is the subject-matter of
proceedings where they serve to protect the right to determine the dispute by arbitration, which is the case in the main proceedings.

[11] “The House of Lords adds that since all arbitration matters fall outside the scope of Regulation No. 44/2001, an injunction addressed to Allianz and Generali restraining them from having recourse to proceedings other than arbitration and from continuing proceedings before the Tribunale di Siracusa cannot infringe the regulation.

[12] “Finally, the House of Lords points out that the courts of the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore.

[13] “In those circumstances, the House of Lords decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is it consistent with Regulation No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?’

[14] “By its question, the House of Lords asks, essentially, whether it is incompatible with Regulation No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Art. 1(2)(d) of the regulation excludes arbitration from the scope thereof.

[15] “An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.

[16] “Both West Tankers and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No. 44/2001 because Art. 1(2)(d) thereof excludes arbitration from its scope of application.
“In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No. 44/2001, reference must be made solely to the subject-matter of the proceedings (Rich, para. 26). More specifically, its place in the scope of Regulation No. 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (van Uden, para. 33). Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No. 44/2001.

“However, even though proceedings do not come within the scope of Regulation No. 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No. 44/2001.

“It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No. 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

“In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No. 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by para. 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) (the Brussels Convention), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

“It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No. 44/2001 and that it is therefore exclusively for that
court to rule on that objection and on its own jurisdiction, pursuant to Arts. 1(2)(d) and 5(3) of that regulation.

[22] “Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Art. 5(3) of Regulation No. 44/2001, from ruling, in accordance with Art. 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No. 44/2001.

[23] “It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, Gasser, paras. 48 and 49). It should be borne in mind in that regard that Regulation No. 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorize the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C 351/89 Overseas Union Insurance and Others [1991] ECR I-3317, para. 24, and Turner, para. 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (Overseas Union Insurance and Others, para. 23, and Gasser, para. 48).

[24] “Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No. 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Art. 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No. 44/2001 is based (see, to that effect, Turner, para. 24).

[25] “Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Art. 5(3) of Regulation No. 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.
Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No. 44/2001. This finding is supported by Art. II(3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In the light of the foregoing considerations, the answer to the question referred is that it is incompatible with Regulation No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.”

III. CONCLUSION AND COSTS

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules: It is incompatible with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.”
GERMANY

_Ratification: 30 June 1961_
_No Reservations_

116. Hanseatisches Oberlandesgericht [Hanseatic Court of Appeal], Hamburg, 14 March 2006, 6 Sch 11/05

Parties: Claimant: Not indicated  
Defendant: Not indicated

Published in: Available online at <www.dis-arb.de>

Articles:  
I; III; IV(1)(a); IV(2); V(1)(a)

Subject matters:  
– enforcement of partial award (yes)  
– partial award on jurisdiction containing decision on procedural costs  
– original arbitration agreement or certified copy required (no)  
– translation of award (no)

Commentary Cases:  

Facts

On 10/12 September 2001, the parties concluded an English-language contract for laying cables in Mozambique. Clause no. 31 of the contract provided that the contract "shall be governed and construed in accordance with the Laws and shall be subject to the non-exclusive jurisdiction of the German Courts". Clause no. 35 of the contract provided for ICC arbitration of disputes; the arbitration was to be conducted in English.

A dispute arose between the parties. The present defendant commenced an action in Germany before the Hannover Court of First Instance, seeking payment for work done. The court dismissed the action, finding that there was a valid
arbitration agreement between the parties and the dispute should be referred to ICC arbitration. This decision was affirmed by the Celle Court of Appeal on 25 August 2005 and by the Federal Supreme Court on 12 January 2006 (the unsuccessful action on the merits).

In the meantime, the present claimant commenced ICC arbitration in Switzerland. On 31 August 2005, a sole arbitrator rendered a partial award on the issue of jurisdiction; the partial award also allocated the costs related to the jurisdiction phase of the proceedings. On 11 November 2005, the claimant sought enforcement in Germany of the decision on costs contained in the ICC partial award.

The Hanseatic Court of Appeal in Hamburg granted a declaration of enforceability of the Swiss award. It first denied the defendant’s argument that the claimant failed to supply a German translation of the contract, reasoning that a translation was unnecessary since the parties had concluded their contract in English and had agreed on English as the working language of the arbitration.

The court also dismissed the defendant’s contention that the arbitration clause in the contract contradicted the clause providing for the non-exclusive jurisdiction of the German courts. The court referred to the findings on this issue in the unsuccessful action on the merits commenced by the defendant against the ICC award in the German courts.

The court of appeal then noted that the claimant sought enforcement of only the part of the partial award deciding on the costs of the jurisdiction phase of the arbitration. This was in the court’s opinion a final decision that could clearly be enforced. The court added that it need not decide whether the arbitrator’s decision on jurisdiction would be enforceable, since the claimant did not seek to enforce that part of the partial award.

Finally, the court held that no oral hearing was required here under the provision of German law stating that an oral hearing must be held in enforcement proceedings if grounds for annulment of the award are raised. The court relied on jurisprudence and doctrine reading this requirement to mean that grounds for annulment must be “relied on and substantiated”. This was not the case here, as the defendant’s objection to the award was based on its contention that the arbitration clause was invalid. This argument was clearly without merit, having been rejected in three instances before the German courts.
Excerpt

[2] “The claimant supplied, with its request for a declaration of enforceability of the foreign arbitral award, a certified copy of the ‘Partial Award’ of 31 August 2005, thereby meeting the requirements in Sect. 1025(4) and Sect. 1064(3) and (1) ZPO (BGH WM 2004, 703). The defendant’s objections in respect of the submission of documents in English are unjustified insofar as the contract of 10/12 September 2001 and the arbitral award are concerned, because the defendant had no right to a German translation of these documents: the parties concluded the contract in English and agreed on English as the working language of the arbitration. Hence, it was unnecessary for the [claimant] to supply a translation of the contract.
[3] “There are no grounds for refusal under Art. V [of the 1958 New York Convention]. There is a valid arbitration agreement (Art. II(2) Convention). The further objections of the defendant against the validity of the contractual provisions in clause 35 of the contract of 10/12 September 2001 are unjustified. This was held not only by the Hannover Court of First Instance and by the Celle Court of Appeal; also the Federal Supreme Court expressly held in its decision that the arbitration clause at no. 35.2 of the contract does not give rise to doubts and in particular, contrary to the arguments of the defendant, is not invalid because it contradicts clause no. 31. This court refers to that decision in order to avoid repetitions...
[4] “The sole arbitrator had therefore the authority to decide in accordance with the Rules of the International Chamber of Commerce (ICC), that were agreed on in the arbitration clause.
[5] “The arbitral award at issue is an enforceable ‘Partial Award’, since the sole arbitrator finally decided the issue of jurisdiction, as he was authorized to do

1. Sect. 1025(4) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

“(4) Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.”

2. Sect. 1064 ZPO reads:

“(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings.
(2) The order declaring the award enforceable shall be declared provisionally enforceable.
(3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards.”

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under the applicable ICC Rules, issuing at the same time a final ruling between the parties over the costs of that procedural phase. This is a ‘partial arbitral award [Zwischenschiedsspruch] that clearly differs from a provisional decision, which does not claim to have a final effect.

[6] “We do not need to decide whether the claimant would have the right to request recognition of the arbitral award in respect of the issue of jurisdiction, because [the claimant] only seeks a declaration of enforceability of the decision on costs, which the sole arbitrator rendered as a final decision on costs for this procedural phase, in accordance with Art. 31 ICC Rules.3 Hence, this is clearly a ‘final’ arbitral award whose content is enforceable content.

[7] “The set-off alleged by the defendant is no obstacle to the declaration of enforceability, because the claim relied on for set-off appears to be a claim also falling within the scope of the arbitration clause, which according to the facts described in the arbitral award was already set off in the arbitration by the claimant (claimant in the arbitration) against the totality of the claimant’s … claims against the defendant (defendant in the arbitration).

[8] “No oral hearing was necessary for this request for a declaration of enforceability. The requirements of Sect. 1063 no. 2 ZPO4 are not met. It is true that the defendant argued that the arbitration agreement was invalid and thus

3. Art. 31 of the ICC Rules of Arbitration reads:

“Decision as to the Costs of the Arbitration
(1) The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

(2) The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.

(3) The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.”

4. Sect. 1063(2) ZPO reads:

“The court shall order an oral hearing to be held, if the setting aside of the award has been requested or if, in an application for recognition or declaration of enforceability of the award, grounds for setting aside in terms of section 1059 sub-section 2 are to be considered.”
relied on a ground for annulment under Sect. 1059 ZPO against the declaration of enforceability; however, this does not make an oral hearing necessary. [An oral hearing] must namely be ordered only when 'in an application for ... declaration of enforceability of the award, grounds for setting aside in terms of Sect. 1059(2) are to be considered.

[9] “However, grounds for annulment are only to be ‘considered’ when they are ‘relied on in a substantiated manner’ (thus, explicitly, BGHZ 142, 204, 207; Münch in MünchKomm ZPO, 2nd edn., Sect. 1063 no. 5: presentation of relevant ‘suspicious’ or conclusive facts; Stein/Jonas/Schlosser, ZPO, 22nd edn., Sect. 1063 no. 2: [hearing] ordered only when it does not already appear from the reasons that the defendant will not succeed). The above considerations however make it clear that the defendant did not rely on and substantiate such grounds for annulment, rather it was perfectly clear that it would fail…

[10] “The request for provisional enforcement complies with Sect. 1064(2) ZPO.”

5. Sect. 1059 ZPO reads in relevant part:

"(2) An arbitral award may be set aside only if:
1. the applicant shows sufficient cause that:
(a) a party to the arbitration agreement referred to in sections 1029 and 1031 was under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law…"
117. Oberlandesgericht [Court of Appeal], Munich, 15 March 2006, 34 Sch 06/05

Parties: Claimant: Manufacturer (Ukraine)
Defendant: Supplier, in liquidation (Germany)

Published in: Available online at <www.dis-arb.de>

Arts.: III; IV(1); V; V(1)(d); V(2)(b); VII(1)

Subject matters: – original arbitration agreement or certified copy required (no)
– translation of award and arbitration agreement (no)
– European Convention of 1961
– irregular composition of arbitral tribunal
– estoppel from raising 1958 New York Convention defense not raised in the arbitration
– public policy and determination of own fees by arbitrators

(contractual penalty; determination of own fees by arbitrators); [8] = ¶ 502

Facts

On 17 November 2001, the parties concluded a contract whereby the Ukrainian manufacturer undertook to manufacture clothing with materials provided by the German supplier. The contract contained a clause referring disputes to arbitration by “two or more arbitrators” at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

A dispute arose between the parties when the supplier allegedly failed to pay under several invoices of the Ukrainian manufacturer. The Ukrainian manufacturer commenced arbitration. The ICAC sent the parties a list of possible arbitrators; both parties chose Mrs. X as arbitrator. On 24 December 2003, the ICAC informed the parties that since they had both chosen Mrs. X, she would act
as sole arbitrator. The defendant did not object to the appointment of Mrs. X and did not take further part in the arbitration. On 2 April 2004, the sole arbitrator found in favor of the claimant, directing the German defendant to pay the amount of the invoices, the contractual penalty for delay in payment as provided for in the contract and the costs of the proceedings.

The claimant sought enforcement of the Ukrainian award in Germany. The Munich Court of Appeal granted enforcement. It first noted that the claimant complied with the conditions for requesting enforcement established by the 1958 New York Convention. The claimant supplied both the original award and a certified translation thereof. The translation, reasoned the court, was in fact unnecessary under German law, which applies on the basis of the more-favorable-right principle in Art. VII(1) of the 1958 York Convention. Similarly, German law does not require that the claimant supply the arbitration agreement.

The court then held that there was no ground for refusing recognition of the Ukrainian award. The court denied the defendant’s argument that the arbitral body was comprised of only one arbitrator rather than two or more arbitrators, as agreed in the arbitration clause. While an irregular composition of the arbitral tribunal can lead to refusal of enforcement, in the present case the defendant was aware of the composition of the arbitral tribunal but did not object thereto during the arbitration. The court did not answer the question whether the parties had thus modified their agreement as to the constitution of the arbitral body or whether the defendant was precluded (präkludiert) from relying on that ground because it had not raised that objection in the arbitration. The court merely concluded that the defendant, having unconditionally participated in the arbitration, could no longer rely on the incorrect composition of the tribunal in the enforcement proceedings, also by virtue of the prohibition of ‘venire contra factum proprium’. The court finally noted that the defendant no longer resisted enforcement.

Excerpt

[1] “The Munich Court of Appeal has jurisdiction over the request to declare the arbitral award of 2 April 2004 enforceable (Sect. 1025(4) and Sect. 1062(2))

1. Sect. 1025(4) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

“Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.”

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2. Sect. 1062(2) and (5) ZPO reads:

"(2) If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (Oberlandesgericht) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammergericht) shall be competent.

(5) Where there are several Higher Regional Courts (Oberlandesgerichte) in one Land, the Government of that Land may transfer by ordinance competence to one Higher Regional Court, or, where existent, to the highest Regional Court (Oberstes Landesgericht) [at present existing only in Bavaria (Bayerisches Oberstes Landesgericht)]; the Land Government may transfer such authority to the Department of Justice of the Land concerned by ordinance. Several Länder may agree on cross-border competence of a single Higher Regional Court."

3. Sect. 1061(1) ZPO reads:

"(1) Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected."

Sect. 1064 ZPO reads:

"(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings. (2) The order declaring the award enforceable shall be declared provisionally enforceable. (3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards."
certainly applies (BGH NJW-RR 2004, 1504). According to Sect. 1064(1) and (3) ZPO, the certified copy of the arbitral award suffices. It ensues from the most-favorable-right principle that it is not necessary to supply the arbitration agreement as required by Art. IV(1)(b) New York Convention (BGH NJW-RR 2004, 1504; BayObLGZ 2000, 233), because domestic law does not require it.  


[5] “In particular there is no ground for refusal under Art. V(1)(d) New York Convention (see Art. IX(1)(d) [European Convention]). The arbitral tribunal was indeed comprised of only one arbitrator rather than two or more arbitrators, against the original agreement of the parties. In principle, a defect in the constitution of the arbitral tribunal leads to refusing recognition and enforcement (Schwab/Walter, Schiedsgerichtsbarkeit, 7th edn., Chapter 57 no. 13). However, it is now undisputed between the parties that the representative of the defendant did not object to the composition of the tribunal, of which he was aware, at any time during the proceedings. It can remain open whether in such manner the agreement as to the procedure was conclusively modified (see Stein/Jonas/Schlosser, ZPO, 22nd edn., Annex to Sect. 1061 no. 122) or whether the defendant is precluded [präkludiert] from relying on the irregular composition of the tribunal (see, Schwab/Walter, Schiedsgerichtsbarkeit, 7th edn., Chapter 57 no. 13; Stein/Jonas/Schlosser, ZPO, 22nd edn., Annex to Sect. 1061 no. 124; Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd edn., no. 847 et seq.). In any case the defendant, which unconditionally participated in the arbitration without raising any objection in respect of the composition of the tribunal, can no longer rely here on the incorrect composition of the tribunal (see also BGH SchiedsVZ 2005, 259). This ensues also from the principle of the prohibition of ‘venire contra factum proprium’ (Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd edn., no. 847). Further, the defendant has now declared that it no longer wishes to oppose the declaration of enforceability.  

[6] “There are no further grounds for refusal under Art. V New York Convention, in particular no violation of domestic public policy, also in respect of the amount of the contractual penalty, which the arbitral tribunal calculated in accordance with clause 3.3 of the contract concluded between the parties on 17 December 2001.  

[7] “The determination of the fees of the arbitral tribunal by the arbitral tribunal itself (see in general on this issue Zöller/Geimer, ZPO, 25th edn., Sect. 1057 no. 4 et seq.) is not by definition inadmissible in international arbitration (Schwab/Walter, Schiedsgerichtsbarkeit, 7th edn., Chapter 33 no. 15 fn. 30).
[8] “There is no review of the merits of the arbitral award (Zöller/Geimer, op. cit., Sect. 1061 no. 40).
[9] “The decision on costs is based on Sect. 91(1) ZPO. The decision on provisional enforceability ensues from Sect. 1064(2) and (3) ZPO.”
(...)
118. Bundesgerichtshof [Federal Supreme Court], 21 May 2007, III ZB 14/07

Parties: Appellant/Claimant: Supplier (US)
Appellee/Defendant: State enterprise (Belarus)

Published in: SchiedsVZ 2008, p. 195; available online at <www.dis-arb.de>

Articles: V(1)(e)

Subject matters: – enforcement of set-aside award
– European Convention of 1961

Commentary Cases: ¶ 516 + ¶ 704

Facts

The facts of this case are also reported in Yearbook XXXIII (2008) at pp. 510-516 (Germany no. 110).

By a contract of 2 November 2000, the US supplier agreed to supply and the defendant, a manufacturer of tractors owned by the Belarusian State, agreed to purchase wheels and wheel-rims for tractors. The contract contained an arbitration clause referring disputes to the International Arbitration Court (IAC) at the Belarusian Chamber of Commerce and Industry in Minsk.

A dispute arose between the parties in respect of the payment of a delivery; the US supplier commenced IAC arbitration. By an award of 12 July 2005, an IAC arbitral tribunal found in favor of the US supplier. The award was signed by the president of the tribunal and the arbitrator appointed by the US supplier; the signature of the third arbitrator, who had been appointed by the Belarusian defendant, was replaced by a statement of the president that the third arbitrator was on vacation. The US supplier sought enforcement of the award in Germany, where the defendant had a subsidiary company.

In the meantime, the Belarusian defendant sought annulment of the award in Belarus. On 19 September 2005, the Supreme Commercial Court of Belarus set aside the award, holding, inter alia, that the arbitral tribunal violated the IAC Rules, which provide that the same tribunal which hears the case render the
award. The Court found that the third arbitrator did not sign the award because he disagreed with the others and that he did not participate in the decision-making. Under the IAC Rules, the president should then have requested the appointment of a substitute arbitrator.

In the German enforcement proceedings, on 31 January 2007, the Dresden Court of Appeal denied enforcement under Art. V(1)(e) of the 1958 New York Convention because the award had been set aside in Belarus. This decision is reported in Yearbook XXXIII (2008) at pp. 510-516 (Germany no. 110).

The Federal Supreme Court dismissed the US supplier’s appeal on a point of law (Rechtsbeschwerde). The Court disagreed with the supplier’s argument that the court of appeal violated due process by failing to fully examine the supplier’s claim that the award was validly rendered and merely referring for its conclusion to the Belarusian court’s annulment decision. The Federal Supreme Court reasoned that, first, the 1958 New York Convention allows the enforcement court to refuse recognition when the award has been set aside by a court of the country of rendition (as was the case here); furthermore, the court of appeal ascertained independently that the award was rightly annulled because it was rendered by a truncated tribunal in violation of the applicable arbitration rules. Second, the claimant’s argument that the third arbitrator did in fact participate in the decision-making process leading to the award was generic and unsubstantiated. For both these reasons, the court of appeal did not violate due process by failing to examine fully the claimant’s arguments.

The Supreme Court concluded that as the award was rendered by only two of the three arbitrators, in violation of the IAC arbitration rules, recognition should be refused under Art. V(1)(d) New York Convention for an irregularity in the arbitral procedure.

Excerpt

[1] “The claimant’s appeal on a point of law [Rechtsbeschwerde] against the decision of the 11th Civil Chamber of the Dresden Court of Appeal dated 31 January 2007 (11 Sch 18/05) is inadmissible and is dismissed; the claimant shall bear the costs of this proceeding.

[2] “The claimant obtained an arbitral award of the International Arbitration Court [IAC] at the Belarusian Chamber of Commerce and Industry in Minsk dated 12 July 2005; the award directed the defendant to pay the claimant a total

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of US$ 2,104,823.34. This arbitral award was annulled at the request of the defendant by the Supreme Commercial Court of Belarus by a decision of 19 September 2005. The Supreme Commercial Court based its annulment [decision], inter alia, on the ground that the arbitral tribunal violated the agreed-on procedural rules because it did not, as required [in the IAC Rules], decide in the same (three-person) composition in which it heard the case, since R, the arbitrator appointed by the defendant, did not participate in the decision-making and the arbitral award was rendered only by arbitrators B and K.

[3] “The claimant has sought a declaration of enforceability of the arbitral award in the Federal Republic of Germany, [claiming] that it was not hindered by the annulment decision of the Supreme Commercial Court. The court of appeal held that the arbitral award could not be recognized in [Germany]. The claimant impugns [this decision] by this appeal on a point of law, by which it again seeks a declaration of enforceability.

[4] “This appeal is allowed by the law (see Sect. 574(1) first sentence no. 1 to Sect. 1065(1) first sentence and Sect. 1062(1) no. 4 second case ZPO), but is inadmissible, since the issue submitted to the court is not of

2. Sect. 574(1)-(2) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads in relevant part:

"(1) An appeal on a point of law (Rechtsbeschwerde) is admissible from a decision when
1. it is explicitly provided for in the law
2. it is admissible on procedure
   
(2) In cases falling under paragraph 1 no. 1, an appeal on a point of law is only admissible when
   1. the dispute has fundamental relevance or
   2. the development of the law or the protection of uniform jurisprudence requires a decision of the Rechtsbeschwerde court."

3. Sect. 1065(1) ZPO reads:

"(1) A complaint on a point of law [to the Federal Court of Justice (Bundesgerichtshof)] is available against the decisions mentioned under section 1062, subsection 1, nos. 2 and 4 if an appeal on points of law would have been available against them, had they been delivered as a final judgment.
   
No recourse against other decisions in the proceedings specified in section 1062, subsection 1 may be made."

4. Sect. 1062(1) ZPO reads in relevant part:

"(1) The Higher Regional Court (Oberlandesgericht) designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to

   ... 

4. the setting aside (section 1059) or the declaration of enforceability of the award (section 1060

fundamental relevance nor does the development of the law or the need to ensure uniformity of jurisprudence require [here] a decision of the [Supreme Court] (Sect. 574(2) ZPO).

5. “It is argued in the appeal that the conditions for admissibility [of the appeal] in Sect. 574(2) no. 2 ZPO are met because there was a violation of due process (Art. 103(1) GG). [It is argued that] the court of appeal based its decision on the fact that, in violation of the agreed-on procedural rules, only two of the three arbitrators participated in the decision-making process and that the annulment of the arbitral award on this ground by the Supreme Commercial Court of Belarus should be accepted pursuant to Art. IX(1)(d) of the [1961 European Convention] (BGBl. 1964 II p. 425 …); thus, the court of appeal allegedly failed to examine fully an argument of the claimant that was relevant for the decision (Art. 103(1) GG).

6. “We hold that there was no violation of due process for the following reasons. [First,] the declaration of enforceability of the arbitral award at hand, which was rendered in Minsk, Belarus, is governed by the [1958 New York Convention] (BGBl. 1961 II p. 121 …), because of [that Convention’s] direct application as (incorporated) international law and because of the reference domestic law makes thereto (see Sect. 1025(4) and Sect. 1061(1) first sentence ZPO). According to [the New York Convention], recognition and enforcement of an arbitral award may be refused when the party against whom enforcement is sought furnishes proof that the arbitral award ‘has been set aside … by a competent authority of the country in which, or under the law of which, that award was made’ (see Art. V(1)(e) second alternative first case Convention).

et seq.) or the setting aside of the declaration of enforceability (section 1061)."

5. Art. 103 of the German Constitution (Grundgesetz – GG) reads:

“(1) Anyone has a right to a fair hearing before the court.”

6. Sect. 1025(4) ZPO reads:

“(4) Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.”

7. Sect. 1061(1) ZPO reads:

“(1) Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.”
Such annulment occurred here. By decision of 19 September 2005, the Supreme Commercial Court of Belarus annulled the [IAC] arbitral award rendered in Minsk on 12 July 2005.

[7] “The court of appeal, however, did not rely only on this fact to refuse recognition; it did not deem sufficient that the arbitral award had been set aside by the (competent) court of the state of rendition. Rather, the court of appeal went on to examine whether the Supreme Commercial Court’s decision to annul the arbitral award was ‘correct in its outcome’, and held that the annulment was justified.

[8] “[The court of appeal] deemed that the procedural defect justifying annulment was the fact that only the two arbitrators B and K concluded the arbitration proceedings; in accordance with the arbitration rules, they should have replaced arbitrator R, who refused (further) cooperation, with another arbitrator and should have rendered the arbitral award together with this latter [arbitrator]. The ‘overall behavior’ of R, who refused to fulfill the obligations of an arbitrator and made a replacement necessary according to the arbitration rules, appears from the written declaration of the presiding arbitrator B, supplied by the claimant. Thus, [the court of appeal] did not disregard a substantial argument of a party.

[9] “[Second,] the [claimant’s statement in this appeal] … does not conclusively challenge R’s refusal to participate in the ‘decision-making’, which [refusal] the court of appeal assumed. Namely, it cannot be deduced from this statement [that the claimant is of] the opinion that at a certain point in time all three members of the arbitral tribunal met to discuss the draft award of arbitrator B and decided (by majority) on the arbitral award at issue. The appeal on a point of law does not allege that there was a written consultation and voting procedure. From the [claimant’s] statements in the appeal it can [only] be deduced that after the arbitration hearing on 6 May 2005 had ended, ‘further date(s) including the disputed date for rendition, 12 July 2005’ were envisaged; it is not said that arbitrator R participated. It is merely stressed that R did not take part in the ‘pronouncement hearing’ (by which is meant 12 July 2005); on that day, allegedly, ‘the decision [was only] pronounced, that is, it was issued by being signed’. Nor does the other argument made in the appeal … allege that there was a consultation and decision-taking hearing (dated or otherwise indicated) in which arbitrator R participated.

[10] “The claimant’s arguments in respect of the crucial issue (from the decisive legal point of view of the court of appeal) whether arbitrator R participated in the arbitral decision – to be taken on the basis of the draft prepared by B, after
consultation of all the arbitrators and if necessary by majority – are generic. This rules out a violation of due process [by the court of appeal].

[11] “We must assume, on the basis of the determinations of the court of appeal (which cannot be objected to) that the arbitral award was rendered by only two arbitrators of the three-person arbitral tribunal in violation of the arbitration rules applicable to the arbitration proceeding. Hence, the arbitral award cannot be recognized pursuant to Art. V(1)(d) New York Convention, as correctly pointed out by the statement in reply to the appeal on a point of law.

[12] “As a consequence, we shall not deal with the further arguments raised in the appeal against the refusal of recognition on the basis of Art. V(1)(e) second alternative first case [New York Convention] (together with Art. IX(1)(d) 1961 European Convention and Sect. 328 ZPO). To that extent we shall not give reasons (Sect. 577(6) third sentence ZPO).”

8. Sect. 577 ZPO reads:

"(6) An appeal on a point of law shall be decided by judgment [Beschluss]. Section 564 applies accordingly. Further, [the court can] refrain from giving reasons, when [reasons] would not be suited to contribute toward the clarification of legal questions of essential relevance, the development of the law or the protection of uniform jurisprudence."
119. Kammergericht [Court of Appeal], Berlin, 17 April 2008, 20 Sch 02/08

Parties: Claimant: Buyer (Ukraine)  
Defendant: Supplier (Germany)

Published in: Available online at <www.dis-arb.de>

Articles: I(1); III; IV(1)(a); V(1); V(1)(b); V(1)(c); V(2)(b)

Subject matters:  
– estoppel from raising 1958 New York Convention defense not timely raised in annulment action in country of origin  
– due process (registered letter not collected)  
– proper notice of arbitration and award  
– due process as ground for violation of public policy


Facts

On 18 October 2004, the parties concluded a contract under which the German supplier supplied pharmaceutical products to the Ukrainian buyer. The contract contained a clause providing that disputes be finally settled by arbitration at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

A dispute arose between the parties and the Ukrainian buyer commenced ICAC arbitration as provided for in the contract. On 1 June 2007, the ICAC secretariat sent the claimant’s statement of claim, the ICAC Rules and a list of possible arbitrators to the German supplier by registered letter. The letter was not collected and was returned to the sender. A subsequent registered letter containing the invitation to the hearing was also returned. On 27 August 2007, the arbitral tribunal rendered an award in favor of the Ukrainian buyer. On 6 September 2007, the award was sent to the German supplier by a registered letter that was not collected. On 7 December 2007, the supplier’s lawyer again
sent the award to the German supplier. By the present action, the buyer sought enforcement of the Ukrainian award in Germany.

The Berlin Court of Appeal granted the request, finding that the Ukrainian claimant had complied with the formal conditions for requesting enforcement by supplying a certified copy of the arbitral award, and that the German defendant was precluded (präkludiert) from relying on grounds for denying enforcement under the 1958 New York Convention since it had failed to raise them in annulment proceedings in Ukraine within the time limit of three months set by Ukrainian law. The court agreed with the claimant’s opinion that although the New York Convention does not provide for estoppel, the preclusion (Präklusion) provision established in respect of domestic awards in German law also applies to the enforcement of foreign awards.

The court of appeal added that in any case the defendant had failed to substantiate its allegation that there had been a violation of due process. It reasoned that although the defendant had not collected the registered letters informing it of the commencement of the arbitration and of the date of the hearing, it had nevertheless been properly informed of the arbitration as assumption of communication [Zustellungsfiktion] suffices according to the applicable Ukrainian law.

Excerpt


1. Sect. 1061(1) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

"Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected."
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2. Sect. 1064 ZPO reads:

"(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings.

(2) The order declaring the award enforceable shall be declared provisionally enforceable.

(3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards."


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against an interpretation excluding reliance on precluded grounds, that the foreign legislator could limit the German [legislator’s] review of a ground for refusal in Germany by providing for a time limit for the appeal with a preclusive effect.

[9] “However, on the other hand [the claimant argues], pursuant to Sect. 1060(2) third sentence, that the grounds for annulment in Sect. 1059(2) no. 1 are not to be taken into account if the time limit for a request for annulment has expired. Thus, in the interest of a uniformity of treatment the preclusion of such grounds according to a law other than German law must be recognized, since the German legislator enacted parallel provisions in Sect. 1059 [ZPO – on domestic arbitration] on the one hand, and by including the Convention in German law through Sect. 1061 [ZPO] on the other (see Musielak/Voit, op. cit.). Also, pursuant to its Art. VII(1) the Convention does not hinder any practice of national law that is more recognition-friendly, so that the courts remain free as

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5. Sect. 1060 ZPO reads:

"Domestic awards
(1) Enforcement of the award takes place if it has been declared enforceable.
(2) An application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 sub-section 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 sub-section 2 no. 1 shall also not be taken into account if the time limits set by section 1059 sub-section 3 have expired without the party opposing the application having made an application for setting aside the award."

6. Sect. 1059(2) no. 1 ZPO reads:

"An arbitral award may be set aside only if:
1. the applicant shows sufficient cause that:
   (a) a party to the arbitration agreement referred to in sections 1029 and 1031 was under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law; or
   (b) he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award...."
before to interpret national law restrictively [teleologische Reduktion] in respect of grounds that already existed under the earlier law (OLG Karlsruhe, see above). The Court agrees with this opinion.

[10] “Furthermore, the defendant, who has the burden to raise and prove objections, has not been able to raise and prove a ground for refusal of recognition under Art. V(1)(b) Convention in a substantiated manner. It is indeed undisputed that the defendant did not take part in the arbitration proceeding and that the documents commencing the proceeding and the invitation to the hearing were returned to the file of the arbitration without the defendant having taken cognizance of them. This does not mean however that the defendant was not duly informed of the appointment of the arbitrators or the arbitration proceedings. Assumptions of communication [Zustellungsfiktionen] suffice for proper summons (Zöller/Geimer, ZPO, 26th edn., Sect. 1061 no. 53; BayObLG, decision of 16 March 2000 – 4 Z Sch 50/99 –, NJW-RR 2001, 431).”

[11] “It appears here from the arbitral award that on 1 June 2007 the arbitral tribunal sent copies of the documents of the proceeding (including the statement of claim), the rules of procedure and the list of arbitrators of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry to the defendant by registered mail with return receipt requested, at the address mentioned in this decision; this registered letter however was returned on 2 July 2007 with the postal note ‘not collected’ and the stamp of the German Mail Service. Pursuant to Art. 3(1) of the Ukrainian Law ‘On International Commercial Arbitration’ the registered letter is thus deemed to have been delivered to the defendant in the arbitration. The defendant did not raise objections in this respect.

[12] “There is no violation of procedural public policy under Art. V(2)(b) Convention in respect of the principle of due process, because also the invitation

8. Art. 3(1) of the Ukrainian Law on International Commercial Arbitration reads:

"Receipt of Written Communications.
1. Unless otherwise agreed by the parties:
– any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, permanent residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, permanent residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
– the communication is deemed to have been received on the day it is so delivered.”
to the hearing of 27 August 2007, which according to the arbitral award was sent to the defendant at the above address, was returned to the file of the arbitration with the postal note ‘not collected’ and the stamp of the German Mail Service. Pursuant to Art. 3(1) of the Ukrainian Law ‘On International Commercial Arbitration’, the registered letter is thus deemed to have been delivered to the defendant in the arbitration.

[13] “[Fifth,] the defendant’s objection that on 25 January 2007 it forwarded € 15,103.00 to company G at the instruction of the claimant is irrelevant, as it should have been raised before the Ukrainian arbitral tribunal.

[14] “The decision on costs is based on Sect. 91(1) ZPO; the decision on provisional enforceability on Sect. 1064(2) ZPO.”
120. Oberlandesgericht [Court of Appeal], Schleswig-Holstein, 16 June 2008, 16 Sch 02/07

Parties: Claimant: Supplier (Denmark)
Defendant: Buyer (Germany)

Published in: Available online at <www.dis-arb.de>

Articles: III; IV; V(2)(b); VI

Subject matters: – estoppel from raising 1958 New York Convention defense denied in foreign court annulment proceedings
– due process as ground for violation of public policy
– discretion to stay enforcement proceedings pending annulment proceedings
– calculation of interest


Facts

On 10 December 1996, the parties concluded a framework contract under which the Danish supplier agreed to supply cement to the German buyer. The contract contained a clause providing for the settlement of disputes either by arbitration in Denmark or in court proceedings before a Danish court.

A dispute arose between the parties in respect of the termination of the contract and its performance. The German buyer claimed compensation for lost profit, hire of storage space, transport and labor costs; the Danish supplier sought payment of certain deliveries of cement. On 13 March 2006, arbitration commenced in Denmark. On 6 March 2007, the arbitral tribunal granted the parties’ claims; the difference between the mutual claims was in the Danish supplier’s favor.

The German buyer sought annulment of the award from a court in Aalborg, Denmark; the petition was denied on 14 September 2007. On 14 May 2007, the Danish supplier sought enforcement of the award in Germany.
The Court of Appeal for Schleswig-Holstein granted enforcement. The court first reasoned that it need not decide whether the claimant had supplied the necessary documents together with its application, as the authenticity of the arbitration clause and the award was undisputed. It then held that there were no grounds for refusing enforcement under the 1958 New York Convention.

The German defendant argued that the arbitral tribunal violated due process because it based its decision on arguments that had not been raised in the arbitration and because it acted on the basis of an arbitration clause that had been challenged before the Danish courts; hence, enforcement of the award would lead to a violation of German public policy. The court of appeal disagreed, reasoning that there could be no violation of German public policy because the defendant was given the opportunity to have the award reviewed by the Aalborg court; that is all German law requires. The court added that it agreed with the Danish court’s rejection of this argument on the merits in the annulment proceeding.

The court of appeal exercised its discretion not to stay proceedings pending the German defendant’s appeal in Denmark against the decision of the Aalborg court, noting that the lower instance in the annulment action had already decided in the claimant’s favor.

**Excerpt**


[2] “The court of appeal for Schleswig-Holstein has competence to decide on the request for a declaration of enforceability of the arbitral award under

1. Sect. 1025(4) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

   “Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.”

2. Sect. 1061(1) ZPO reads:

   “Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.”
Sect. 1062(1) no. 4 and (2) ZPO because the defendant has its seat in this district.

(3) “It may remain open whether the formal conditions for recognition under Art. IV Convention are complied with, that is, whether the documents mentioned in that article (arbitral award, arbitration agreement) have been supplied in the form provided for in Art. IV Convention, because Art. IV Convention is merely a provision regulating means of evidence and plays no role where, as here, the authenticity of the documents is undisputed (BGH NJW 2000, 3650).

(4) “There are no grounds for refusing enforcement under Art. V Convention. No grounds under Art. V(1) Convention, which the defendant has the burden to prove, have even been conclusively raised, nor are there grounds under Art. V(2) Convention, which are to be examined at the court’s initiative.

(5) “According to [Art. V(2)], recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds either that the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or that the recognition or enforcement of the arbitral award would be contrary to the public policy of that country.

(6) “It is unnecessary to decide whether the arbitral tribunal violated the defendant’s right to due process, and thus at the same time German public policy, because – in the defendant’s opinion – the tribunal did not duly hear [the argument that] the right to claim damages had allegedly expired and based its decision on arguments that the claimant had not raised in the arbitration or had not been part of the arbitration.

(7) “The defendant had requested in the Danish proceeding that the claimant be directed to recognize the invalidity of the arbitral award. The court in Aalborg
fully examined the defendant’s objections, which are also the object of the present proceeding, in its decision of 14 September 2007. It came to the conclusion that it was not possible to give a broad interpretation of the arguments of the defendant during the arbitration and that the arbitral tribunal appeared not to have taken a position in respect of any argument that was not raised by the defendant.

[8] "In any case, a violation of German public policy is excluded because the defendant was given the opportunity to have the award reviewed, from the point of view of a possible violation of due process, in formal proceedings, namely through an appeal to the court in Aalborg. It ensues from Sect. 1059 ZPO⁴ that

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4. Sect. 1059 ZPO reads:

"Application for Setting Aside

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections 2 and 3 of this section.

(2) An arbitral award may be set aside only if:

1. the applicant shows sufficient cause that:
   (a) a party to the arbitration agreement referred to in sections 1029 and 1031 was under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law; or
   (b) he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award; or
   2. the court finds that
       (a) the subject-matter of the dispute is not capable of settlement by arbitration under German law; or
       (b) recognition or enforcement of the award leads to a result which is in conflict with public policy (ordre public).

(3) Unless the parties have agreed otherwise, an application for setting aside to the court may not be made after three months have elapsed. The period of time shall commence on the date on which the party making the application had received the award. If a request had been made under section 1058, the time limit shall be extended by not more than one month from receipt of the decision on the request. No application for setting aside the award may be made once the award has been declared enforceable by a German court.

(4) The court, when asked to set aside an award, may, where appropriate, set aside the award and remit the case to the arbitral tribunal.

(5) Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute.”
German arbitration law does not provide for more than this right. Furthermore, the court agrees with the opinion of the court in Aalborg.

[9] “There are no grounds to stay proceedings as requested by the defendant because of the appeal filed in Denmark against the decision of the court in Aalborg (see on [the issue of] stay, Schwab/Walter, [Schiedsgerichtsbarkeit], Chapter 30 no. 16; on a declaration of enforceability notwithstanding an annulment action, Chapter 57 no. 20). Pursuant to Sect. 1061(1) ZPO together with Art. VI Convention, the court may, if it considers it proper, adjourn the decision on the enforcement of the award if an application for setting aside the award has been made in Denmark to a competent authority in the sense of Art. V(1)(e). Since one instance in the annulment action has already decided in favour of the claimant and considering that the authority under Sect. 1061(3) ZPO5 to set aside a declaration of enforceability after the arbitral award is annulled abroad presumes that a declaration of enforceability is possible even if an annulment action is pending or still possible, this court exercises its discretion under Art. VI Convention not to adjourn the proceeding.

[10] “Since the arbitral award grants mutual claims for payment in the main dispute, the arbitral award shall be declared enforceable, at the request of the claimant, in respect of the difference, being € 119,830.36.

[11] “Insofar as the arbitral award grants legal interest to the claimant after 12 January 2006, this [interest] has to be specified as done in the operative part of this decision [Tenor]. If a foreign decision orders that further sums be paid in addition to the main sum that is the object of the decision, and it refers to foreign laws for their calculation, then the German court seized with the request for a declaration of enforceability must define an application that satisfies German [law] requirements for certainty; an insufficiently defined title may not be declared enforceable (BGH NJW 1993, 1801). This requirement also applies to the declaration of enforceability of foreign arbitral awards.

[12] “Pursuant to Sect. 293 ZPO, provisions of foreign law are ascertained through the evidence supplied by the parties and through other sources of evidence. Party-expert reports must be taken into consideration and the parties are under an obligation to cooperate (Zöller-Geimer, ZPO, 26th edn., Sect. 293 no. 16 et seq.). The claimant has argued that in Denmark legal interest after the commencement of proceedings is 7 percent higher than the official reference

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5. Sect. 1061(3) ZPO reads:

“If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.”
interest rate published by the Danish National Bank. It has supported this information with the statutory declaration of a Danish attorney as well as with a copy of the Danish law taken from a law gazette, as well as an uncertified translation of these texts.

[13] “Since the defendant subjected itself to Danish law and to a Danish arbitral tribunal, and taking into account its obligation to cooperate, its additional request that both the original legal provisions and a certified translation thereof be submitted shall not be granted. The official reference interest rate can be seen on the website of the Danish National Bank and this court therefore includes it in its decision for the period up to 30 June 2008.

[14] “The decision on costs is based on Sect. 91(1) ZPO; the decision on provisional enforceability on Sect. 1064(2) ZPO.”

6. Sect. 1064(2) ZPO reads:

“(2) The order declaring the award enforceable shall be declared provisionally enforceable.”
121. Oberlandesgericht [Court of Appeal], Dresden, 6 August 2008, 11 Sch 02/08

Parties: Claimant: Not indicated  
Defendant: Not indicated  

Published in: SchiedsVZ 2008, 309; available online at <www.disarb.de>  

Articles: III; V; V(1)(b); V(1)(d); V(1)(e); V(2)(b)  

Subject matters: – due process and refusal of request for adjournment  
– time limit to render award  
– appearance of bias of arbitrator (no)  


Facts  

On 30 October 2007, an arbitral tribunal in Norway rendered an award in favor of the present claimant, which was also the claimant in the arbitration. The defendant commenced an action for annulment of the award in a Norwegian court of first instance. In turn, the claimant sought enforcement of the Norwegian award in Germany.  

The Dresden Court of Appeal granted enforcement, dismissing the defendant’s argument that enforcement should be denied under the 1958 New York Convention because the arbitral tribunal had violated due process and the procedural rules of the arbitration. The defendant argued in particular that it had not timely received the claimant’s response to its own statement in reply, and that the arbitral tribunal had refused to extend the time limit to reply. The Dresden court held that there had been no violation of due process: based on the facts of the case, the arbitrators had simply not believed the defendant, which maintained that it had not received the relevant communication, and had instead believed the claimant, which stated that the communication had been sent.  

The court then dismissed the defendant’s argument that the award was invalid because it had been rendered after expiry of the six-month time limit provided
for in the applicable arbitration rules. The court reasoned that the relevant provision was not mandatory but rather a “shall-provision” [Soll-Vorschrift] whose non-observance could not invalidate the award. Also, the defendant did not dispute the claimant’s allegation that the parties had accepted without objections the arbitral tribunal’s announcement at the hearing that the award would be rendered after the six-month limit.

The court of appeal also disagreed with the defendant’s concern that the president of the arbitral tribunal might have been biased because an assistant legal counsel for the defendant had joined the president’s law firm after the arbitration but before the rendition of the award. The court held that it was unplausible that the president, a senior partner, would be influenced by the opinion of a junior associate working in a different department.

Finally, the court held that while the defendant had commenced annulment proceedings in Norway, the award had not yet been annulled and it seemed unlikely that it would be.

**Excerpt**

[1] “The Dresden Court of Appeal has territorial competence because the defendant has its seat in the district of the court of appeal, Sect. 1062(2) ZPO.¹

[2] “The declaration of enforceability is governed by the [1958 New York Convention], as provided for in Sect. 1061(1) ZPO.² According to the Convention, foreign arbitral awards must be recognized unless a party to the arbitration proves one of five exceptions (Art. V Convention).”

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1. Sect. 1062(2) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

   “If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (Oberlandesgericht) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammergericht) shall be competent."

2. Sect. 1061(1) ZPO reads:

   “Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesanzeigerblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.”

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“In the case at hand, the only [defense] to be considered is that the arbitral proceeding was not in accordance with the law of the country in which the arbitration took place (Art. V(1)(d) Convention). The defendant has not proved that the arbitral tribunal violated procedural rules or the defendant’s right to due process.

“(1) Allowing the claimant’s response [to the defendant’s statement in reply] without granting a further time limit to the defendant. The arbitral tribunal has already examined this issue thoroughly. The arbitral tribunal did not believe the statement of the defendant’s representative that he did not receive the E-mails and letters containing the claimant’s response dated 13 April 2007. The arbitral tribunal believed the assistant of the claimant’s representative, who stated that the response was sent by mail to attorney F and that the letter was not returned as undeliverable. This, and the fact that attorney F alleges that he did not receive any of the e-mails that were sent to the same e-mail address from which he himself sent e-mails, led the arbitral tribunal not to believe the defendant’s representative. The arbitral tribunal held that [its conclusion] was confirmed by the fact that when the response was again sent by e-mail in August 2007, it was allegedly caught in the spam-filter. The court does not deem that this manner of proceeding was a violation of the procedural rules of the arbitral tribunal or a violation of the defendant’s right to due process.

“(2) Ignoring an undisputed fact. The defendant argues that it was explicitly undisputed in the oral hearing before the arbitral tribunal that the claimant did not put the ‘X system’ at the disposal of the defendant; it was therefore established that the defendant could not validly manufacture the product according to license. This is no valid objection to the manner of proceeding of the arbitral tribunal. After hearing several witnesses, the arbitral tribunal reached the conclusion that the claimant gave the defendant all the information [the defendant] wished for. If the arbitral tribunal deemed on this basis that the claimant had met all its obligations under the license agreement, this court cannot find that it violated procedural rules. The arbitral tribunal did not ignore this argument of the defendant; rather, it held that it was irrelevant in view of the fact that all of the defendant’s wishes for information had been completely fulfilled.

“(3) Exceeding the six-week time limit between conclusion of the oral hearing and rendition of the arbitral award. Art. 18 of the Arbitration Rules of the arbitral tribunal, in the version quoted by the defendant, is a mandatory provision [Soll-Vorschrift]: ‘The Award by the Tribunal shall be notified to the parties not
later than six weeks after the conclusion of the Hearing ...’. The violation of such a Soll-Vorschrift cannot make the arbitral award invalid. Further, the claimant argued that the parties accepted without objections the announcement of the arbitral tribunal, at the oral hearing, that the arbitral award would be rendered at the end of October. This argument was not disputed.

[7] “(4) The defendant’s concern that the president of the arbitral tribunal was biased. The defendant has not been able to convince this court that it was justified in its concern that the president of the arbitral tribunal was biased. This [issue] is to be decided according to Norwegian law, Art. V(1)(d) Convention. The relevant [Norwegian] norm corresponds to the provision in the German Code of Civil Procedure [Zivilprozessordnung]. Sect. 14(1) of the [Norwegian] Arbitration Act requires arbitrators in Norway to inform the parties of all relationships ‘that might give rise to justifiable doubts’ as to their impartiality and independence. The circumstance that the assistant legal counsel acting for the claimant would join the law firm of the president of the arbitral tribunal in September 2007 may not give rise to justified doubts as to the president’s impartiality and independence. According to the undisputed information of the president of the arbitral tribunal, 160 attorneys work in his law firm, he works in a different department than the ex-assistant legal counsel and is a partner, while the new colleague has been hired. It is thus unlikely that the president of the arbitral tribunal would mold his legal opinion in the arbitration on the legal opinion that the new young colleague might have had on the subject matter of the arbitration when he was assistant legal counsel for the claimant.

[8] “The defendant relies on a decision of the Gulating Lagmannsrett [Court of Appeal] of 5 September 1997, which indeed found that an arbitrator was biased; it did so however on the basis of a different factual situation. The arbitrator was a partner in a law firm which, though through a different partner than the arbitrator, had been counsel for the defendant in the arbitration in a similar legal dispute four years earlier. There was therefore a business relationship between the law firm of the arbitrator and one of the parties to the arbitration. The Gulating Lagmannsrett correctly held that this circumstance was sufficient to give rise to a concern as to the bias of the arbitrator, since it cannot be excluded that an arbitrator has in mind the economic interest of his law firm, and thereby also the interest to keep a client, when he decides as arbitrator on a legal dispute involving precisely that client. The relationship however is not the same here. As we said, it is unlikely that a senior partner would let himself be influenced in his

3. Note General Editor. Although it was not mentioned in the decision, this article is contained in the Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce.
legal opinion by a possible difference of opinion with the legal opinion of a newly hired young colleague.

[9] “(5) Annulment of the arbitral award in the country of rendition. The defendant has sought annulment of the arbitral award in the state court in Trondheim; however, there has been no annulment yet and none is to be expected.

[10] “The decision on costs is based on the fact that the claimant was successful in its application, Sect. 91 ZPO. The provisional enforceability of this decision ensues from Sect. 1064(2) ZPO....”

4. Sect. 1064(2) ZPO reads:

“The order declaring the award enforceable shall be declared provisionally enforceable.”
122. Oberlandesgericht [Court of Appeal], Frankfurt am Main, 16 October 2008, 26 Sch 13/08

Parties: Claimant: Buyer (nationality not indicated)  
Defendant: Seller (Germany)

Published in: Available online at <www.dis-arb.de>

Articles: III; IV(1); V(1(e)); V(2)(b); VII(1)

Subject matters: – enforceability of award irrelevant in proceedings for declaration of enforceability (German law)  
– waiver of right to recourse against award by adopting International Chamber of Commerce (ICC) Rules  
– limited review of award to ascertain grounds for refusal  
– damages awarded contrary to expert report  
– equitable determination of damages by arbitrators  
– award of costs and arbitrators’ fees  
– costs apportionment ratio


Facts

By a contract of 6 July 2004, the buyer, a company of the D Group, bought shares in D Group AG from the German seller, who had been general manager of companies of the D Group until 2003. The contract provided for a non-competition clause for the German seller for a period of three years. It also contained a clause for ICC arbitration of disputes in Switzerland.

In June 2005, the buyer commenced ICC arbitration against the German seller, seeking damages for breach of the contractual obligation of non-competition and an order that the seller cease his competition activities. Arbitral
proceedings ensued in Zurich. On 7 May 2008, the arbitral tribunal found in favor of the buyer, directing the seller to pay damages for market disturbance, but dismissed the buyer’s request for a cease-and-desist order because the three-year time limit in the non-competition clause had expired. The award also provided that the claimant pay 43.8 percent of the costs of the arbitration and the defendant bear the remaining 56.2 percent, and specified the sum owed by the defendant to the claimant. The buyer sought enforcement of the ICC award in Germany.

The Frankfurt Court of Appeal granted enforcement. It first dismissed the seller’s argument that the award could not be granted a declaration of enforceability because it did not itself contain such declaration. The court reasoned that the only requirement for enforcement under the 1958 New York Convention is that the award is binding, that is, that it cannot be challenged before an appellate arbitral tribunal or in the state courts. This was the case here, since under the ICC Rules an award rendered in ICC arbitration is final and binding on the parties.

The court of appeal then dismissed the defendant’s argument that enforcement would violate German public policy because the tribunal found that the claimant was entitled to damages notwithstanding an expert report to the contrary and further determined those damages arbitrarily. The court held that this allegation, even if proven, would not amount to a violation of public policy, that is, a violation of the most basic principles of German substantive and procedural law. In fact, added the court, the tribunal’s decision was correct under the applicable Swiss law and was not contradictory or arbitrary.

The court of appeal also held that although in principle arbitrators may not determine their own fees, in ICC arbitration costs and fees are determined by the Court rather than by the arbitrators. Hence, the determination of costs in the award was valid. The court finally considered that the apportionment of costs made by the arbitrators was correct on the facts of the case.

Excerpt

[1] “The [claimant’s] request for a declaration of enforceability of the arbitral award of 8 October 2007 is admissible (Sect. 1025(4), Sect. 1061(1) first

1. Sect. 1025(4) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

“Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.”

Yearbook Comm. Arb’n XXXIV (2009)
2. Sect. 1061(1) ZPO reads:

"Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected."

3. Sect. 1064(1) and (3) ZPO reads:

"(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings. ....

(3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards."

4. Sect. 1062(1) no. 4 and (2) ZPO reads:

"(1) The Higher Regional Court (Oberlandesgericht) designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to ....

4. the setting aside (section 1059) or the declaration of enforceability of the award (section 1060 et seq.) or the setting aside of the declaration of enforceability (section 1061).

(2) If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (Oberlandesgericht) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammengericht) shall be competent."
according to the law applicable to it (Art. V(1)(e) Convention), [that is,] it cannot be challenged before an appellate arbitral tribunal or by appeal to a state court (see Zöller-Geimer, ZPO, 26th edn., Sect. 1061 no. 24).

[4] “This condition is complied with in the present case. Clause 13.11 of the sale contract contains an arbitration clause providing for the exclusive jurisdiction of an arbitral tribunal with seat in Zurich, deciding according to the Rules of Arbitration of the International Chamber of Commerce in Paris (ICC), over all disputes arising out of the contractual relationship. According to Art. 28(6) of the Rules of Arbitration of the ICC, every award rendered under these Rules shall be binding on the parties. By choosing these arbitration rules, the parties undertake to refrain from any form of recourse.

[5] “Nor does the recognition and enforcement of the arbitral award lead to a result that is at odds with (German) public policy (ordre public, Art. V(2)(b) Convention). According to these principles, recognition of a foreign arbitral award [in Germany] can only be refused (1) if the recognition concretely affects in the specific case the basic principles of German social and economic life, that is, if the result is so clearly at odds with the basic principles of the German legal system and the legal principles embodied therein, that it is to be deemed unacceptable (BGH, NJW 2002, 960, 961 – substantive public policy), or (2) if the decision is based on proceedings that deviate in such a manner from the basic principles of German procedural law that it cannot be deemed, in the German legal system, to have been rendered in regular and legally conducted proceedings (BayObLG, FamRZ 2002, 1637, 1639 – procedural public policy).

[6] “Incompatibility is evident when it is flagrant, unquestionable and so to speak obvious. The burden of raising this [defense] lies on the party resisting enforcement (BGHZ 134, 79, 91; BGH, NJW-RR 2002, 1151). There is no review of the merits [revision au fond], that is, the incorrectness of the arbitral award on the merits is not a ground for annulment; possible erroneous decisions of the arbitral tribunal must be accepted (see also OLG München, OLGR 2006, 906, 907).

[7] “A review of the objections raised by the defendant that is in line with the above standards does not justify a refusal of the declaration of enforceability being sought. The defendant finds fault essentially with the fact that the arbitral tribunal granted damages to the claimant against the opinion of an expert report submitted by [the defendant] and ultimately estimated their amount arbitrarily without giving comprehensible reasons. Hence, the [defendant]’s argument only concerns the erroneous application of the law by the arbitral tribunal, which cannot be reviewed by the state court. The defendant has not shown to what extent the – alleged – violation of substantive law led to a result that is so clearly
at odds with the basic principles of the German legal system and the legal principles embodied therein that it must be deemed unacceptable.

[8] “The arbitral tribunal granted [the claimant’s] claim for compensation of damages for violation of the contractually agreed prohibition of competition, while denying the claimant’s other claims; it then awarded a so-called damage for market disturbances and estimated its amount in accordance with Art. 42(2) of the Swiss Code of Obligations [Obligationenrecht]. According to this provision, when the exact amount of a damage cannot be determined, the judge can determine it equitably, taking into account the usual course of events and the measures taken by the damaged party. This manner of calculating damage is not unknown in German law, see Sect. 252 Civil Code (Bürgerliches Gesetzbuch – BGB) and Sect. 287 ZPO. No violation of German public policy can be found under these circumstances.

[9] “Further, the decision of the arbitral tribunal is not contradictory. The claimant correctly pointed out that the report obtained by the arbitral tribunal concerned only one aspect of the damages sought, namely whether the fact that an employee of the claimant went over to [a company held by the company of which the German seller was the majority holder] caused a damage. The arbitral tribunal denied that the claimant suffered a damage on that ground. If it then awarded further, different damages, this does not contradict the findings in the report. Nor was the tribunal prevented from finding damages against the outcome of the report. Furthermore, the arbitral tribunal specifically indicated the circumstances that it considered relevant for awarding damages for market disturbances and estimating their amount ... so that it cannot be said that the decision was arbitrary.

[10] “Finally, it is no obstacle to the declaration of enforceability that the arbitral award also awards the costs of the arbitral tribunal. It is true that in principle arbitrators, because of the prohibition on deciding on their own interests [in eigener Sache], may not determine their fees themselves, even indirectly by determining the value of the dispute or by an arbitral award on costs that quantifies costs, including the fees of the arbitrators. Such award cannot normally be declared enforceable. The situation is different however when the costs are determined beforehand, that is, when their amount is determined in the agreement with the arbitrators or in a later agreement with both parties (see Schwab/Walter, Schiedsgerichtsbarkeit, 7th edn., Chapter 33 no. 15; Zöller-Geimer, ZPO, 25th edn., Sect. 1057 nos. 4 and 5). This is the case here. According to the ICC Rules of Arbitration agreed upon by the parties, the value of the dispute, the fees of the arbitrators and further procedural costs are determined not by the members of the arbitral tribunal, but by the [International]
Court of Arbitration or its Secretary-General (Arts. 30 and 31 ICC Rules of Arbitration; Art. 1 and Art. 2 of Annex III to these Rules of Arbitration).

[11] “The defendant’s objections to the decision on costs, in particular the apportionment determined by the arbitral tribunal, are no obstacle to the declaration of enforceability. In this respect too the defendant only claims an – alleged – violation of procedural law without claiming at the same time a violation of public policy. The arbitral tribunal apportioned costs according to the proportional winning and losing of the parties in respect of the entire value of the dispute; this corresponds to the rule in Sect. 92(1) ZPO. Further, the apportionment of costs was not calculated incorrectly: the arbitral tribunal assumed that the claimant’s request for a cease-and-desist order (value: € 250,000) had been successful, because it found that the request was founded and only rejected it because of the expiry of the time limit [in the non-competition clause]. Taking into account that [the claimant prevailed] for a total of € 281,000 in a dispute concerning € 500,000, the apportionment made by the arbitral tribunal is correct.

[12] “Since no other grounds for annulment are relied on or appear to exist, the request for a declaration of enforceability of the arbitral award must be granted.

[13] “The decision on costs ensues from Sect. 91 ZPO; the determination of the value of the [dispute] is based on Sect. 3 ZPO.”
123. Oberlandesgericht [Court of Appeal], 26th Civil Chamber, Frankfurt am Main, 24 October 2008, 26 Sch 03/08

Parties: Claimant: T. GmbH (Ukraine)
Defendant: J.S., acting under the name S Consulting (Germany)

Published in: Available online at <www.dis-arb.de>

Articles: III; IV(1); V(1)(a); V(2)(b); VII(1)

Subject matter: – award of costs and arbitrators’s fees


Facts

By a contract of 21 February 2006, T. GmbH (the supplier) agreed to supply aluminum castings to S Consulting (the buyer). The contract provided for arbitration of disputes at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

A dispute arose between the parties when the German buyer failed to pay for certain supplies. The Ukrainian supplier commenced ICAC arbitration as provided for in the contract. On 1 June 2007, an ICAC arbitral tribunal rendered an award in favor of the Ukrainian supplier, which then sought enforcement of the award in Germany.

The Frankfurt Court of Appeal granted enforcement of the main part of the award, noting that it was based on a valid arbitration agreement in writing within the meaning of the 1958 New York Convention, that the claimant had complied with the conditions for requesting enforcement and that the defendant did not rely on any ground for refusal.

The court of appeal however denied enforcement in respect of the costs of the arbitration determined in the award. The court reasoned that arbitrators are prohibited in principle from determining their own costs and fees. An exception is made when costs and fees are determined before the arbitration in an
agreement between the parties and the arbitrators. The claimant had hinted but not argued that this was the case here.

Excerpt

[1] “The request for a declaration of enforceability of the arbitral award of 1 June 2007 is admissible (Sect. 1025(4), Sect. 1061(1) first sentence, Sect. 1064(1) first sentence ZPO, Art. VII(1) of the 1958 New York Convention, BGBl. 1961 II p. 121 ...). The competence of the court also ensues from Sect. 1025(4), Sect. 1062(1) no. 4 and (2), Sect. 16 ZPO: the last known domicile of the defendant was in Hesse.

1. Sect. 1025(4) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

"Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards."

2. Sect. 1061(1) ZPO reads:

"Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121 ...). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected."

3. Sect. 1064(1) ZPO reads:

"(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings."

4. Sect. 1062(1) no. 4 and (2) ZPO reads:

"(1) The Higher Regional Court (Oberlandesgericht) designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to ...

4. the setting aside (section 1059) or the declaration of enforceability of the award (section 1060 et seq.) or the setting aside of the declaration of enforceability (section 1061).

(2) If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (Oberlandesgericht) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammergericht) shall be competent."
“The request is also founded for the most part. The arbitral award cannot be refused recognition in [Germany]. The arbitral decision is sufficiently justified by [the existence of] an ‘agreement in writing’ within the meaning of Art. II(2) Convention (Art. III first sentence; Art. V(1)(a) Convention). The conditions of Art. IV(1) Convention are also complied with. The defendant has not relied on grounds for refusal in the sense of Art. V(1)-(2) Convention.

“The arbitral award however cannot be declared enforceable in respect of the costs of the arbitration determined therein. In principle arbitrators, because of the prohibition to decide on their own interests [in eigener Sache], may not determine their fees themselves, even indirectly by determining the value of the dispute or by an arbitral award on costs that quantifies costs including the fees of the arbitrators. Such award cannot normally be declared enforceable. The situation is only different when the costs are determined beforehand, that is, when their amount is determined in the agreement with the arbitrators or in a later agreement with both parties (see Schwab/Walter, Schiedsgerichtsbarkeit, 7th edn., Chapter 33 no. 15; Zöller-Geimer, ZPO, 26th edn., Sect. 1057 nos. 4 and 5). Notwithstanding a request to this aim, the claimant has not proved that these conditions were complied with here.

“The decision on costs ensues from Sect. 92(2) no. 1 ZPO. Accordingly, the defendant shall bear the entire cost of the proceedings, because the [part of the claimant’s claim that shall not be enforced] is of minor importance and has only caused a minor increase in costs...."
124. Oberlandesgericht [Court of Appeal], Hamm, 28 November 2008, 25 Sch 09/08

Parties: Claimant: Not indicated  
Defendant: Not indicated

Published in: Available online at <www.dis-arb.de>

Articles: III; IV; V(1)(b); V(1)(c); V(1)(e); V(2)(b)

Subject matters: – estoppel from raising 1958 New York Convention defense not raised in annulment action in country of origin  
– finality of award  
– due process and language of arbitration  
– issue of jurisdiction to be decided by interim award (no)  
– appearance of bias of arbitrator (no)  
– set-off


Facts

In 2000, the parties concluded a contract setting out the framework for their future business relationship. The framework contract provided for the application of Swiss law and the conclusion of separate supply contracts. The contract was amended in 2004; in 2006 a clause was added, providing for arbitration of disputes at the Swiss Chambers of Commerce in Zurich.

As contractually agreed, the parties concluded supply contracts under the framework contract. Each contract contained specific provisions in respect of
A dispute arose between the parties in respect of the framework contract and was referred to arbitration in Zurich. On 28 September 2007, an arbitral award was rendered and was later affirmed by the Swiss Federal Supreme Court. This arbitration had not yet concluded at the time of the present decision.

Disputes also arose between the parties in respect of four supply contracts, dated 2 April and 2 June 2004, and 25 March and 5 May 2005. The claimant commenced ICAC arbitration in Moscow. On 17 December 2007, an arbitral tribunal issued four awards in the claimant’s favor in respect of each of the supply contracts. The claimant sought enforcement of the awards in Germany.

The Hamm Court of Appeal granted enforcement by four separate decisions. As all decisions are identical but for the date of the supply contract at issue, only the decision in respect of the contract of 2 June 2004 is reported below.

The court reasoned at the outset that the defendant was likely precluded (präkludiert) from raising grounds for refusal under the 1958 New York Convention because it had failed to commence an action for annulment of the award in Russia. However, this issue could remain open because the defendant failed to prove any such grounds in the present enforcement proceedings. For the same reason, the court need not answer the question whether preclusion (Präklusion) can affect the grounds for refusal under Art. V(2) of the Convention, which are to be examined by the court on its own initiative.

The court dismissed all of the defendant’s defences under Art. V(1) Convention. It held that, contrary to the defendant’s opinion, the award was final and binding because under the ICAC Rules an award is final and binding on the parties from the moment of its rendition. Also, in the present case the time limit for seeking the award’s annulment had expired. Further, the Russian arbitral tribunal had jurisdiction over the dispute because, as the framework contract and the supply contract were separate and distinct, the clause for Swiss arbitration in the 2006 addition to the former did not affect the clause for ICAC arbitration in the latter. Finally, there had been no violation of due process in the arbitration, as argued by the defendant, because the defendant was unaware that Russian would be the language of the proceedings and because it had not been able to reply to a document that the claimant submitted only three days prior to the rendering of the award.
hearing. The court reasoned that Russian is the language used in ICAC arbitrations unless the parties agree otherwise, the defendant had the hearing postponed because of the language issue and eventually submitted its statement in Russian. As to the late submission, it appeared from the award that the arbitrators did not take that document into account for their decision.

The court then denied the public policy arguments raised by the defendant under Art. V(2) Convention. The court held first that contrary to the defendant’s opinion the arbitral tribunal could decide on the issue of jurisdiction in the award together with the merits and need not issue a separate interim award on jurisdiction. This is allowed under the ICAC rules and is an accepted procedure in German law.

Second, the defendant alleged that one of the arbitrators was biased because he spoke at a conference either financed or co-organized by counsel for the claimant. The court reasoned enforcement may not be denied on the public policy ground of bias when bias could have been relied on in the country of origin of the award before a state court essentially applying the same principles that apply to bias in German law. This was the case here. Also, the defendant did not prove that the alleged bias concretely affected the arbitral decision.

Third, the court dismissed the defendant’s argument that enforcement of the ICAC award would violate public policy because the arbitral tribunal failed to grant the defendant’s request for a set-off. The court noted that under the ICAC rules arbitrators are allowed to disregard such requests. Also, the claim on which the request was based arose under the framework contract and was still being heard in arbitration in Switzerland.

Excerpt

[1] “The request for declaration of enforceability of the … arbitral award must be granted pursuant to Sect. 1061(1) first sentence ZPO together with [the 1958 New York Convention] (BGBl. 1961 II, p. 121) and Sect. 1062 et seq. ZPO.

2. Sect. 1061(1) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) reads:

“Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.”
GERMANY NO. 124

3. Sect. 1062(2) ZPO reads:
"If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court (Oberlandesgericht) where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (Kammergericht) shall be competent."

4. Sect. 1064(1) ZPO reads:
"At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorized to represent the party in the judicial proceedings."


[2] "The Hamm Court of Appeal is competent under Sect. 1062(2) ZPO.¹
[3] "The formal conditions for a request [for enforcement] laid down in Sect. 1064(1) ⁴ and Sect. 1061(1) first sentence ZPO (together with Art. IV Convention) are complied with. The claimant supplied a certified copy of the arbitral award of 17 December 2007 together with a translation certified by a notary public and an apostille.
[5] "In respect of the grounds for refusal raised by the defendant under Art. V(1) Convention, there is in this court’s opinion good reason to believe that the defendant is precluded [präkladiert] because it did not avail itself of the possibility to commence an action for annulment in Russia, the country of origin of the arbitral award (for a finding of preclusion [Präklusion], see OLG Karlsruhe SchiedsVZ 2006, 281, 282 et seq.;³ Adolphsen in Münch-Komm-ZPO, 3rd edn. 2008, Sect. 1061 annex 1 Convention Art. V no. 12; Voit in Musicak, ZPO, 6th edn. 2008, Sect. 1061 no. 20). This point however can ultimately remain open, because the defendant has not proved any ground for refusal under Art. V(1) Convention (see below at [[7]-[13]])
[6] "It can remain open whether preclusion is also possible in respect of the grounds for refusal under Art. V(2) Convention, which are to be examined ex officio, because there are no such grounds (see below at [[14]-[22]])."
1. GROUNDS FOR REFUSAL UNDER ART. V(1)


[8] “The defendant has not proved that there is a ground for refusal under Art. V(1)(e) Convention. On the contrary, it ensues from Sect. 44(1) of the ICAC Rules⁶ that the arbitral award rendered on 17 December 2007 was final and binding from the day of its rendition. Moreover, the defendant did not impugn the foreign arbitral award in the country of origin. Independent of whether Art. 230 of the Arbitrazh Court Procedure Code of the Russian Federation … or Art. 34 of Law no. 5338-1 of 14 August 1993 [on International Commercial Arbitration] … applies, the time limit for [an annulment action] has expired in the meantime. In any case, the fact that other means of recourse, comparable to the request for annulment under Sect. 1059 ZPO, may still be available under the foreign law is no obstacle to finding that there is a binding arbitral award in the sense of Art. V(1)(e) Convention (BGH NJW 1988, 3090, 3091; NJW 2007, 772, 774).

[9] “Nor has the defendant proved the existence of a ground for refusal under Art. V(1)(c) Convention, because it has not proved that the ICAC lacked jurisdiction. On the contrary, the jurisdiction [of the ICAC] ensues from the fact that the supply contract of 2 April 2004, on which the claimant based its claim before the arbitral tribunal in Moscow, contained this passage: ‘All disputes and differences arising from the performance of this contract are subject to arbitration at the [ICAC] under its rules, to the exclusion of the ordinary courts.’ Furthermore, the parties agreed on Russian law. Moreover, the individual supply contract contains independent provisions on payment and date for payment.

[10] “This legal transaction must be distinguished from the exclusive contract concluded by the parties in 2000, which established the framework provisions for their cooperation and provided not only for the application of Swiss law ‘for this contract’ but also explicitly for the conclusion of separate supply contracts (which contained the arbitration clause for Moscow). The framework contract was modified in 2004; in 2006 the following addition was made: ‘Disputes … out of or in connection with this contract … shall be decided in arbitration pursuant to the International Arbitration Rules of the Swiss Chambers of Commerce…

⁶ Sect. 44(1) of the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation reads:

“An award made by the ICAC shall be final and binding from the date thereof.”
The seat of the arbitration shall be Zurich….’ It cannot be deduced from this clause that the agreements already made in the supply contracts were modified. This does not ensue in particular from the words ‘in connection with this contract’: ‘this contract’ was concluded, or more precisely added to, in 2006, the supply contract in 2004.

[11] “This court also refers to the convincing reasons given in the arbitral award, with which both the Moscow Arbitrazh Court and the Federal Arbitrazh Court for the Moscow District (in parallel proceedings) agreed, as well as the reasons in the arbitral award rendered on 28 September 2007 by the arbitral tribunal of the Zurich Chamber of Commerce, which was affirmed by the Swiss Federal Supreme Court.

[12] “The defendant has also not proved that there is a ground for refusal under Art. V(1)(b) Convention, since it does not appear that there was a violation of due process because of an uncertainty of the defendant in respect of the Russian language of the proceedings chosen by the arbitral tribunal. It clearly ensues from Sect. 23(1) ICAC Rules’ that lacking a separate agreement over the language, only Russian came into consideration as the language of the proceedings. Even if we assume that the defendant did not have to be aware of this [provision], it cannot be deemed that there is a violation of due process, since the date of the hearing was postponed at the request of the defendant on the ground of the language of the proceedings. Further, it is not apparent how the (alleged) procedural defect had an impact [on the arbitration]. The statement of the defendant was made in Russian and was taken into account by the arbitral tribunal.

[13] “Nor did the defendant prove that there was a violation of due process and therefore of Art. V(1)(b) Convention because the claimant submitted a document to the arbitral tribunal only three days before the oral hearing, to which the defendant could not reply. According to the arbitral award, the arbitral tribunal did not take that document into account. The defendant has not supplied proof of the contrary; it has not even proved that the document contained new factual arguments.”

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7. Art. 23(1) ICAC Rules reads:

“The arbitral proceedings in a case shall be conducted in the Russian language. By agreement between the parties, the ICAC may conduct the arbitral proceedings in a different language.”
II. PUBLIC POLICY


[15] “There is no violation of international public policy because the Russian arbitral tribunal did not issue an interim award on jurisdiction and decided directly on the merits. This is true even if such interim decision is possible under the arbitration rules of the arbitral tribunal (see Sect. 2(4) second sentence ICAC Rules). This manner of deciding on jurisdiction in the arbitral award together with the merits rather than in an interim award does not violate a codified international legal opinion nor is it unknown in German law (see BGH NJW 2007, 772, 775). Hence, no violation of international public policy can be found and enforcement cannot be denied on this ground.

[16] “Further, the involvement of arbitrator X constitutes no causal violation of (procedural) (international) public policy under Art. V(2)(b) Convention. The bias of an arbitrator can have an impact in the proceedings for the declaration of enforceability of a foreign arbitral award only when either the affected party can still request annulment of the arbitral award on that ground according to the applicable foreign law (see BGHZ 52, 184, 189) or recognition of the arbitral award would for that reason lead to a result that is evidently irreconcilable with basic principles of German law (BGH NJW-RR 2001, 1059, 1060). It cannot have an impact when the bias could have been relied on in the country of origin of the arbitral award before a state court essentially deciding according to the same principles that apply to bias in German law (BGH NJW-RR 2001, 1059, 1060). Only when this was not possible or was attempted without success, it can be examined whether recognition of the arbitral award would for that reason lead to a result that is irreconcilable with basic principles of German law.

[17] “Further, the violation of the principle of the impartial administration of arbitral justice constituted by the involvement of a biased arbitrator must have had a concrete impact; it must be proved that the biased arbitrator was prejudiced in respect of a party and let himself be influenced by this prejudice.

8. Sect. 2(4) ICAC Rules reads:

“The issue of ICAC jurisdiction in a particular case shall be decided by an arbitral tribunal examining the case. The arbitral tribunal may take a separate decision on the jurisdiction issue before the case is examined on its merits, or deal with this issue in an award on the merits of the dispute.”

in his decision (BGH NJW-RR 2001, 1059, 1060; BGHZ 98, 70, 75 on Art. V(2)(b) Convention). This is even more true if the declaration of enforceability of a foreign arbitral award is subject to the less strict regime of international public policy (see BGHZ 98, 70, 73 et seq. and 110, 104, 106 et seq.).

[18] “Accordingly, it can remain open whether the fact that arbitrator X gave a presentation at a conference that the claimant’s Russian lawyer in the [arbitration] financed, according to the defendant, or only gave organizational support to, as [the lawyer] replies, justifies the conclusion that arbitrator X was not sufficiently impartial.

[19] “Even if we assume that he was biased, it is not evident that the alleged violation of the principle of impartial administration of arbitral justice has had a concrete impact. It cannot be deemed that arbitrator X was prejudiced in respect of a party and let himself be influenced by this [prejudice] in his decision.

[20] “Finally, it can also remain open whether the defendant, as it argues, declared a set-off in the arbitration. Even if it is argued and deemed, contrary to what is said in the arbitral award, that the Russian arbitral tribunal did not take into account the set-off on inadmissible procedural grounds, because it held that [set-off] was not requested timely and that a necessary advance payment was not paid in due time, this is not a causal violation under Art. V(2)(b) Convention.

[21] “It can remain open whether this contradicts the arbitration rules of the Russian arbitral tribunal, since there is in no causal procedural violation. Pursuant to Sect. 13(1) ICAC Rules,10 the Russian arbitral tribunal could decide not to take into account the claims on which the set-off was based. These [claims] have their origin in the exclusive agreement of 2000 and 2004 (added to in 2006), so that they are subject to arbitration in Switzerland.

[22] “Since there is no causal violation, it can equally remain open whether the denial of set-off is merely a ground for refusal of recognition under Art. V(1)(b) Convention, [a ground] that needs to be proved [by the defendant] and is possibly

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10. Sect. 13(1) ICAC Rules reads:

“The respondent may, within the period of time specified in Sect. 12(2) of these Rules, make a counter-claim or a set-off, provided that there is an arbitration agreement covering such a claim or set-off long with the demands of the principal claim.

Where the arbitral proceedings are extended because of unjustified delay on the part of the respondent in submitting his counter-claim or set-off, the respondent may be required to cover the extra costs and expenses incurred by the other party due to the delay.

The arbitral tribunal may refuse permission for a counter-claim or set-off to be made because of the delay caused.”
precluded, or also a possible violation of due process constituting a violation of public policy that is to be ascertained ex officio under Art. V(2)(b) Convention.

[23] “In any case, the defendant cannot claim set-off in the present enforcement proceedings with alleged (and in no manner substantiated) counterclaims under the framework contract, because of the pending arbitration [in Switzerland] (on the admissibility in principle of set-off when the counterclaim is not the object of a pending arbitration, see BGH SchiedsVZ 2008, 40, 43). Until the oral hearing is concluded [in the Swiss arbitration], the counterclaim is still the object of a pending arbitration; the defendant does not argue, nor is there any indication in this sense, that the arbitration in Switzerland has ended and has been concluded with a final arbitral award concerning the claim [at issue] (see BGH NJW-RR 2008, 556, 557).”

III. COSTS AND PROVISIONAL ENFORCEABILITY

[24] “The decision on costs is based on Sect. 91 ZPO, the decision on provisional enforceability on Sect. 1064(2) ZPO,11 which is analogous to Sect. 711 ZPO.”

11. Sect. 1064(2) ZPO reads:

“The order declaring the award enforceable shall be declared provisionally enforceable.”

20. Efeteio [Court of Appeal], Athens, decision no. 7195 of 2007

Parties: Appellant: Company A (Greece)  
Appellee: Company B (Germany)

Published in: Nomiko Bhma [Law Tribune] 2008 p. 650

Articles: II(2)

Subject matter: – incorporation of arbitration clause by general reference to standard conditions

Commentary Cases: ¶ 209

Facts

In the spring of 2004, Company A (the buyer) and Company B (the seller) conducted negotiations in Greece for the sale and purchase of a textile loom. The buyer eventually placed a written order with the seller. The seller sent a written confirmation of order, which was signed by the representatives of both parties and contained a clause reading “For more details please refer to the enclosed General Terms of Delivery and Assembly.” The parties later also signed a contract containing the following end note: “End. (enclosed): General Terms of Delivery and Assembly C/G, VWA, V, K, KI, K6, KD, VW, TAW.” The seller’s General Terms contained a clause for international arbitration outside Greece.
A dispute arose between the parties when it appeared that the loom was inappropriate for the specific use intended, despite the seller’s assurances that it met all the agreed criteria and was suitable for that specific use. The buyer commenced proceedings before a court of first instance in Greece, seeking damages for the seller’s breach of its contractual obligations. The seller raised the objection of lack of jurisdiction based on the arbitration clause in its General Terms. The court granted the seller’s objection and referred the dispute to international arbitration.

On appeal, the Athens Court of Appeal affirmed the lower court’s decision. It held that the arbitration clause in the seller’s General Terms of Delivery and Assembly had been validly incorporated into the written confirmation of order by general reference and was an agreement in writing as provided for in the 1958 New York Convention. The court reasoned that good faith and trade usages allow an arbitration clause to be validly concluded by reference in the international contract signed by the parties to a separate document containing the clause, even if that document is unknown to one of them.

Excerpt

[1] “The 1958 New York Convention, which was ratified by Greece by Legislative Decree no. 4220 of 1961, provides in its Art. II…. [Quotation of Art II omitted.]

[2] “The arbitration clause, which is contained in a separate document – to which the contracting parties make a general reference – is valid, since there is a presumption that the contracting parties are aware of and accept all the clauses in that [separate] document, which are referred to for the sake of brevity. It is not necessary that the arbitration clause be explicitly and specifically mentioned, when arbitration is an usual and familiar way of resolving disputes in the trade sector at issue and the contracting parties have expressed no reservation thereto.

[3] “The written agreement does not need to be executed separately, but can also be a part – a term or a clause – of a separate document regulating the relations between the parties. When the document signed by the parties and embodying their international transaction refers to a separate document with which one of the parties is not familiar, it is reasonable to assume, based on the principles of good faith and on trade usages, that an arbitration clause may be included in that [second] document with respect to the settlement of the disputes arising out of that specific contract and that in this way the prerequisite of the written form is satisfied.
GREECE NO. 20

[2] Art. 264 (1) of the Greek Code of Civil Procedure reads: "If the dispute falls within the scope of an arbitration agreement, the court refers the case to arbitration; however, the effects of the filing of the lawsuit are maintained. If the arbitration agreement expires, the case is brought back to court by writ of summons."
HONG KONG

Accession: 24 September 1975*
1st Reservation

Court of Appeal, 22 May 2009, Civil Appeal Nos. 106 and 197 of 2008

Parties:
Applicant: Not indicated (PR China)
Respondents: (1) Eton Properties Limited (Hong Kong SAR);
(2) Eton Properties (Holdings) Limited (Hong Kong SAR)

Published in: Available online at <www.hklii.org>

Articles: I(1); III; V; V(2)(a); V(2)(b)

Subject matters:
– enforcement of award ordering specific performance
– partial enforcement of award
– review of merits of award (no)
– public policy and impossibility of specific performance
– public policy and mutual fulfillment of obligations
– remittal to arbitrators at enforcement stage (no)

Commentary Cases: 
[2]-[7] + [26]-[36] = ¶ 110 + ¶ 301; [8]-[24] + [37]-[64] + [74]-[85] = ¶ 502 + ¶ 524 (impossibility of specific performance); [65]-[66] = ¶ 524 (mutual fulfillment of obligations); [68]-[69] = ¶ 519; [77]-[78] = ¶ 301

* Accession by PR China on 22 January 1987 and extended to Hong Kong with the 1st Reservation, to replace the previous extension by the United Kingdom.
Facts

Eton Properties Limited (EPL) and its parent company Eton Properties (Holdings) Limited (EPHL) (collectively, the Respondents) were the sole shareholders of Legend Properties (Hong Kong) Company Ltd. (Hong Kong Legend), a Hong Kong company, each holding one share. Hong Kong Legend in turn wholly owned Legend Properties (Xiamen) Company Ltd. (Xiamen Legend), a Mainland China company that owned land in Xiamen (the Property). EPL and EPHL were both companies of the Eton Group, ultimately controlled by Eton Properties Group Ltd (EPGL).

By an Agreement of 4 July 2003, the Applicant, a PR China company, agreed to pay the Respondents the sum of RMB 120 million to obtain the right to develop the Property and to receive its profits. Upon receipt of the RMB 120 million, the Respondents would transfer their shareholding in Hong Kong Legend to the Applicant for the nominal amount of HK$ 2. The July 2003 Agreement contained a clause for arbitration of disputes by an arbitral tribunal of the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing.

The Applicant paid the initial deposit of RMB 5 million. The Respondents however never delivered the Property. On 14 November 2003, they returned the initial deposit and notified the Applicant that they would not go through with the Agreement because – they claimed – its performance would be contrary to PR China law. The Applicant did not accept the Respondent’s termination notice and remitted the returned deposit back to Xiamen Legend’s bank account; the Respondents then caused the deposit to be held by a Notary.

On 8 August 2005, the Applicant commenced CIETAC arbitration proceedings in Beijing, seeking specific performance of the Agreement. The Respondents argued in opposition that, inter alia, the Agreement was essentially a disguised transfer of land contrary to PR China law and in any event performance of the Agreement had become impossible as a result of the commencement of construction work on the Property. On 27 October 2006, a CIETAC arbitral tribunal issued an award in favor of the Applicant, directing the Respondents to “continue to perform the Agreement” and to pay interest on the initial deposit.

In the meantime, the Eton Group had executed a corporate restructuring. On 16 November 2005, Hong Kong Legend issued 9,998 new shares to EPGL; on 6 April 2006, EPL transferred its one share in Hong Kong Legend to EPGL, and EPHL executed a declaration of trust to the effect that it held its one share in Hong Kong Legend on trust for EPGL.
On 30 March 2007, the Applicant sought to enforce the CIETAC award before the Intermediate People’s Court of Xiamen. On 30 July 2007, the Xiamen court dismissed the proceedings on the basis that the Respondents and their assets were not within Xiamen. In turn, on 16 April 2007, the Respondents applied to the Second Intermediate People’s Court in Beijing to set aside the award. On 19 June 2007, they withdrew their application.

By the present proceedings, the Applicant sought to enforce the CIETAC award in Hong Kong SAR. On 31 October 2007, the High Court, per Andrew Cheung, J, granted an ex parte enforcement order. The Respondents applied to set aside that order, claiming that they had already complied with the monetary part of the award and that enforcement of the non-monetary part would be contrary to public policy because specific performance had become impossible.

By the first decision reported below, the Court of First Instance, per Reyes, J, dismissed the application. The court noted at the outset that, contrary to the Respondents’ opinion, a court may order partial enforcement of an award. It then dismissed the Respondents’ argument that enforcement would violate the public policy of Hong Kong because specific performance under the award had become impossible. It noted that, first, where (specific) performance is impossible, the court may tailor equitable remedies to the exigencies of the situation. Second, in the present case the Applicant might actually be in the position to obtain the Hong Kong Legend shares, because the execution of the Agreement and the payment of the initial deposit had given rise to an equitable interest in the shares in favor of the Applicant and, as a consequence, to a minimal fiduciary duty of the Respondents not to undermine that interest. In allowing the creation of new shares and in transferring their shares to EPGL, the Respondents violated their fiduciary duty. Hence, the Applicant may at least arguably require the Respondents to recover the shares from EPGL and transfer them to the Applicant upon payment of the total consideration stipulated in the Agreement. This is the first decision reported below.

The Respondents appealed. On 18 August 2008, they also commenced a second CIETAC arbitration, seeking further determination on the basis that the Agreement could no longer be performed by the parties and a ruling that the parties be discharged from their obligations under the Agreement. On 9 October 2008, the Respondents sought a stay of the appellate proceedings pending the second CIETAC arbitration. This application was dismissed on 20 October 2008.

By the second decision reported below, the Court of Appeal, before Rogers, VP, Le Pichon and Hartmann, JJA, in an opinion by Doreen Le Pichon, dismissed the Respondents’ appeal. The court reasoned that the Respondents “sought to conflate the execution stage and the registration stage of an award”.

At the registration stage, the court may only grant or deny enforcement and its role, as also noted by the lower court, should be as “mechanistic as possible”. Here, the Respondents argued that enforcement should be denied because performance of the award had become impossible: it was impossible to deliver the land and, because of the restructuring, the shares could no longer be transferred. The court held that since the conversion of an award into a judgment of the court (the registration) does not involve going into the merits, “it is difficult to see how impossibility of performance is relevant at the registration stage”. The court agreed with the lower court that in fact performance could still be possible, and noted that the restructuring of the Eton Group was not a valid reason for the alleged impossibility “since the impossibility (if any) is self-inflicted”. This is the second decision reported below.

Excerpt

Court of First Instance, 24 June 2008

[1] The court quoted the following passages from the CIETAC award:

“‘The subject matter of the Agreement is the contractual right to buy and sell the shares in Hong Kong Legend that has an indirect effective control over the [land]. The amount of RMB 120 million is the consideration for the Applicant to obtain the contractual right to acquire all shares in Hong Kong Legend for HK$ 2, and also the consideration for the [appellants] to obtain the contractual right to sell all the shares in Hong Kong Legend for HK$ 2.

(....)

the true intent of the parties is to progressively transfer the right to develop, operate and make earnings from the [land] and, after all the terms and conditions provided in the Agreement are met, to sign the legal instrument on transfer of shares in the target company and to handle the specific procedures. In other words, the main rights and obligations of the parties in the Agreement in this case do not involve how to transfer the shares in Hong Kong Legend in detail but involve how to perform certain specific obligations to cause the said transfer of shares to be effected ultimately.’
The tribunal rejected the appellants’ argument of impossibility of performance, stating:

‘The Arbitral Tribunal considers that an agreement shall be binding upon the parties thereto once the agreement is executed. Even though any change in circumstances makes it difficult to perform the agreement during its performance, the parties shall exert reasonable efforts in good faith to perform the Agreement completely and fully other than purely emphasize external causes. In this case, as stated by the [appellants], the Agreement is a framework agreement, whose performance may be difficult due to various uncertainties. This needs close cooperation between the parties and reasonable efforts to seek alternative approaches to meet the purpose of the Agreement. The [appellants’] allegations cannot constitute justifiable reasons for impossibility to perform the Agreement and discontinuing performance of the Agreement without consent of the Applicant.’”

1. PRELIMINARY OBSERVATIONS

[2] “I will make a few preliminary observations about the nature of the present proceedings, focusing in particular on the Court’s role. These proceedings concern the enforcement of a Mainland Arbitration Award. I shall focus my attention on the provisions in the AO [Arbitration Ordinance] which specifically apply to such awards. But I appreciate that my remarks should be generally applicable (possibly with some minor modification) to the enforcement of most arbitration awards.

[3] “AO Sect. 40B(1) provides that a Mainland Award ‘shall, subject to this Part, be enforceable in Hong Kong either by action in the Court or in the same manner as the award of an arbitrator is enforceable by virtue of Sect. 2GG’. Mr. Benjamin Yu SC (appearing for the Respondents) draws a distinction between what he describes as the ‘summary process of enforcement’ allowed by AO

1. “AO Sect. 2GG provides as follows:

'(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.

(2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.”
HONG KONG NO. 21

Sects. 40B(1) and 2GG and the enforcement of an award by action under Sect. 40B(1). Where the summary process is involved, Mr. Yu (referring to AO Sect. 2AA(2)(b))\(^2\) says that the Court may only enter judgment in terms of the award. The summary process is starkly described by Mr. Yu as being in consequence ‘all or nothing’. I can (Mr. Yu contends) summarily order that all of an award be enforceable as a judgment of this Court. But (Mr. Yu stresses) I cannot order that only some of the award be so enforceable.

[4] "Mr. Yu supports this characterisation of the Court’s jurisdiction in relation to the ‘summary enforcement’ of an award with a variety of citations. Mr. Yu first draws my attention to Walker v. Rowe [1999] 2 All ER (Comm) 961. There Aikens J held that the Court had no jurisdiction under the Supreme Court Act 1981 to order post-award interest on a sum determined by an arbitral tribunal. This would apparently be the case even where the award had been converted into a judgment of the Court. Thus, if a party failed to ask the arbitral tribunal for post-award interest or the tribunal had omitted to award the same, the Court could not interfere by awarding interest once the award had been made enforceable as a judgment of the Court.

[5] "Mr. Yu further cites Norsk Hydro ASA v. State Property Fund of Ukraine [2002] EWHC 2120 (Comm).\(^3\) There the arbitral tribunal had made an award against The Republic of Ukraine, through the State Property Fund of Ukraine, a single respondent. Morison J ordered ex parte that the award be made an order of the Court. But Morison J’s order purported to enforce the award against The Republic of Ukraine and The State Property Fund of Ukraine, two separate respondents. Gross J, in accepting that Morison J’s order could not stand, said this:

‘17. Section 100 and following of the Arbitration Act 1996 (the 1996 Act) provide for the recognition and enforcement of the New York Convention Awards. There is an important policy interest, reflected in the country’s

\(^2\) "AO Sect. 2AA provides:

'(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.

(2) This Ordinance is based on the principles that:

(a) subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved; and,

(b) the Court should interfere in the arbitration of a dispute only as expressly provided in the Ordinance.’”

\(^3\) Reported in Yearbook XXVIII (2003) pp. 885-895 (UK no. 64).
treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as ‘mechanistic’ as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (Sects. 102-103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that Issue (I) falls to be considered.

18. Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt, true “slips” and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions, is sought in terms other than those of the award. Still further, though I do not rest my decision on it, such an approach raises the spectre of unintended consequences should a false step be taken – for example, English domestic law rules as to election and the enforcement of judgments against principal and agents would need to be considered.… In my judgment, this is all inappropriate territory for the enforcing court. The right approach is to seek enforcement of an award in the terms of that award.’

[6] “Finally, Mr. Yu refers me to a dictum of Beatson J in Gater Assets Ltd. v. Nak Naftogaz Ukrainiy [2008] EWHC 1108 (Comm). There Beatson J refused to follow Aikens J in Walker at least as far as New York Convention awards were concerned. With Convention awards, Beatson J thought that the Court could order interest to be made once the award had been made a judgment of the Court. Beatson J’s dictum states:

‘20. Mr. Higham’s submissions rely on three assumptions. The first is that the need in Sects. 66(2) and 101(3) for the judgment to be entered “in terms of the award” means that, where the arbitrators did not award
interest, to do so would amount to an alteration by the court of the arbitrator’s award. The second is that the change as to the interest position in domestic arbitrations effected by Sect. 49 of the 1996 Act affected New York Convention awards. The third is that the fact that judgment is entered in the terms of the award does not change the position.

(....)

23. With regard to the third assumption, an award may either be enforced “in the same manner as a judgment” (see Sects. 66(1) and 101(2) of the 1996 Act) or “judgment may be entered in terms of the award” (Sects. 66(2) and 101(3)). The leave of the court to enforce “in the same manner as a judgment” is a prerequisite of the power to enter judgment in the terms of the award, but the two are separate. The essential difference is that the obligation to honour an award arises by virtue of the agreement of the parties, whereas in the case of a judgment it follows from the power of the court. This difference is reflected in the approach of Aikens J in two cases. He proceeded on the basis that the entering of a judgment changes the position. Walker v. Rowe ... at [13]-[14], relied on by Mr. Higham, in fact concerned the post award but pre-judgment phase and it appears (see [14]) that Aikens J considered that the position would be different once judgment was entered. In Pirtek v. Deanswood [2005] 2 Lloyds R 728 his Lordship stated (at [47]) that the difficulty that arose in that case, where the award had not included interest and the arbitrator sought to do so by a retrospective order, “could have been avoided by a much earlier application to make the award a judgment. Judgment Act interest would then have run on the sum awarded.”

[7] “In my view, Mr. Yu’s ‘all or nothing’ position is too extreme. I do not think that it is supported by the dicta cited by him. In this respect, I would make four observations.”

1. Mechanistic Principle

[8] “First, no one would deny that a Court must guard against deciding disputes which the parties have agreed ought to be determined by an arbitrator. The Court’s role is essentially that of an overseer. This ‘overseeing’ essentially consists in ensuring that an arbitration is conducted fairly and in lending the means at the Court’s disposal (for example, interlocutory injunctions, orders for security for costs, orders for the enforcement of an award as a Court judgment) to make an award effective. To that extent, I would wholly accept Gross J’s
observation that the Court should not second-guess an arbitration award. Its role should be, although by no means entirely 'mechanistic', as 'mechanistic as possible'.

[9] “By way of footnote, I stress that in endorsing what might be called the 'mechanistic principle', I should not be taken to be accepting the correctness of the particular results in either Walker or Gater. It will be noticed that, on the specific question of post-judgment interest, the latter two cases are somewhat at odds with each other. The extent to which a Hong Kong Court will follow one or either or (possibly) neither on the question of interest is something which must be left to the future.”

2. Real Nature of Impossibility Objection

[10] “Second, in reality, it is the Respondents who are inviting me to approach the matter otherwise than ‘mechanistically’. On the face of the award, there is (as Ms. Teresa Cheng SC points out) nothing objectionable. Hong Kong Courts routinely order that a party ‘shall continue to perform an agreement’. It is the Respondents who are asking me to consider the circumstances of this case in detail; to divine (‘second-guess’) what the arbitrators meant or did not mean by their Award; and to hold that for whatever reason that Award is now impossible so that enforcement by this Court would be repugnant to public policy.

[11] “The Respondents are essentially seeking to go behind the Award and re-argue matters which were either argued before the arbitrators or (if not) ought to have been argued before them. The Court must be vigilant against such attempts to go behind an award, in the guise of dealing with questions of public policy.

[12] “I would go further. Take the argument of impossibility with which this case is concerned. Unless an award is plainly incapable of performance such that it would be obviously oppressive to order a party to comply with it, the Court cannot consistently with the ‘mechanistic principle’ hold that the award is contrary to public policy and refuse to convert the award into a judgment of the Court. This is because otherwise the Court would have to go behind the award. The Respondents would in effect be allowed to re-open that which the arbitrators had decided. The Court would be doing that which it ought not to do, namely, encroach upon the jurisdiction of an arbitration tribunal.”

[13] “Consider more closely the question of a public policy objection to enforcement of a foreign award. In Hebei Import & Export Corp. v. Polytek
Engineering Co. Ltd. [1999] 1 HKLRD 665 (CFA), Bokhary PJ emphasised (at 674) that:

‘there must be compelling reasons before enforcement of a convention award can be refused on public policy grounds. That is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgment or award.’

Although the dictum specifically refers to awards to which the New York Convention applies, similar considerations must apply to any foreign arbitration award.

[14] “The rationale for the Court’s stringent approach is that, as a matter of comity, the Courts must lean in favour of recognising foreign arbitral awards. The parties having agreed to submit to arbitration and having actually gone through an arbitration process, it would be wrong and unjust in principle if a successful party were denied the Court’s assistance in enforcing an award otherwise than for ‘compelling reason’. As Litton PJ observed in Hebei Import (at 670G), it is itself a matter of public policy that:

‘the courts should recognise the validity of decisions of foreign arbitral tribunals … and give effect to them, unless to do so would violate the most basic notions of morality and justice. It would take a very strong case before such a conclusion can be properly reached, when the facts giving rise to the allegation have been made the subject of challenge in proceedings in the supervisory jurisdiction and such challenge has failed.’

[15] “The Court, therefore, has to scrutinise each particular case to see the extent to which (if at all) domestic public policy truly militates against (and is outraged by) the enforcement of a foreign arbitral award.

[16] “The life of the law and lawyers is argument. Where the best that can be said is that an award is ‘arguably’ (as opposed to plainly) impossible, I do not think that ‘compelling reason’ to which Bokhary PJ refers can have been made out.”

3. **Role of Court of Seat of Arbitration**

[17] “Third, this does not mean the Respondents are without remedy where they genuinely feel that the Award is now rendered impossible or somehow invalid. I referred the parties to the recent decisions of the English Court in *A v. B* [2007] 1 Lloyds Rep 237 (Colman J) and *C v. D* [2008] 1 Lloyds Rep 239 (CA). Those cases are authority for the following principle (see Colman J at para. 111 and the CA at para. 17):

‘[A]n agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator’s jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as to the seat of the arbitration.’

[18] “The consequence of such principle is that, if the Respondents genuinely believed that there was something impossible or somehow invalid about the award, it is incumbent upon them to challenge the award in the court of the seat of arbitration. In this case, it is the Beijing Court (not the Hong Kong Court) which by the parties’ agreement impliedly has exclusive jurisdiction and in the ordinary course of events the parties should be held to such an agreement.

[19] “Save in the plain and obvious case where an award is so incapable of performance so that to make it an order of the Court would offend against a sense of justice, I do not see why this Court (which by the parties’ own agreement does not have jurisdiction over the substance of the dispute) should concern itself about whether it is arguable or not arguable that a contract is wholly or partly incapable of performance. That would seem to me to usurp not just the arbitrators’ jurisdiction, but also the exclusive jurisdiction of the court of the arbitration seat. If something is arguably impossible about the Award here, it is to the Beijing Court as supervisory court (or perhaps a CIETAC Beijing arbitration tribunal) that the argument should properly be advanced.

[20] “When I expressed the foregoing worry to Mr. Yu in the course of oral submissions, Mr. Yu referred to a dictum of Mason NPJ in *Hebei Import*. That states (at 136J-137C):

‘It follows also that a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from

resisting on that ground the enforcement of the award in the enforcing court in another jurisdiction. That is because each jurisdiction has its own public policy.

What I have said does not exclude the possibility that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. Failure to raise such a point may amount to an estoppel or a want of bona fides such as to ... justify the court of enforcement in enforcing an award (see Chrome Resources SA v. Léopold Lazarus (Yearbook Commercial Arbitration XI (1986) 538-542 (Switzerland no. 10)]. Obviously an injustice may arise if an award remains on foot but cannot be enforced on a ground which, if taken, would have resulted in the award being set aside.’

[21] “My worry (Mr. Yu submitted) was inconsistent with Mason NPJ’s view that it was unnecessary to raise a public policy ground in the arbitration home forum. A party may bide his time and raise the point for the first time in Hong Kong. This is because (Mr. Yu notes) what is involved are notions of Hong Kong domestic public policy. A foreign arbitration tribunal or a foreign court would not be able to pronounce meaningfully on Hong Kong domestic policy concerns. Thus, Mr. Yu reasoned, assuming impossibility was simply ‘arguable’ at this stage, I must nonetheless take a view whether performance of the Award is or is not impossible and then on the basis of that view decide whether it would be contrary to Hong Kong policy to enforce the Award. Assume (Mr. Yu posited) the Respondents went to Beijing with their impossibility argument and Beijing decided against them. That would still not preclude me (Mr. Yu submitted) from coming to a different view and as a matter of Hong Kong public policy from refusing to enforce the Award.

[22] “I do not accept Mr. Yu’s reasoning. I see nothing inconsistent between Mason NPJ’s dictum and my previous comment about role of the Beijing Court. It cannot be contrary to public policy for the court of enforcement to enforce an award where the alleged impossibility is not plain and obvious but only arguable (perhaps even strongly arguable). In such circumstances, it cannot be for the court of enforcement to second-guess how the arbitration tribunal or the court of supervision (here the Beijing Court) might assess the relevant facts and law in determining whether the alleged impossibility is substantive or fanciful. For me to second-guess, would mean abandoning the mechanistic principle, going behind the award and exceeding the jurisdiction of the court of enforcement.
[23] “Mr. Yu suggests in effect that, because I have to decide whether Hong Kong public policy is affronted by the ordering of the impossible, I can ignore the Beijing Court’s conclusion on impossibility of performance. I should (Mr. Yu says) come to my own view on the facts and circumstances said arguably to constitute impossibility. But that conclusion does not follow from the premises. This is because the parties have agreed that a particular Court is to have the carriage of deciding substantive questions of fact or law arising out of the relevant contract. I should certainly defer to the parties’ express wishes. For reasons of comity, I am not entitled to pre-suppose that the foreign Court will get it wrong such that I can ignore its assessment of circumstances and substitute my own summary determination. As a matter of principle, I should not simply pay lip-service to the supervisory role or jurisdiction of the Court of the seat of arbitration.

[24] “Indeed, it seems from the second paragraph of Mason NPJ’s dictum cited above that he contemplated the court of enforcement enforcing an award even if there may be injustice in the sense that a point, if taken in the arbitration or before the court of supervision, might have led to the award being set aside.

[25] “By way of footnote to this observation, I note Mr. Yu’s suggestion that the Respondents attempted to set aside the Award by arguing against enforcement in Xiamen (as opposed to Beijing). In my view, the arbitration being expressly a CIETAC Beijing arbitration, the court of the seat of arbitration must have been the Beijing (not Xiamen) Court. In any event, the Respondents sought in Xiamen to resist enforcement of the Award against the Property. They were not seeking (and certainly did not) set aside the Award.”

4. Enforcement of Part of the Award: “All or Nothing”

[26] “Fourth, I am unable with respect to understand the point of the distinction drawn by Beatson J between ‘enforcing an award in the same manner as a judgment’ and ‘entering judgment on an award’. Both in effect need leave of the Court.

[27] “As far as Hong Kong is concerned, for example, an application under AO Sect. 2GG requires leave. Where in contrast it is sought to enforce an award through proceedings by writ, the leave of the Court will be required in the sense that the Court must decide whether or not to give judgment. In such case, the Court will not necessarily function as a rubber stamp.

[28] “An application under Sect. 2GG is heard summarily. An application to enforce an award through proceedings by writ may, of course, in the same manner as any other action involve a trial. But typically the person in whose
favour the award has been made will seek summary judgment. This is because there will usually be no defence. The parties having agreed to abide by the award as a result of their agreement to go to arbitration, it is difficult to see what reason a losing party can have for refusing to perform an award adverse to him. Thus, in practice, I do not think that the mere fact that Sect. 2GG applications are usually heard summarily and writs actions to enforce an award may on a rare occasion give rise to a trial can be any real distinction between the two types of proceeding.

29. “I do not therefore read Beatson J as drawing such a distinction of summary and non-summary procedure as Mr. Yu suggests, because it does not seem to me a sensible distinction to make. Nor do I fully understand what Beatson J means by distinguishing between the process of obtaining leave and entering judgment on an award. The processes are self-evidently distinct. But I am unsure how the distinction leads to any particular conclusion about the Court’s approach in a given situation.

30. “Thus, I do not accept Mr. Yu’s distinction between the invocation of a summary process under AO Sect. 2GG and the enforcement of an award by writ action. I do not understand why the Court’s general approach towards either means of enforcement should be radically different. To posit differences in general approach would be to allow technicality as to the form of an application to get in the way of the Court’s consideration.

31. “More pertinently, I see nothing in the authorities cited by Mr. Yu that justifies an ‘all or nothing approach’ where it is sought to convert an award into a judgment of the Court. The mechanistic principle does not logically have the consequence that I should not allow an award in any circumstances to be enforced in part.

32. “Let me give a simple example. AO Sect. 40C(2) provides that, where a Mainland award has not been fully satisfied by way of enforcement in the Mainland, then ‘to the extent that the award has not been so satisfied, the award may be enforceable under this Part [of the AO]’. I read this to mean that I have a discretion whether to allow an award to be enforced in whole or in part.

33. “Take another situation. Suppose an award requires a respondent to do X and Y. It seems to me that an applicant should be able to waive performance of X and ask this Court only to order that Y be enforced as a judgment.

34. “As far as I see, nothing in the AO ties the Court’s hand as to enforcing only part of an award where appropriate. Nor do I think that partial enforcement necessarily requires the Court to look behind an award. Obviously, if (say) a respondent argues that an applicant’s award should only be partially enforced for some reason or other, the Court may have to decide whether or not the reason
advanced requires the Court to look behind the award in a way that is not permissible. But that is far cry from saying that in every single case the Court can only order the whole or nothing of an award to be enforceable as a judgment of the Court.

[35] “The Court has a degree of flexibility in the deployment of the means of enforcement available to it. I do not see why this flexibility should be constrained by the form (for example, an application under AO Sect. 2GG) by which enforcement is sought.

[36] “Let me now approach the issues in this case within the context of my preliminary observations.”

II. PUBLIC POLICY: IMPOSSIBILITY OF SPECIFIC PERFORMANCE

[37] “Since around 2003 Xiamen Legend has developed the Property. Some 99% of the residential units built by Xiamen Legend on the Property have now been sold. Accordingly, Mr. Yu says that it is no longer possible for the Respondents (or indeed Xiamen Legend) to deliver possession of the Property to the Applicant as stipulated in the Agreement. Further, Mr. Yu notes the change in share ownership of Hong Kong Legend. There are no longer two Hong Kong Legend shares held by the Respondents. There are 10,000 shares of which EPHL holds one in trust for EPGL and EPGL holds the remainder. In those premises, it would be wrong (Mr. Yu argues) for the Court to order specific performance of the impossible. It would be ‘fundamentally offensive’ to common law notions of justice and contrary to public policy for the Court to direct a person to engage in such activity. That person would simply face being charged with contempt and imprisoned for failing to do that which cannot be done.

[38] “Mr. Yu stresses that it does not matter if the impossibility was induced by a person’s own breach. For this, he cites Spry on Equitable Remedies (7th ed.) (at pp.131-132):

‘It has sometimes been suggested that a defendant will not be permitted to rely upon impossibility of performance, as providing a defence to proceedings for specific performance, wherever that impossibility has been brought upon by his own breach of contract or wrong. These suggestions are not, however, sound. For if an act cannot be performed the defendant will not be required to do what cannot be done, even though it is through his own acts or omissions that the obstacle in question has arisen. So it was
said by Kindersley VC in a case where after entry into a contract the rights of the plaintiff had been restricted by the operation of an award,

“Assuming the defendants to be entirely in the wrong, doing everything in contravention of the agreement, still, when the court is asked to restrain them from acting under the award, it is impossible for me to do so, since the defendants have not the power of doing that which it is said they ought to do. Put the extreme case of a vendor burning a title-deed: the court could not make a decree that he should deliver it up, and be imprisoned if he does not.”

In circumstances of this kind the plaintiff is commonly found to have acquired a remedy in damages, and, moreover, it may even be, on the principle have been discussed, that he is entitled to specific performance of the material contract save the obligation that cannot be performed. Further, in circumstances where a vendor is shown to be unable to convey the precise interest in land that he has agreed to convey, specific performance may nonetheless be ordered, subject to the payment of compensation.’

[39] “I am not persuaded by Mr. Yu’s argument. First, where performance of a contract is obviously wholly impossible, the Court may perhaps not order specific performance, no matter who has brought about the impossibility. That is because there would likely be no point to such an order. But equitable remedies are flexible and can be tailored to the exigencies of a given situation. As the passage from Spry just quoted recognises, where performance of some (but not all) obligations is possible, the Court can grant specific performance (possibly subject to compensation or abatement).

[40] “Such flexibility in the Court’s equitable jurisdiction is supported by Goodhart and Jones, Specific Performance (2nd ed.) (at pp. 60-61):

‘Finally, there are some cases which do not fit clearly into any of the recognised exceptions to the general principle that contracts will not be enforced in part. These cases may be taken as authority for the proposition that the general principle, if it exists, will not be applied where it would lead to injustice. For example, in Peacock v. Penson [(1848) 11 Beav 355] a vendor had undertaken in the contract for the sale of a plot of land to construct a new road (which was not of much benefit to the plot) over adjacent leasehold land retained by him, and it was then discovered that he
could not do so without incurring a forfeiture for breach of a covenant in
the lease. Lord Langdale MR refused to order the vendor to make the road
but ordered specific performance of the rest of the contract with
compensation for the non-construction of the road. In Soames v. Edge
[(1860) John 669] the defendant had agreed to demolish a building, erect
a new one in its place and take a lease of the new buildings. Upon his
failure to rebuild, he was ordered to take a lease of the site and pay
damages under Lord Cairns’ Act for non-construction of the building.
Again in Elmore v. Pirrie [(1887) 57 LT 333], it was held that the court had
jurisdiction to order specific performance of an agreement to purchase
patent rights for a lump sum even though the contract also included
unenforceable agreements by the purchasers to form a company to work
the patents and pay royalties to the vendors. “Why should not the plaintiffs
have damages for that part of the agreement of which the court does not
grant specific performance? The court has power to order specific
performance of the whole of the agreement, or of part of it, with damages
for the rest.” [(1887) 57 LT 333 at 336, per Kay J]. Finally, in Lytton v.
Great Northern Rly Co [(1856) 2 K & J 394] the court ordered specific
performance of a contract by the defendants to construct a siding on their
land though specific performance of a term requiring them to maintain it
was refused.

It is suggested, therefore, that there is no longer any general rule that the
courts will not enforce some of the defendant’s obligation by specific
performance if it cannot enforce them all. The plaintiff seeking specific
performance is clearly content to accept partial performance, and the
defendant can hardly complain if he is required to perform only some of his
contractual obligations. Naturally, the courts will not order specific
performance of ancillary provisions if the principal provisions are incapable
of being specifically performed, nor will they artificially sever what is in
substance a single obligation into separate obligations so that part may be
enforced.’

[41] “Given the passages cited, there is nothing contrary to public policy in the
partial enforcement of an agreement. There is nothing repugnant in Equity
decreeing specific performance of that part of a contract which is possible. I am
not persuaded that the Agreement here is obviously substantially incapable of
performance. Let me further articulate why.

[42] “The Arbitration Tribunal held that the Agreement was essentially the
performance of certain specific obligations (such as the payment of RMB 120
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million) in order to cause the transfer by the Respondents of their controlling shares in Hong Kong Legend to the Applicant. Mr. Yu says that it is now impossible to transfer the Hong Kong Legend shares to the Applicant (even if it were ready, willing and able to pay the balance of the RMB 120 million consideration and nominal transfer fee of § 2) because of the restructuring within the Respondents’ Group. EPL no longer holds any shares, while EPHL’s one share is held on trust for EPGL.

[43] “But I am far from satisfied of the correctness of such analysis. It seems to me that there might be merit in Ms. Cheng’s suggestion of that the true analysis is as follows:

1. Under the Agreement, insofar as the transfer of Hong Kong Legend shares is concerned, Hong Kong law governs.
2. The Agreement being essentially one for the sale of shares in a private company the execution of the Agreement and the payment of the initial deposit gave rise to an equitable interest in the Hong Kong Legend shares in favour of the Applicant.
3. In consequence of that equitable interest, the Respondents came under a minimal fiduciary duty not to exercise their shareholders’ rights in a way that undermined such equitable interest.
4. In allowing or sanctioning the creation of 9,998 new shares in Hong Kong Legend, the Respondents acted contrary to their fiduciary duty. The new shares effectively diluted the value of the Applicant’s equitable interest.
5. EPL further breached its minimal fiduciary duty by purporting to transfer its one share in Hong Kong Legend absolutely to EPGL.
6. EPHL further breached its minimal fiduciary duty by purporting to declare that it held its one share in Hong Kong Legend on trust for EPGL absolutely.
7. It is inconceivable that EPGL would not have known of the Agreement at the time of the various transfers of Hong Kong Legend shares to it. This must be especially so, given that the Arbitration between the Applicant and the Respondents was taking place at the time of the transfers. In those circumstances, EPGL must have received its shares in Hong Kong Legend with actual or constructive notice of the Applicants’ equitable rights in respect of the shares.
8. In the premises, EPGL received its Hong Kong Legend shares subject to a constructive trust on behalf of the Applicant.
9. Further, as a matter of Hong Kong law, the Applicant may be in a position to require the Respondents, as the Applicant’s fiduciaries, to recover the Hong Kong Legend shares from EPGL with a view to transferring them to the Applicant upon payment of the total consideration stipulated in the Agreement.
“There is in fact a recently-initiated and still ongoing proceeding in the Hong Kong Court (HCA 961 of 2008) where the Applicant is pursuing a claim along the lines which Ms. Cheng has sketched out against the Respondents, EPGL, Hong Kong Legend and Xiamen Legend.

“I have no intention of deciding here whether the Applicant’s contentions in HCA 961 of 2008 are right. I do not have to go that far. In light of my preliminary observations, it is sufficient if I indicate that to my mind the claim is at least arguable. Given that is so, I am unable to say that it is impossible for the Hong Kong Legend shares eventually to be transferred to the Applicant.

“Mr. Yu has helpfully analysed the parties’ obligations under the Agreement in the course of his submissions. He stresses that the Applicant was not just under an obligation to make staged payments totalling RMB 120 million. The Applicant was also to bear the cost of constructing a development on the Property. In the event, the cost of developing the Property was undertaken by Xiamen Legend (acting (Mr. Yu says) under the belief that it had validly terminated the Agreement) and the residential units so constructed on the Property have largely been sold. In those circumstances, one simply cannot push the clock back (Mr. Yu submits) and treat the Agreement as continuing to subsist. In particular, most of the Property no longer belongs to Xiamen Legend. It is no longer possible (Mr. Yu points out) to give possession of the Property to the Applicant.

“But, as Ms. Cheng points out, the Agreement concerned not just the right to obtain possession of and develop the land. The Agreement also encompassed the right to receive profits from its development. The Applicant being a commercial entity, its ultimate objective in entering into the Agreement would not have been obtaining possession of the Property for the mere sake of development. Presumably, the Applicant’s overriding purpose was eventually to enjoy income or profits from the whole deal. At some point in the whole process, there would be an accounting of the gross profits or income derived from the development of the Property against the construction costs of developing the Property and the consideration for acquiring the shares of Hong Kong Legend.

“Obviously, there can no longer be the staged payments of the RMB 120 million consideration as envisaged within the Agreement. But that was due to the Respondents wrongly treating the Agreement as terminated. Arguably, that self-induced limitation cannot be a basis for the Respondents to suggest that, since the consideration for the shares can no longer be paid in keeping with the timetable outlined in the Agreement, the Agreement cannot be performed at all. The essence of the Applicant’s obligation might be said to be the payment of the
agreed consideration. Provided it is willing and able make the payment, it is at least arguable that there is no real obstacle here to substantive specific performance.

[49] “What about construction cost? Here the Applicant’s obligation was to bear the same. It was originally to have a role in vetting or controlling such costs. But that is clearly no longer possible. Nonetheless, there would seem to be no obstacle to the Applicant bearing such (say) properly audited construction costs as have actually been incurred in developing the Property. The essence of the Applicant’s obligation was apparently the bearing of construction cost. I therefore doubt that it is a self-evident objection to specific performance that the construction work has already been done and cost has been incurred.

[50] “Consequently, at the end of the day, there is at least some arguable prospect of the Hong Kong Legend shares becoming available for transfer to the Applicant upon payment of the agreed consideration and an accounting of construction cost. Obtaining control of Hong Kong Legend would give control of Xiamen Legend and conceivably lead to an enjoyment of the profits derived by Xiamen Legend from the development of the Property. In other words, to a substantial extent the apparent ultimate objectives of the Agreement might yet be realised.

[51] “It is true that the process may be a messy one. But that strikes me as merely a natural consequence of the peculiar facts of this case. I do not think that the absence of a neat solution can of itself be a ground for equity refusing to grant specific performance. Nor do I see any public policy ground arising out of this messiness compelling me from ordering specific performance subject to compensation.

[52] “I stress that, in explaining why I find Mr. Yu’s impossibility submission far from established, it is not my intention to go behind the award or second-guess what the tribunal may have in mind. In pointing out what I find to be weaknesses in Mr. Yu’s position, I am only explaining why I am not persuaded that there is any plain and obvious impossibility here such that to enforce the award as a judgment would offend against this Court’s sense of justice. It appears that units in the Property were sold after the arbitration was heard but before the Award was made. Whether such sales have or have not rendered the Agreement or the Award impossible has never been substantively raised by the Respondents before an arbitration tribunal or the Beijing Court. It is enough for me to indicate that on a possible reading of the Agreement or Award it is arguable that performance is still possible in substance. A definitive reading of the effects of the Agreement or the Award is (as I have mentioned) within the province of the arbitration tribunal or the Beijing Court.
"I have not lost track of the fact that in his submissions Mr. Yu advances a number of reasons why (according to the Respondents) the Applicant’s recent action for the return of Hong Kong Legend shares may be susceptible to a stay or strike-out application. For instance, Mr. Yu suggests the following:

1. Mr. Yu suggests that the Agreement was not specifically enforceable because it required certain things to be done to the Property which would have required constant supervision from the Court. If the Agreement was not specifically enforceable for this reason the Applicant would hold no equitable interest in the Hong Kong Legend shares. Then the Respondents could not have held the Hong Kong Legend shares on constructive trust for the Applicant upon its payment of the initial deposit.

2. Even if somehow there were a constructive trust, the Respondents’ duties would not have been the same as a conventional trustee. The Respondents’ duties would have been narrow and at best would be confined to those with the purchaser holding an equitable lien over the Property commensurate with the amount of the initial deposit.

3. Insofar as Hong Kong Legend shares were transferred to EPGL, the Applicant would have to establish unconscionable conduct on the part of EPGL in order to establish a constructive trust of such shares in EPGL’s hands. That requires proof of actual or constructive knowledge.

4. In any event, it is hard to see what asset of the Applicant was disposed of to EPGL in breach of trust.

"Mr. Yu may be right or wrong in his submissions on the defects of the Applicant’s new action. The point is, despite Mr. Yu asserting that his arguments are all ‘plainly’ correct, I do not see anything obvious or self-evident in the matter. Mr. Yu’s propositions are at best arguable. If so, there could be nothing contrary to public policy (I think) in my allowing the award to be enforced as a judgment of this Court.

Ms. Cheng has referred me to *Gill v. Tsang* [2003] All ER (D) 175. There Deputy High Court Judge Vos QC, in referring to the flexibility of specific performance as an equitable remedy, said:

‘33. Specific performance is an equitable remedy. Once granted, the contract remains in force and is not merged in the judgment. But, that said, the equitable nature of the remedy does not stop with the grant of the
order. The court controls the working out, variation or cancellation of the order. Equitable principles apply to these processes.

(....)

35. Nothing in these passages deprives the court of its equitable jurisdiction to make the order for specific performance work. There is not, as Mr. Mark Warwick, counsel for Pamigold, suggested, a stark choice between enforcing or dissolving the order. The court may, in my judgment, make such orders as are just and equitable in the circumstances then existing, to give practical effect to the order it has made. In making its order work in the circumstances then arising, the court is not re-writing or even varying the contract between the parties. It is providing a mechanism to give the claimant what he bargained for, namely the sale or purchase of land. Such relief may be granted in a whole range of circumstances in which a defendant has failed to perform both his original contract and the court’s subsequent order. If Mr. Warwick were right, an inappropriate and unnecessary rigidity would be introduced into the equitable remedy of specific performance.

35. If for some reason, a vendor cannot perform every aspect of the contract, the purchaser is in general terms still entitled to seek specific performance with an abatement of the purchase price to reflect the deficiency. Likewise a vendor can generally seek specific performance subject to an abatement, if he can comply substantially with the agreement. This illustrates the flexibility of the remedy (see Megarry & Wade on the Law of Real Property 6th ed. at paras. 12-115 to 12-120).

[56] “It would follow from this observation that the making of an order for specific performance need not be the end of a matter. If it later appears that some of the Agreement can no longer be performed in substance, the parties can approach the Court for such directions (including the grant of an abatement) so as ‘to make the order for specific performance work’.

[57] “Mr. Yu, however, says that Gill is not apposite. This is because there specific performance had already been granted by the Court and what was being sought from the Court was a variation of the original order. Here (Mr. Yu says) the arbitral tribunal and not the Court was originally seised of the matter.

[58] “I do not accept Mr. Yu’s objection. I do not see the logic in distinguishing between: (i) on the one hand, the Court becoming seised of a matter because it makes an order converting an arbitral award into a judgment; and (ii) on the other hand, the Court being originally seised of a matter and making an order. In either case, where the Court’s order involves specific performance, the parties
should be able to come back to the Court for further directions to make such order work.

[59] “Mr. Yu submits that any variation of an order for specific performance may usurp the jurisdiction of the arbitrator’s tribunal. He suggests that it would also be contrary to the summary nature of the AO Sect. 2GG procedure. I do not think that it is possible to be so categorical. The Court’s response may depend on the nature of the variation for which subsequent application is made. Again it is not all or nothing.

[60] “The Court, of course, may or may not grant any variation of the specific performance order simply in the exercise of its discretion.

[61] “Moreover, on one reading, the effect of the Award here is to treat the Agreement as subsisting. That may well possibly include the agreement to arbitrate. Assume that is the case. This would then have the consequence that any future disputes over the substance of the parties’ obligations may have to be referred to CIETAC Beijing arbitration. In such situation, the Court may be reluctant to vary an order or grant an abatement in a particular way in the absence of a further reference to arbitration by the parties.

[62] “But the simple point is that, contrary to what Mr. Yu submits, there is nothing inherently inconsistent between the Court’s ability to tailor an order of specific performance in a given situation and the fact that the order for specific performance results from the conversion of an arbitral award into a judgment of the Court. In considering whether to grant relief, the Court will always be aware that as much as possible it should not second-guess what an arbitral tribunal has decided or might determine in the future.

[63] “Mr. Yu suggests that the Applicant is not genuinely seeking specific performance. He says that:

‘It is clear from the Award that the arbitral tribunal did not make any ruling as to whether as a matter of PRC law the agreement is capable of being performed or not. It only decided that the parties should cooperate with each other and work out how they should continue to perform their parts under the agreement so as to achieve the ultimate objective. This should not be taken as equivalent to the grant of relief of specific performance in a common law jurisdiction.’

Mr. Yu argues that ‘all the Applicant wants to get from the agreement is the profits made during the course of the development but not the ultimate shareholdings of the HK company’. Damages (Mr. Yu submits) should be an adequate remedy and specific performance should not be awarded. But (Mr. Yu
concludes) any claim for damages should be made in the arbitration. The Court should not ‘allow the Applicant to pursue an order for specific performance for the purpose of seeking an award of damages through the backdoor’.

[64] “I am puzzled by this submission. All the Applicant seeks at present is for its Award to be converted into a judgment of the Court. That means essentially an order by this Court that ‘the Respondents shall continue to perform the Agreement’. As I have been at pains to suggest above, precise directions for working out the order to make it work can be given at a later stage to the extent necessary. Equity is flexible. Such directions can (if appropriate) be made pursuant to further determinations by an arbitral tribunal (or the Beijing Court as supervisory court) or as interim measures in aid of further arbitration. I do not have to consider at this stage whether damages are an adequate remedy, whether I should grant an abatement, or what parts of the Agreement may or may not definitively be performed. Those are not questions currently before me.”

III. PUBLIC POLICY: APPLICANT UNWILLING TO FULFIL OBLIGATIONS (NO)

[65] “Mr. Yu submits that the Applicant only wishes to obtain the fruits of the development on the Property without having to pay for the same. Ms. Cheng, however, has confirmed that the Applicant is fully prepared to pay the RMB 120 million consideration and the $2 nominal fee and to bear the properly audited construction costs of the development. There is no question (Ms. Cheng stresses) of the Applicant shying away from its obligations under the Agreement.

[66] “The mutual fulfilment by the Applicant of the substance of its obligations under the Agreement is implicit from the stricture that the Respondents continue to perform their obligations under the Agreement. I do not think that this issue gives rise to any basis for refusing enforcement of the Arbitration Award on public policy grounds. Further, where the Respondents have by their actions made it difficult or impossible for the Applicant to perform certain obligations, the Court must be wary of too readily holding that on public policy grounds the Respondents should be excused from fulfilling their obligations because the Applicant cannot fulfil all its obligations.”
IV. OTHER ISSUES

1. Material Non-Disclosure

[67] “I do not think that there was any material non-disclosure. I doubt that the fact of the deposit being available for collection by the Applicant from the Notary would have made any difference to the grant of the ex parte Order.”

2. Arbitrability

[68] “Let me assume (without necessarily accepting) that the delivery of land situate outside Hong Kong is somehow incapable of settlement by an arbitration under Hong Kong law. The proposed Order does not actually involve a transfer (in the sense of a conveyance) of the Property (which is situate outside Hong Kong) from one entity to another. The proposed Order is in personam addressed to the Respondents which are both domiciled and resident in Hong Kong to perform their parts of the Agreement. They are (among other things) obliged to transfer the Hong Kong Legend shares to the Applicant subject to the payment of the consideration due and a proper accounting of construction cost.

[69] “The effect of the share transfer may be that the Applicant gains control of Xiamen [Legend] which formerly owned the entire Property. But that does not make the Hong Kong Legend share transfer a ‘delivery of land outside Hong Kong’. Therefore, even on the assumption made, I see no matter that is incapable of settlement by arbitration under Hong Kong law such as to trigger the restriction in AO Sect. 40E(3). Indeed, I do not see how AO Sect. 17 is relevant. That simply provides that, in the absence of contrary intention, every arbitration agreement is deemed to have a provision enabling an arbitrator to order specific performance of any contract ‘other than a contract relating to land or any interest in land’.”

3. Enforcement in Xiamen

[70] “It is correct that the Applicant applied to enforce the Award in Xiamen. But that was rejected on the basis that the Respondents were in Hong Kong and had no assets in Xiamen. The rejection was thus purely on jurisdictional grounds.

[71] “There is nothing as far as I can see in AO Sect. 40C to prevent the Applicant from now seeking to enforce here where the Respondents are to be found and where presumably the Respondents have assets. The Applicant
attempted to enforce in Xiamen and solely on jurisdictional grounds the Award was not fully satisfied by way of that attempted enforcement.

[72] “Mr. Yu suggests that an application to the Court to enforce an award is not an ‘enforcement’ within the terms of AO Sect. 40(2)(b). But I do not think that is right. It seems to me instead that the expression ‘by way of that enforcement’ in Sect. 40(2)(b) refers to ‘an application … the Mainland for enforcement of a Mainland award’ in Sect. 40(2)(a). Accordingly, the application in Xiamen to enforce was an ‘enforcement’ within Sect. 40(2)(b).”

V. CONCLUSION

[73] “The Respondents’ application to set aside Andrew Cheung J’s Judgment Order dated 31 October 2007 fails. The Respondents’ application is dismissed. There will be an Order Nisi that the Respondents pay the Applicant’s costs with certificate for 2 counsel. Costs are to be taxed if not agreed.”

Court of Appeal, 22 May 2009

[74] “At the adjourned hearing of this appeal, Mr. Chan SC appeared for the appellants [EPL and EPHL]. The thrust of his submissions was no different from that advanced in Mr. Yu’s skeleton submissions for the original hearing in December which Mr. Chan adopted. The main argument was that it has become impossible to perform the award as the development of the land has been completed and as at 2 January 2008, 99% of the units had been sold to third parties. It would therefore be contrary to the notion of justice to enforce something that was no longer possible to perform. It was said that the order granted by the Hong Kong courts was tantamount to a decree for specific performance and the judge erred in holding the court could exercise its powers to give directions in order to make the order for specific performance work.

[75] “Mr. Chan submitted that the applicant was really looking at the ‘further stages’ remedies such as damages in lieu or an account of profits rather than the right to develop the land or any interest in the land itself but as those remedies formed the enforcement of the stage 1 award, that would be a matter for CIETAC, the supervisory court, from whom further directions should be sought. In that regard, in the course of the hearing, Mr. Chan offered the court the following undertaking on behalf of the appellants:
‘The Appellants undertake to commence within 28 days and to pursue with all expedition further arbitration to CIETAC in Beijing and to take all steps to submit themselves to such arbitration (whether commenced by the Appellants or the Respondent) for a determination on what alternative remedies (including damages) that the Respondent should have in carrying out the purpose of the Agreement and on any further directions as to how the Award should be complied with.’

In the alternative, it was said that the court could remit the matter to CIETAC so that directions could be obtained or adjourn the appeal pending such directions.

[76] “In my view, the appellants have had ample opportunity to raise squarely before CIETAC the issue of impossibility of performance and to obtain all necessary directions flowing from the award had they seen fit to do so. After all, those matters featured in the stay application and one would have expected them to have featured in the second arbitration which, when the stay application was made, was already on foot. Those matters featured again in the appellants’ written submissions submitted to this court in December 2008 for the original hearing, at a time when the date of hearing of the second arbitration had not yet been fixed. Plainly, it would not have been too late for the appellants to raise those matters specifically in the second arbitration. In fact, the applicant did not file its response in the second arbitration until 12 January 2009. There is simply no rational explanation for this omission on the part of the appellants except the very obvious one that the omission was intentional. Given the factual matrix, the undertaking is simply meaningless.

[77] “As regards the suggestion that this court should remit the matter to CIETAC, Mr. Chan relied on Margulies Brothers, Ltd v Dafnis Thomaides & Co (UK) Ltd [1958] 1 Lloyd’s Rep 250, 253 where Diplock J (as he then was) held that he had jurisdiction to remit the award to the Board of Appeal to calculate the sum of money due to the applicant who was seeking to enforce the award. But as Ms. Cheng SC (who appeared for the applicant) pointed out, the award in that case was a London award made by the Board of Appeal of the Cocoa Association of London, Ltd. The court there, being the supervisory court, was exercising its supervisory jurisdiction and, accordingly, the Margulies case is not an authority that this court has jurisdiction to remit the matter back to CIETAC. I would respectfully agree. Under the provisions of the Arbitration Ordinance, the court may enforce the award or refuse to enforce it; there is no jurisdiction to remit.

[78] “Ms. Cheng SC submitted that the appellants have sought to conflate the execution stage and the registration stage of an award. She submitted that there
is a distinction between converting an award into a judgment of the court and execution, which is the second stage. That distinction is set out in the New York Convention. These proceedings only concern the first stage, which is the registration of the award.

[79] “Sect. 40E of the Arbitration Ordinance provides, in pertinent part, that:

‘40E. Refusal of enforcement
(1) Enforcement of a Mainland award shall not be refused except in the cases mentioned in this section.
(2) ....
(3) Enforcement of a Mainland award may also be refused … if it would be contrary to public policy to enforce the award.’

[80] “In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction. Its role is confined to determining whether or not grounds exist for refusing to enforce the award because it would be contrary to public policy. As the judge recognized, the court’s role should be as ‘mechanistic as possible’.

[81] “As regards public policy, the only ground the appellants rely on as justifying a refusal to enforce the award is impossibility of performance. It was said that it is now impossible to deliver the land and, further, because of the restructuring, the shares can no longer be transferred. Since the conversion of an award into a judgment of the court does not involve going into the merits, it is difficult to see how impossibility of performance is relevant at the registration stage. No authority has been cited for the proposition that impossibility of performance is sufficient reason to justify a refusal to enforce an award under public policy grounds.

[82] “I have already referred to the nature of the agreement as determined by the tribunal when making the award [the Court of Appeal reproduced the [first] quotation at [1] above]. This was also the view of the tribunal in the second arbitration. In the second award, it noted that the mutual intention of the parties to the agreement ‘was the arrangement of the shareholding of Hong Kong Legend which enable the [applicant] to enjoy and possess the right to the profit arising from the development of the [land] ultimately’. It rejected the submission that the objectives of the agreement could not be fulfilled.

[83] “So far as the shares are concerned, the appellants’ impossibility argument is misguided. One share in Hong Kong Legend remains vested in [EPHL]. Nor is there any insuperable impediment to the transfer of the shares registered in the name of EPGL to the applicant. In any event, the restructuring cannot be a valid
reason since the impossibility (if any) is self-inflicted. The Eton Group went ahead with the restructuring notwithstanding that the arbitration had commenced. It took a calculated risk and must bear the consequences.

[84] “The notion that the appellants would be at risk for contempt proceedings for failing to comply with an order that is impossible to carry out is equally misguided. It was suggested that enforcement of the award is tantamount to an order decreeing specific performance, thereby exposing the appellants to the risk of contempt proceedings with all its consequences, including imprisonment. But the order does not specify any time for performance and committal proceedings may only be commenced against a person who refuses or neglects to do an act within the time specified in the order. Further, a person who genuinely is unable to carry out the order cannot be made liable for the contempt. I agree with Ms. Cheng that the risk of imprisonment for contempt is entirely fanciful.”

[85] “In conclusion, not only have the appellants failed to demonstrate any impossibility, as earlier noted, in any event, impossibility is not a sufficient reason to justify refusal on the basis that it would be contrary to public policy.”

(….)
22. Court of Final Appeal, Hong Kong Special Administrative Region, 5 December 2008, Final Appeal No. 6 of 2008 (Civil)

Parties:
Plaintiff/Respondent: Karaha Bodas Company LLC (Cayman Islands)
Defendant/Appellant: Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (otherwise known as PERTAMINA) (Indonesia)

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Articles: I(1); V; V(1)(d); V(2)(b)

Subject matters:
– fraud as ground for violation of public policy
– review of merits of award (no)
– grounds for refusal of enforcement are exhaustive
– lack of reasons for award


Facts

The facts of this case are also reported in Yearbook XXVII (2002) at pp. 814-815 (US no. 387), Yearbook XXVIII (2003) at pp. 908-914 (US no. 404) and pp. 752-759 (Hong Kong no. 17), Yearbook XXIX (2004) at pp. 1262-1302 (US no. 482), Yearbook XXX (2005) at pp. 488-490 (Canada no. 19) and Yearbook XXXIII (2008) at pp. 574-590 (Hong Kong no. 20) and pp. 1009-1012 (US no. 627).

On 28 November 1994, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), the Indonesian state oil company, concluded a Joint Operation Contract (JOC) with Karaha Bodas Company (KBC) for the development of a geothermal project in the Karaha area in West Java, Indonesia. Also on 28 November 1994, KBC, Pertamina and Perusahaan Listruik Negara (PLN), an Indonesian state-owned electrical utility, entered into an Energy Sales
Contract (ESC) under which PLN undertook to purchase the electricity developed and delivered by KBC over a period of thirty years.

The JOC provided that it was to terminate after six years, if KBC had not by the end of that period sent Pertamina a notice of its intention to develop an electricity-generating unit in the concession area (Notice of Intention to Develop – NOID). Any NOID had to be preceded by a Notice of Resource Confirmation (NORC) confirming the discovery of workable geothermal resources.

Both the JOC (Art. 15.2.e) and the ESC provided that a “Government Related Event” would be a force majeure event for KBC only. Both provided for the application of Indonesian law and contained a clause for arbitration of disputes in Switzerland according to the UNCITRAL Arbitration Rules.

KBC commenced exploration work in May 1995. On 18 September 1997, it submitted a NORC (the September NORC) to Pertamina detailing the results of its operations to date. Indonesia was by then undergoing a severe economic crisis. Two days later, on 20 September 1997, it suspended the project by Presidential Decree No. 39/1997. Negotiations followed and the suspension was lifted by Presidential Decree No. 47/1997 on 1 November 1997.

On 16 December 1997, KBC issued a second NORC (the December NORC) confirming a probable resource capacity of 210 MW. It also issued a NOID (the December NOID), giving Pertamina notice of its intention to construct and operate geothermal generating units based on the probable resource capacity indicated in the December NORC.

On 10 January 1998, because of its continuing financial difficulties, Indonesia finally cancelled the Karaha project by Presidential Decree No. 5/1998.

On 30 April 1998, KBC initiated arbitration in Switzerland against Pertamina and PLN. On 18 December 2000, the Swiss arbitrators rendered a Final Award in favor of KBC, holding that the Indonesian parties were in breach of contract. The arbitrators awarded KBC US$ 150 million for loss of profits and US$ 111.1 million for the expenses incurred under the contracts. Several court proceedings followed in various jurisdictions. Only the relevant proceedings are mentioned below.

KBC sought enforcement of the award in Canada, Hong Kong, Singapore and the United States. In turn, Pertamina sought to have the award set aside in Switzerland and Indonesia, claiming that it had been procured by fraud. In August 2001, the Swiss Supreme Court denied the request on procedural grounds, because Pertamina failed to provide security and pay filing costs on time. The annulment action also eventually failed in Indonesia.

In September 2006, Pertamina commenced an action in the Cayman Islands, seeking restitution of the sum it had paid under the award following an
enforcement decision in the United States; it alleged that the award was procured by fraud and claimed that it had documents in support of its allegation, which had been discovered only in August 2005 when boxes of documents left by KBC at the project’s site had been inspected.

In the enforcement proceedings commenced by KBC in Hong Kong, the High Court, per Burrell, J, granted enforcement on 15 March 2002. On 27 March 2003, the same judge dismissed Pertamina’s application to set aside the enforcement order. This decision is reported in Yearbook XXVIII (2003) at pp. 752-789 (Hong Kong no. 17). On 9 October 2007, the Court of Appeal affirmed the lower court’s decision. This decision is reported in Yearbook XXXIII (2008) at pp. 574-590 (Hong Kong no. 20).

By the present decision, the Court of Final Appeal, before Li, Chief Justice, Bokhary, Chan and Ribeiro, PJJ and Lord Woolf, NPJ, in an opinion by Ribeiro, denied Pertamina’s appeal from the 9 October 2007 appellate decision.

The Court of Final Appeal first denied Pertamina’s fraud argument, holding that Pertamina failed to comply with one of the requirements established by case law for admitting new evidence, namely, that the evidence would probably have had an important (though not necessarily decisive) impact on the result of the case.

The documents Pertamina sought to submit were internal communications among KBC employees which allegedly proved that the December NORC and NOID were fraudulent in that they falsely represented (1) that KBC genuinely believed that there was a probable geothermal resource capacity of 210 MW in the concession area; (2) that the methodology used as the basis for the confirmation was the most reliable and generally accepted in the industry and (3) that KBC intended to proceed with the development of the geothermal energy and the eventual sale of electricity to PLN.

The Court noted that there was no reason for KBC to issue a fraudulent NORC and NOID in December 1997: the purpose of these notices was to prevent the JOC expiring and any overstatement of the field’s capacity would have been a financial risk for the investor – KBC – only. Nor was there any reason for KBC to issue fraudulent documents in order to support a possible future claim for damages in the expectation that the project would be shut down. The Court reasoned that KBC could expect the project to continue, as the contracts placed the financing burden entirely on KBC rather than Indonesia.

On the merits of the new evidence, the Court of Final Appeal noted that the standard of proof of geothermal resources referred to in the newly discovered documents was the higher “managerial proof” required to prove the commercial...
viability of the project to potential investors; the level of proof required for a 
NORC and NOID was, acceptably, the less strict “technical proof”.

Further, the use of the allegedly fraudulent December NORC and NOID in 
the arbitration had not deceived the arbitrators into finding in favor of KBC. The 
arbitrators saw them as subjective statements by KBC; it would do the arbitrators 
“an injustice”, in the Court’s opinion, to suggest that they mistook them for 
decisive proof of the actual existence of certain resources in the Karaha field and 
of KBC’s intention to develop and construct the geothermal generating units. The 
Court noted that the arbitral tribunal in fact awarded KBC a much lower 
sum than the sum it had claimed.

Pertamina also resisted enforcement of the Swiss award on the ground that the 
loss-of-profit award of US$ 150 million duplicated compensation provided by the 
US$ 111.1 million award and was unsupported by reasons, contrary to the 
applicable UNCITRAL Rules, which require that the arbitrators give reasons.

The Court of Final Appeal held that the double-counting argument was not a 
ground for denying enforcement under the relevant provision of Hong Kong law 
(which basically reproduces Art. V of the 1958 New York Convention). Further, 
the arbitral tribunal had expressly held that KBC was entitled to two types of 
damages – compensation for the expenses incurred and compensation for lost 
profits – and its conclusion could not be second-guessed.

The Court added that it was “fair and proportionate” to require Pertamina to 
raise the argument of lack of reasons in setting-aside rather than enforcement 
proceedings. There might be perfectly good reasons for this lack, which were not 
stated in the award: the supervisory court can then remit the award to the 
arbitrators for proper reasons to be supplied – a power which the enforcing court 
lacks. In fact, on the merits of the objection, the Court found that the arbitrators 
did give reasons for their award.

Pertamina’s last objection to enforcement was based on the argument that the 
arbitrators gave the contracts among the parties such an irrational construction 
that they effectively rewrote them and therefore acted outside the scope of the 
arbitration. The Court held that this defence sought in fact an inadmissible 
review of the merits of the case.

Excerpt

(....)

[1] “KBC obtained leave to enforce the Award in Hong Kong by order of 
Burrell J dated 15 March 2002. Pertamina’s application to set that order aside
was refused by his Lordship on 27 March 2003 (HCCT 28/2002 (27 March 2003)).

After a hiatus agreed upon by the parties, Pertamina’s appeal came before the Court of Appeal in September 2007 and was dismissed on 9 October 2007 ([2007] 4 HKLRD 1002 (Tang VP, Stone and Lam J)). Leave to appeal to this Court was granted by Court of Appeal on 18 March 2008.

3. “Cap 341. Sect. 2: ‘Convention award’ means ... an award made in pursuance of an arbitration agreement in a State or territory, other than China or any part thereof, which is a party to the New York Convention.’”
4. Sect. 2AA(2)(b).
5. Sect. 44(1)-(3) of the Honk Kong Arbitration Ordinance reads:

(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
(2) Enforcement of a Convention award may be refused if the person against whom it is invoked...
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

Ordinance and the Convention give effect to the principles of finality and comity by prohibiting refusal of enforcement of a Convention award except in the cases for which they provide....

[5] “It is of course well-established that the Hong Kong court, sitting as an enforcing court, does not review the merits of the Tribunal’s award. Moreover, it is clear that even though a case comes within a Sect. 44 category where refusal of enforcement is permitted, the court has a discretion nevertheless to permit enforcement.”

1. FRAUD AS VIOLATION OF PUBLIC POLICY

[6] “In relation to the fraud argument, Pertamina relies on Sect. 44(3) which states: ‘Enforcement of a Convention award may also be refused ... if it would be contrary to public policy to enforce the award.’ While it is well-settled that ‘public policy’ in this context is given a narrow meaning, requiring it to be shown that enforcement of the award would be ‘contrary to the fundamental conceptions of morality and justice of the forum’, an award which has been obtained by fraud plainly comes within that category.

proves –
(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.”

7. “Ibid.: ‘... both provide for exceptions to that prohibition by stating the grounds on which enforcement may be refused’.”
“Pertamina’s task is to show that it has a sufficient threshold case to justify this Court remitting the question whether the Award was obtained by fraud for trial before the Judge at first instance with a view to deciding whether enforcement should be refused.

The Court of Appeal took the threshold test to be one requiring Pertamina to show that it has a real prospect of success in persuading the Judge to find, on a remitter, that the Award had been obtained by KBC by fraud. I respectfully agree that this is the appropriate standard to adopt. There has been some discussion of whether the test might be one requiring demonstration of a prima facie case of fraud; or whether it ought to be a more flexible test, such as the approach taken by Cooke J in the New Zealand case of Svirskis v. Gibson. I do not, for my part, think that there is much practical difference between these various formulations.

Since its fraud argument depends on Pertamina being permitted to rely on evidence which it had not adduced before Burrell J, it faces the additional task of persuading the appellate court to exercise its discretion in favour of admitting in evidence the ten documents mentioned. Like the Court of Appeal, this Court examined those documents de bene esse.

The well-known three-tiered test stated by Denning LJ in Ladd v. Marshall, ([1954] 1 WLR 1489 at 1491) is applicable:

‘To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.’

9. "Per Tang VP at paras. 57-59; and Stone J at para. 131. This test that had been applied by Kaplan J in J J Agro Industries (P) Ltd v. Texuna International Ltd [1994] 1 HKLR 89; borrowed from The SAUDI EAGLE [1986] 2 Lloyd’s Rep 221."

10. "As adopted in Syal v. Heward [1948] 2 KB 443 in the context of an attack on a foreign judgment as having been obtained by fraud."

11. "[1977] 2 NZLR 4 at 10: ‘The power to direct an issue is discretionary. In deciding whether a case strong enough to justify such a direction has been made out, the court would be entitled, we think, to have regard to all the circumstances of the case including whether the defendant is merely seeking to try again on substantially the same evidence issues already adjudicated on in the overseas court; and whether the defendant refrained from appearing in that court.’ Cited with approval by the Court of Appeal in WFM Motors Pty Ltd v. Maydwell [1996] 1 HKC 444 at 449-450.”
“Mr. Jat Sew-Tong SC, appearing with Ms. Grace Chow for KBC, submitted that given the strong policy in favour of the finality of Convention awards, the second Ladd v. Marshall condition should be made more stringent in cases like the present. He urged adoption of Waller LJ’s formulation in Westacre Investments Inc v. Jugoimport-SPDR Ltd [[2000] 1 QB 288 at 309] namely, that for such further evidence to be admitted, it ‘must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result’.

While I would leave open the possibility that such a test may be appropriate in certain situations, I do not consider it the proper test to apply in the present case. I think it may unduly complicate the threshold question, for Sect. 44(3) purposes, of whether a real prospect of success of establishing fraud can be shown. Accordingly, in my view, the unmodified second Ladd v. Marshall condition applies.”

1. Pertamina’s Argument

Pertamina’s case on fraud centres on the December NORC and December NOID. Those documents are said to be fraudulent in that, to KBC’s knowledge, they falsely represented (i) that KBC genuinely believed that it had confirmed a probable geothermal resource capacity of 210 MW in the concession area (the false confirmation); (ii) that the methodology used as the basis for the false confirmation was the most reliable and generally accepted in the industry (the misdescribed methodology); and (iii) that KBC intended to proceed with development of such geothermal energy and the eventual sale of electricity to PLN (the false statement of intention).

The truth, according to Pertamina, was first, that the methodology adopted in the December NORC and NOID was, to KBC’s knowledge, not the most reliable and generally accepted. Instead, the test of commerciality generally adopted was proof of 50% steam at the wellhead. Pertamina alleges that the ten documents sought to be introduced are crucial in showing that KBC’s staff were themselves using wellhead steam as the criterion for confirming commercially viable resources and well knew that this criterion had not been met. KBC, so it is argued, was therefore cynically purporting to confirm commercially exploitable resources using spurious criteria to justify such confirmation, knowing that genuine confirmation could not be given if proper, wellhead steam criteria had been applied. Secondly, Pertamina’s case is that KBC’s statement of its intention to undertake substantial works to develop and deliver electricity
from geothermal sources in the Karaha area was a sham, the truth being that KBC had no such intention.

[15] “It is important to note that Pertamina’s case is that the December NORC and NOID were fraudulent from their inception, that is, as at 16 December 1997. The contention is that KBC persisted in this fraud by presenting to the Tribunal these documents as representing a genuine confirmation of geothermal resources and of its development intentions in December 1997. It was by virtue of those documents that KBC is said to have fraudulently obtained the Award. Pertamina’s case is therefore that the December NORC and NOID were fraudulent when issued in December 1997 and fraudulent when used at the arbitration hearing in June 2000. The Court must therefore examine whether Pertamina has a real prospect of success in proving that the December NORC and NOID were fraudulently employed on those two occasions.

[16] “Pertamina says that the ten new documents demonstrate, from communications passing among KBC operatives, that KBC knew that 50% steam at wellhead was the proper approach to confirming available geothermal resources and that those persons had in fact themselves adopted those and other appropriate criteria, including criteria that temperatures found on drilling should exceed 260° C; that there should be benign fluid and gas chemistry; that non-condensable gas should be less than 3-5%; that there should be permeability and that the wellhead steam pressure should exceed 150 psi.”

2. Were the December NORC and NOID Fraudulent When Issued?

[17] “… Art. 4.5 of the JOC makes provision for KBC to issue a NORC ‘upon the confirmation, to KBC’s satisfaction, of geothermal energy KBC considers sufficient to supply a unit that KBC proposes to cause to be constructed’. And Art. 4.6 provides that KBC may at any time during the first six years, issue a NOID to signify its ‘intention to develop the initial increment of geothermal energy and [to] construct the initial unit(s)’. The contract therefore leaves it entirely to KBC to judge whether and when it has satisfied itself that there is enough geothermal energy to go ahead with the project.

[18] “This is as one might expect. The purpose of issuing the December NORC and NOID was to prevent the JOC expiring after six years and to notify Pertamina formally of KBC’s intentions. It did not require any response from, or have any financial impact on, either Pertamina or PLN. As pointed out above, the risk of not being able to develop a viable system of geothermal electricity lay on KBC. If it was wrong to think that there was enough geothermal energy, it would be unable to recoup or profit from its front-end investment since it would
fail to develop electricity for sale to PLN. As we have seen, proceeding with the project in 1998 involved an anticipated expenditure of some US$102.7 million. The JOC left it up to KBC to decide whether to venture further investments of such magnitude.”

3. Who Was KBC Trying to Deceive in December 1997?

[19] “Recognition of the contractual allocation of risk prompts the question: Who, then, was KBC supposed to be deceiving in December 1997 when it issued the NORC and NOID? Obviously, if KBC genuinely intended to proceed and to make further substantial investments in the project, there would be no plausible case of fraud. It would make no sense to view the NORC and NOID as deceptive since KBC would only be deceiving itself as to the commercial viability of proceeding. Hence, Pertamina alleges that there was no genuine intention to proceed. However, in a draft pleading setting out the fraud argument (the draft pleading), the answer given by Pertamina to the question posed above is that:

‘... KBC issued the December NORC and NOID with a view to positioning itself to argue that the geothermal project should be allowed to continue by the [Indonesian Government] or failing that to make an enormous claim for loss of profit.’

[20] “That answer undermines its fraud argument. If, as the answer suggests, using the NORC and the NOID in support of a claim was only a fall-back position and KBC was, in the first place, genuinely pressing the Indonesian Government to allow the project to proceed, it is hard to see how KBC’s confirmation of resources and statement of intention to proceed was fraudulent. Moreover, nowhere in the draft pleading is it suggested that Pertamina or PLN were deceived by the December NORC and NOID. Nor could such deception plausibly be suggested.

[21] “As previously noted, Pertamina was closely monitoring KBC’s geothermal operations, regularly discussing them at joint meetings. Pertamina had access to all the data and had the expertise to evaluate it. If, as Pertamina alleges, it was generally known that 50% steam at the wellhead was used by financiers as the criterion of commercial viability, that fact must equally have been known to itself in 1997. The NORC and the NOID, together with the various work plans and programmes delivered to Pertamina, made clear the context of KBC’s statements about the methodologies employed and the resources confirmed. Those statements were self-evidently being made at a relatively early stage of the
project in the course of developing a conceptual model for estimating resource availability. Methodologies accepted to be appropriate to that task were being used while at the same time pursuing a drilling programme which would empirically test the availability and extent of the geothermal resources. KBC’s intended sequence of work was set out in work programmes showing future drillings, well tests, etc. It was never a question of KBC saying, or of anyone believing, that KBC was confining itself to the methodologies relevant to constructing the conceptual model. The NORC and the NOID were purporting to do no more than to convey estimates extrapolated from data then available, arrived at to KBC’s own satisfaction. I am therefore unable to see any deception practiced by KBC on anyone for any purpose related to the project by issuing the two notices."

4. The December NORC and NOID as Manufactured Evidence

[22] “The NORC and NOID may, however, be relevant to Pertamina’s fraud argument if they can be shown to have been created in order to support a bogus claim for damages in the expectation that the project would be shut down. On this scenario, the fraud would not be motivated by any gain or avoidance of loss within the context of the project itself. Rather, the misrepresentations would have been made with a view to bolstering a compensation claim to be launched after the project’s envisaged failure.

[23] “Mr. Benjamin Yu SC, appearing with Mr. Rimsky Yuen SC and Law Man Chung for Pertamina, did not shrink from such a submission. By 16 December 1997, everyone realized that Indonesia was in the throes of a severe economic crisis. Accordingly, so it was argued, KBC must have known that the project was likely to be shut down, leaving it merely with a claim against Pertamina and PLN. The December NORC and NOID were therefore issued to manufacture false evidence of confirmed resources and of KBC’s intention to proceed with development in order to provide a foundation for a damages claim. Why otherwise, Counsel asked, should KBC be in such a hurry to issue those two documents? How otherwise could one account for the sudden leap in estimated reserves in the short period which had elapsed between the September NORC and the December documents?

[24] “In my view, this allegation is simply not borne out by the evidence and is contrary to the findings of the Tribunal. To address Counsel’s rhetorical questions first, the record shows clearly that the ‘hurry’ to issue the NORC and NOID had been prompted by Pertamina and PLN and agreed to by KBC, with a view to persuading the Indonesian Government that the project should be
allowed to proceed. The marked increase in the estimate of geothermal energy reserves had been foreshadowed in the September NORC (the bona fides of which is not questioned) which had stated that further drilling, especially at K-33, might well justify concluding that the Karaha and Telaga fields were one continuous resource, enabling a substantially larger estimate of reserves to be made. The December NORC explains that this is in fact what occurred.

[25] "It is true that everyone knew that Indonesia was at the time undergoing a severe economic crisis. However, when the NORC and the NOID were issued, Pertamina and KBC had already persuaded the Indonesian Government, by the 2nd Presidential Decree, to exempt the project from the freeze imposed by the 1st Presidential Decree. Since the contracts placed the financing burden entirely on KBC, there was no reason to doubt that the exemption secured would continue since the project would make no US Dollar demands on Indonesia until mid-2000 at the very earliest, when the first generating unit was nominally scheduled to begin operation. Continuing the work would mean beneficial foreign currency inflows, local employment and development.

[26] "There is nothing to suggest that when the December NORC and NOID were issued on 16 December 1997, anyone foresaw that the Indonesian Government would reverse itself in relation to the project by the 3rd Presidential Decree eventually issued on 10 January 1998. There was therefore no basis for thinking that the two Notices had been brought into existence with a view to mounting a claim. On the contrary, the evidence indicates that KBC was genuinely seeking to press on with the project and, as the draft pleading acknowledges, was 'positioning itself to argue that the geothermal project should be allowed to continue'. That was the Tribunal’s finding:

'It is also to be noted that said notifications by the Claimant intervened in a period of time during which the suspension of the Project, ordered by the Presidential Decree no. 39/1997 of 20 September 1997, had been cancelled by the subsequent Decree no. 47/1997 of 1 November 1997 so that the Respondents’ reservations about the genuineness of the Claimant’s notices appear unjustified.’ (Award para. 130.)"

5. Do the New Documents Make Any Difference?

[27] "In my view, the ten new documents do nothing to rescue Pertamina’s deficient fraud argument. Indeed, it is difficult to see what benefit Pertamina is able to derive from them. Mr. Yu’s submissions tended to focus on the fact that someone or other had mentioned wellhead steam as a criterion of a well’s success
or had spoken of a need to establish commercial viability, possibly by reference to wellhead steam. Such statements are taken to be a sinister indication that those were the real criteria used internally, to be contrasted with the much less demanding criteria fraudulently adopted in the December NORC and NOID.

[28] “However, such arguments ignore the context in which those documents were created. It is clear from the work programmes issued by KBC that a milestone event a few months into 1998 involved the engineers and scientists on the ground obtaining the approval of KBC’s Management Committee for the project to progress. That Committee was made up of representatives of KBC’s principal investors charged with deciding whether to approve further investment to advance the project and with arranging finance for that purpose. It seems apparent that the ten documents in question were produced in the course of discussions among members of the exploration team on the ground as to how far they would be able to satisfy the Management Committee or potential financiers of the commercial viability of the available geothermal resources.

[29] “Mr. Don Campbell (who had responsibility for day-to-day resource related operations of the project) explains in an affidavit filed on KBC’s behalf that the standard of proof of resources which a management committee or potential financiers will tend to require (referred to by him as ‘managerial proof’) is substantially higher than the level of proof (termed ‘technical proof’) which KBC’s personnel would consider sufficient to issue a NORC and a NOID. ‘Managerial proof’ might typically involve satisfactory wellhead steam figures. But ‘technical proof’ may involve the engineers being satisfied that a sufficient probability of commercially exploitable resources exists as a result of conceptual modelling and extrapolation from available data. There is no reason in principle – and certainly nothing in the JOC or ESC – to require KBC to adopt a standard of ‘managerial proof’ as the opposed to ‘technical proof’ when deciding whether to issue a NORC and a NOID. Far less is there any ground for concluding that it was fraudulent to adopt a lower standard, given that the methodologies applied and data relied on were transparently disclosed. The fact that in a different context and for different purposes, KBC personnel were considering criteria involving wellhead steam production does not advance Pertamina’s fraud argument.”

6. Were the Arbitrators Deceived?

[30] “By contending that KBC obtained the Award by fraud, Pertamina is asserting that by tendering the December NORC and NOID containing the three misrepresentations mentioned, KBC succeeded in deceiving the Tribunal into
awarding it the damages concerned. That proposition does not, in my view, bear
examination.
[31] “The Tribunal was obviously fully aware of the significance of the
December NORC and NOID as stating that KBC had satisfied itself of the
probable existence of a resource capacity of 210 MW and that it intended to
develop that resource, as provided for by the contracts. It does the Tribunal an
injustice to suggest that it might somehow have mistaken such subjective
statements by KBC for decisive proof of the actual existence of such a resource
and such an intention.
[32] “The Tribunal made no such error. It closely scrutinized KBC’s 210 MW
capacity assertion upon which its US$ 512.5 million loss of profits claim was
based. Experts on both sides, familiar with the methodologies employed and with
access to all the available data, joined battle over whether the 210 MW assertion
was well founded. As Tang VP pointed out, during the arbitration Pertamina:
‘… characterized the December NORC and NOID as “shams”, “highly suspect”,
“fictional” and “not real”. And I might add “specious”.’ ([2007] 4 HKLRD 1002
at 1012, para. 36.)
[33] “The Tribunal in fact rejected KBC’s claim to US$ 512.5 million and
awarded (on grounds considered below) the significantly lower sum of US$ 150
million. It was obviously not deceived into simply accepting KBC’s subjective
statements in the NORC and the NOID. KBC failed to substantiate the quantum
of damages it had claimed. But that does not give any basis for saying that KBC
had embarked on a campaign of fraud, still less that it had managed to obtain the
Award by fraud.
[34] “In my view, Pertamina has not come close to demonstrating, even with
the help of the further evidence sought to be admitted, that it has a real prospect
of success in showing that the Award was obtained by fraud. Sect. 44(3) of the
Ordinance therefore provides no basis for refusing enforcement in the present
case.”

7. Conclusion

[35] “The aforesaid conclusion necessarily means that Pertamina is unable to
meet the second Ladd v. Marshall condition. The evidence consisting of the ten
documents sought to be admitted cannot be shown to be likely to have an
important influence on the result of the case on a remitter to Burrell J. It is
unnecessary to discuss the other conditions.”
II. LACK OF REASONS AND DOUBLE-COUNTING

[36] “As indicated earlier, Pertamina seeks to challenge the US$ 150 million loss of profits award on two grounds, namely, the reasons ground and the double-counting ground. It is analytically convenient to begin with the latter ground.

1. Double-counting

[37] “It was contended, but without any detailed submissions, that the award of US$ 150 million involved duplication of compensation granted by the US$ 111.1 million award. It appears that this was merely one aspect of the complaint that the Tribunal had given no reasons for the quantum of the loss of profits award, leaving one in the dark as to whether there had been double-counting.

[38] “Taken alone, I do not see how the double-counting ground comes within any of the Sect. 44 categories permitting the Hong Kong Court to refuse enforcement of a Convention award. As such, it amounts to an impermissible attempt to re-argue the merits of a point decided by the Tribunal against Pertamina.

[39] “I would add that I can see no substance in the double-counting ground itself. The Tribunal found on the evidence that KBC was entitled, under Arts. 1243-1252 of the Indonesian Civil Code to damnum emergens representing monetary compensation for the expenses incurred in reliance on the contract. (Award paras. 97-98.) That led to the US$ 111.1 million award. It went on to hold that KBC was entitled to ‘a second type of damages, namely lost profits associated with the loss of geothermal development opportunities’, reflecting the Roman Law concept of lucrum cessans. It noted the expert evidence stating ‘that no double-counting will occur’ by making such an award. (Award para. 109 and para. 121.) That evidence was plainly accepted as the Tribunal went on to make the additional award of US$ 150 million. It is not for the Hong Kong court to second-guess the Tribunal’s conclusions in this context. There is in any event nothing surprising or questionable about the Tribunal’s approach.”

2. Lack of Reasons

[40] “Pertamina contends that the Tribunal made the US$ 150 million loss of profits award without giving reasons. This, it argues, contravened the arbitral agreement which had incorporated the UNCITRAL Arbitration Rules, including Art. 32(3) requiring the arbitral tribunal to state reasons upon which the award
is based. Such a departure from the arbitral agreement, Pertamina submits, brings the case within Sect. 44(1)(e) of the Ordinance which permits enforcement to be refused where ‘the arbitral procedure was not in accordance with the agreement of the parties’.

[41] “I agree that the complaint, if made good, falls prima facie within Sect. 44(1)(e). However, before the question whether the Tribunal in fact failed to give reasons is reached, Pertamina faces two hurdles. The first arises from the rejection of the double-counting ground. What follows is that the reasons ground becomes academic. Even if it is a sound argument, it cannot affect the result of this appeal. This is because the reasons ground involves only a challenge to the US$ 150 million award. Even if that succeeds, the US$ 111.1 million award in respect of wasted expenditure remains in place and amply justifies enforcement to the limited extent achieved in Hong Kong, that is, to the extent of US$ 900,000. This is a hurdle which Pertamina has been unable to surmount.

[42] “The second hurdle faced by Pertamina arises out of the nature of the complaint. It could well cause injustice to the party who was successful in the arbitration if, because of inadequate reasons in the award, the enforcing court were to refuse enforcement. There might be perfectly good reasons which have not been properly stated. To guard against this, it is likely to be fair and proportionate to require the losing party to apply to the supervisory court to set aside the award on that ground. It would often then be open to the supervisory court to remit the award to the arbitrators for proper reasons to be supplied – a power which the enforcing court obviously lacks. If the arbitrators prove unable to give proper reasons, then the supervisory court may decide to set the whole or part of the award aside. Or an enforcing court might subsequently refuse enforcement.

[43] “In the present case, the Swiss Court is the supervisory court. It summarily dismissed Pertamina’s attempt to set aside the award because of a failure to provide security in time. Pertamina’s application for reconsideration was rejected by the Swiss Supreme Court. No evidence has been filed as to whether the proposed application to the Swiss Court included a complaint regarding want of reasons and there is no evidence as to whether that court had power to order remitter of the award to the Tribunal (assuming for present purposes that the reasons were in fact inadequate and that the argument was not in any event academic). In such circumstances, in line with the generally accepted inclination in favour of enforcement notwithstanding such complaint, I would be minded to exercise my discretion in favour of enforcement notwithstanding such complaint.

“I hasten to add that the reasons ground is in fact clearly without substance. The Tribunal has lucidly spelt out the basis of the US$ 150 million award. As we have seen, the commercial structure of the project required KBC to make the front-end investment with a view to earning profits from the sale of electricity over a 30 year period. Since the project was brought to a halt by the 3rd Presidential Decree at a relatively early stage, the formidable task faced by the Tribunal was to try to assess the quantum of damages in such a case. Its approach, as laid out in the Award, was as follows. (Award paras. 121-136.)

(a) The Tribunal found that Indonesian law permits recovery of lost profit (equated to ‘lucrum cessans’) being damages which have to be foreseeable and the direct result of the breach.

(b) It recognized that the profits which KBC might earn in the future were ‘subject to the vagaries of a number of risks typical of this kind of project’. However, significant risks had been removed by the contracts. Thus, KBC enjoyed contractual protection against the risks of market availability, price fluctuations, currency exchange movements, inflation and government interference.

(c) The principal remaining risks concerned the availability and extent of the geothermal energy reserves, affordable financing and possible delays. In assessing the likely extent of geothermal energy reserves, the Tribunal took full account of Pertamina’s attack on KBC’s US$ 512.5 million claim based on the December NORC and NOID estimates, and gave weight to the argument that they were an overestimate. As to financing, it accepted the evidence of FPL Energy Inc that it would have been prepared to provide the same.

(d) The Tribunal decided that a substantial award was merited but that the parties’ approach of debating an appropriate discount rate for projected earnings from this long-term project should be rejected since there were too many variables.

(e) Instead, it characterized the claim as one for ‘lost profits associated with the loss of geothermal development opportunities’ (award para. 109) or ‘perte de chance’ which it considered ‘a widely recognized basis for [assessing] the lost profits damages component’ (award para. 122), it settled on a ‘significant reduction of KBC’s lost profits claim’, fixing its quantum at US$ 150 million.

“As mentioned at the outset, the enforcing court’s role is not to sit in judgment on the Tribunal’s award. The question is not whether the Tribunal was right or wrong or whether the enforcing court would have arrived at a different award. The issue is whether the Tribunal can properly be said to have failed to
give reasons for its award so as to bring the case within Sect. 44 of the Ordinance. The answer is plainly ‘No’. The Tribunal’s reasoning was amply set forth. Pertamina’s complaint is really that it does not agree with the ‘loss of chance’ approach – necessarily a broadbrush approach – adopted by the Tribunal applying Indonesian law. The reasons ground is without substance.”

III. “IRRATIONAL” AWARD

[46] “In mounting the irrationality argument, Pertamina faces the daunting task of elevating a criticism of the way the Tribunal construed particular provisions of the JOC into a ground falling within Sect. 44. It endeavours to argue that the Tribunal adopted such an irrational construction of the JOC that it effectively re-wrote that contract, bringing the case within Sect. 44(2)(d) on the basis that: ‘... the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration’.

[47] Pertamina cites Re Brown & Williamson Tobacco Corp v. Chesley,13 in support of the court’s intervention on this basis. That was, however, a wholly different type of case. A reference had been made to arbitrators to evaluate the legal work done by certain private attorneys involved in massive tobacco litigation with a view to assessing the legal fees payable to them. However, although the arbitration agreement ‘expressly limited the scope of their evaluation to legal work done “in connection with” the Ellis Action in California’, the arbitrators took it upon themselves to award US$ 1.25 billion to a collection of law firms known as ‘the Castano Group’ for its nationwide litigation efforts in other states. The dispute therefore concerned the scope of the arbitration agreement itself in a challenge brought before the supervisory court.

[48] “What Pertamina seeks to do in the present case is to contend that the Tribunal made errors in its treatment of substantive issues in the arbitration. It submits that the Tribunal was wrong in its holding that non-performance of the contracts by Pertamina and PLN following issue of the 3rd Presidential Decree constituted a breach, with neither of them being entitled to rely on the decree as excusing performance since the two contracts expressly provided that Government Related Events should constitute Events of Force Majeure excusing performance only on KBC’s part.14 Pertamina seeks to argue that the Tribunal

13. “794 NYS 2d 842 (Supp 2002).”
14. “As provided under Art. 15.2.e of the JOC. See Award paras. 54-57....”
should have held that the contracts had been suspended by KBC issuing its force majeure notice, whereupon non-performance by Pertamina and PLN could not constitute a breach; or that non-performance was in any event excused because the decree had introduced a supervening illegality frustrating further performance on their part. This is not an argument that the Tribunal’s award was irrational. It is simply an argument that it was wrong.

[49] “This is accordingly an invitation to this Court impermissibly to review the correctness of the Tribunal’s construction. Pertamina cannot evade the rule preventing review of the merits of the award by arguing not merely that the award is ‘wrong’ but that is ‘so very wrong as to be irrational’, and then clothing that argument in the wording of Sect. 44(2)(d).”

(....)
23. High Court of the Hong Kong Special Administrative Region, Court of First Instance, 12 December 2008, Miscellaneous Proceedings No. 928 of 2008

Parties: Plaintiff: FG Hemisphere Associates LLC (US)
Defendants: (1) Democratic Republic of the Congo;
(2) China Railway Group (Hong Kong) Limited (nationality not indicated);
(3) China Railway Resources Development Limited (nationality not indicated);
(4) China Railway Sino-Congo Mining Limited (nationality not indicated);
(5) China Railway Group Limited (nationality not indicated)
Intervener: Secretary for Justice (Hong Kong SAR)

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Articles: I

Subject matters: – sovereign immunity from execution
– commercial transaction and sovereign immunity
– waiver of sovereign immunity from execution
– reference to 1958 New York Convention does not imply waiver of sovereign immunity from execution

Commentary Cases: ¶ 105

Facts

In the 1980s, Energoinvest, a company that was not a party to the present proceedings, provided financing of approximately US$ 15 million and US$ 22 million to the Democratic Republic of the Congo (DRC). A dispute arose in respect of this relationship. On 30 April 2003, two ICC arbitral tribunals with seat in France and Switzerland, respectively, rendered two awards in favor of Energoinvest. By an assignment of 16 November 2004, Energoinvest’s interest in the awards was transferred to FG Hemisphere (FG).
On 15 May 2008, FG obtained an ex parte order to enforce the two ICC awards in Hong Kong against China Railway Group (Hong Kong) Limited, China Railway Resources Development Limited and China Railway Sino-Congo Mining Limited (the 2nd to 4th Defendants), companies of the China Railway Group. The 2nd to 4th Defendants allegedly owed certain amounts to the DRC under a series of contracts they and other parties had concluded in respect of a joint venture company (JVC) to develop the DRC’s infrastructure – railroads, roads, airports, hospitals, hydroelectric and electric stations, buildings, houses, health centers and universities – in consideration of the right to exploit DRC’s copper and cobalt reserves. The relevant contracts were a Memorandum of Agreement (MOA) dated 17 September 2007, a Cooperation Agreement (CA), a Joint Venture Agreement (JVA), a Supplemental Cooperation Agreement (SCA) and a Supplemental Joint Venture Agreement (SJVA). The MOA referred to and was intended to provide the framework for the implementation of cooperation agreements signed in 2001 between the DRC and PR China. The monies allegedly owed to the DRC by the 2nd to 4th Defendants under these contracts were Entry Fees, an up-front payment for the grant of a licence to exploit the DRC’s mineral rights.

The DRC resisted enforcement of the ICC awards in Hong Kong alleging sovereign immunity. The Honk Kong SAR Secretary of State submitted evidence in the proceeding in the form of a letter (the Letter) dated 20 November 2008 from the Office of the Commissioner of the Ministry of Foreign Affairs (MFA) of the People’s Republic of China (PRC) in Hong Kong to the Constitutional and Mainland Affairs Bureau of the Hong Kong Government. The Letter stated that PR China takes and has always taken the stance that sovereign states enjoy absolute (as opposed to restrictive) immunity before foreign courts.

The Court of First Instance, per A.T. Reyes, J, in Chambers, held that the DRC enjoyed sovereign immunity because the transaction underlying the awards was not of a commercial nature.

The court first examined the submissions of the parties as to what doctrine of sovereign immunity – absolute immunity or restrictive immunity – applied in Hong Kong following its reversion to PR China on 1 July 1997 and the ensuing non-applicability of the UK State Immunity Act (SIA), which undisputably embraced the latter doctrine. In contrast with the absolute immunity doctrine, the doctrine of restrictive immunity holds that states do not enjoy immunity from suit where they are engaged in transactions of a purely commercial nature. The court discussed the theories advanced by counsel and concluded that the most correct and straightforward seemed to be the theory advanced by FG that as a result of the SIA ceasing to have effect the common law as it had developed prior
to the extension of the SIA to Hong Kong in 1979 – which adopted restrictive immunity – was revived. A conclusion on this point however was unnecessary in view of the court’s finding that the transaction underlying the awards was not of a commercial nature.

The court noted the evidence provided in the 2008 Letter but reasoned that the Chinese position may be changing: in 2005, PR China signed the United Nations Convention on Jurisdictional Immunities of States and Their Property, which adopts a restrictive approach in relation to state immunity. In any case, a conclusion on this point was not needed for the reasons above.

The court of first instance then examined the contractual system of the parties’ relationship and concluded that it was not of a commercial nature. It noted that the original cooperation agreements were concluded between the two states, PR China and DRC; that the CA, JVA, SCA and SJVA were executed thereunder; that the Chinese parties to the agreements, though corporate entities, were state enterprises; that the nature and scale of the undertaking was “massive and ambitious” and that the agreements contained terms “which one would [not] expect or find in a conventional trading contract”, such as special tax and customs advantages, visas and work permits for expatriate staff of the JVC. Also, in the court’s opinion, the Entry Fees were a payment that only a state could exact, allowing its natural resources to be used for the direct benefit of its people.

Hence, the court concluded that the DRC did not engage in a commercial activity and was therefore immune even under a restrictive approach to sovereign immunity.

It remained to be ascertained whether the DRC waived its right to sovereign immunity. The court held that it did not. It reasoned that submission to ICC arbitration implies a waiver of immunity from jurisdiction rather than from execution, and that submission to the ICC Rules only means that the DRC undertook to carry out any award without delay and waived its right to recourse. In the court’s opinion, that was “far from saying that the DRC waives its right to plead immunity from the jurisdiction of a foreign court in relation to the enforcement of the award”.

Nor did acceptance of arbitration in countries that are party to the 1958 New York Convention imply a waiver. The DRC may have been aware of the impact of the New York Convention when it submitted to arbitration proceedings in Switzerland and France, but that did not equal “a blanket waiver of immunity and a wholesale acceptance that the awards can be enforced against the DRC in any New York Convention state”.

598 Yearbook Comm. Arb’n XXXIV (2009)
1. ABSOLUTE OR RESTRICTIVE SOVEREIGN IMMUNITY

[1] “There are two schools of thought on the ambit of sovereign immunity in public international law. The traditional thinking is that states being equal to one another, a state enjoys ‘absolute immunity’ from suit in the courts of another state. Under this school, the domestic courts of one state would not normally have jurisdiction to adjudicate upon matters in which another state is named as a defendant. I say ‘normally’ because the absolute immunity school of thinking allows for the possibility of a state waiving immunity before a given tribunal of another state.

[2] “More recently, from at least the 1950s, as states became more involved in commercial transactions either in their own name or in the form of state-owned corporations, a different line of thinking has established itself. This school of thought would confer only a ‘restrictive immunity’ on states. Thus, under this school, states do not enjoy immunity from suit where they are engaged in transactions of a purely commercial nature. On this thinking, regardless of whether a state has waived immunity, it will be subject to the jurisdiction of a foreign court if in relation to suits arising out of ordinary commercial transactions.

[3] “The DRC contends that the Hong Kong Court should follow the absolute immunity school. Alternatively, the DRC contends that the transactions involved here are not commercial ones falling within the exception to sovereign immunity contemplated by the restrictive approach. FG says that the Hong Kong Court should adopt a restrictive approach and the relevant transactions here are purely commercial deals. In the alternative, if the proper approach is absolute immunity or if the transactions here are not commercial, then on the facts (FG suggests) the DRC has waived its immunity.”

1. Sovereign Immunity in Hong Kong Before 1 July 1997

[4] “It is plain that immediately prior to 1 July 1997 Hong Kong followed the restrictive approach. At common law, in the first half of the 20th century, the absolute immunity school of thinking was dominant. But a series of landmark decisions (especially, The PHILIPPINE ADMIRAL [1977] AC 373 (PC), Trendtex Trading Corporation v. Central Bank of Nigeria [1977] 1 QB 529 (CA), and The I CONGRESSO DEL PARTIDO [1983] AC 245 (HL)) heralded a shift to the restrictive immunity school of thinking, initially in respect of actions in rem and
then in relation to all actions whether in rem or in personam. By the time of
CONGRESSO, Lord Wilberforce could state (at p. 261 et seq.):

‘The effect of The PHILIPPINE ADMIRAL … if accepted, as I would accept
it, is that … actions, whether commenced in rem or not, are to be decided
according to the “restrictive” theory.’

[5] “In 1978 the UK enacted the State Immunity Act (SIA) which endorsed the
restrictive approach to state immunity. The SIA was extended to Hong Kong,
with only minor revision, by the State Immunity (Overseas Territories) Order
1979.”

2. Sovereign Immunity in Hong Kong After 1 July 1997

[6] “The difficulty lies in determining Hong Kong’s position following its
reversion to the Mainland on 1 July 1997. At that point, the SIA ceased to have
effect in Hong Kong. Counsel have advanced competing theories as to the
consequence of the SIA ceasing to operate here.

[7] “Theory 1 is supported by Mr. Coleman [counsel for FG]. This posits that,
as a result of the SIA ceasing to have effect, the common law as it had developed
prior to the extension of the SIA to Hong Kong was revived and continues to
apply. Mr. Coleman bolsters Theory 1 by reference to Arts. 8 and 18 of the Basic
Law. Those articles provide that, following the resumption by the Mainland of
sovereignty over Hong Kong, the common law previously in force in Hong Kong
shall apply. If that is right, Mr. Coleman says that Hong Kong must continue to
follow the restrictive approach.

[8] “Theory 2 (supported by Mr. Barlow [counsel for the DRC]) refers to Arts.
13 and 19 of the Basic Law. These provide that the Central People’s Government
shall be responsible for the foreign affairs relating to the HKSAR [Hong Kong
Special Administrative Region]. Accordingly, the Hong Kong Court ‘shall have
no jurisdiction over acts of state such as defence and foreign affairs’. That means
(Mr. Barlow submits) that the Hong Kong Court cannot adjudicate on the
question of sovereign immunity, since such issue concerns foreign affairs
(namely, the status of a foreign state within the Hong Kong forum). If that is
right, then whatever the common law position (whether absolute or restrictive)
the Hong Kong Court simply lacks jurisdiction to determine the DRC’s claim to
sovereign immunity.

[9] “Theory 3 is a variant of Theory 1. It is advanced by Ms. Cheng on behalf of
the DOJ [Department of Justice] and has the support of Mr. Barlow as an
alternative to Theory 2. Theory 3 accepts that the position in Hong Kong is governed by common law. But that is only taken as a starting point. Ms. Cheng argues that the true common law position is not necessarily that reflected by (say) Lord Wilberforce’s dictum cited above. Ms. Cheng suggests that previously, in concluding that customary international law had evolved beyond an absolute to a restrictive immunity position, the English Courts (including the Privy Council and the House of Lords) looked largely to the practice of Western states. That was too narrow an approach. The English Courts did not consider that many developing countries (such as the PRC) have consistently adhered to the absolute immunity school.

[10] “Ms. Cheng has drawn my attention to dicta in Trendtex where Lord Denning MR espouses the view that domestic common law automatically ‘incorporates’ customary international law. This means (according to Ms. Cheng) that if numerous developing states still adhere to the absolute immunity school, customary international law cannot have evolved to a stage where restrictive immunity has become the prevailing orthodoxy. The Hong Kong Court (Ms. Cheng contends) needs to embark upon a comprehensive survey of the general practice of states to determine what precisely customary international law on sovereign immunity is at present. It is only such customary international law, determined after extensive survey, which should now be held by me to constitute Hong Kong common law on sovereign immunity on the basis of Lord Denning’s dicta on incorporation.

[11] “Ms. Cheng does not stop there. She also refers to Arts. 13 and 19 of the Basic Law and the Letter. She submits that, given that this Court has no jurisdiction on matters relating to foreign affairs, in any survey, I should attach significant weight to the Letter as indicative of the PRC’s views on sovereign immunity. The Letter states that the Central People’s Government has consistently advocated absolute immunity in international forums. The PRC has also (the Letter states) persistently objected to any attempt to restrict the ambit of the absolutist doctrine. Ms. Cheng acknowledges that ultimately the Letter is not binding on me. But she submits that, given Arts. 13 and 19, whatever the outcome of the survey which the Court undertakes of other states’ practice, I should attach significant weight to the matters certified in the Letter. Hong Kong forming part of the PRC, it would be odd (Ms. Cheng stresses) for the Hong Kong Court to adopt a restrictive approach, while the PRC Government has always taken an absolute immunity stance.

[12] “Theory 4 is based on an argument sketched out by Mr. Graeme Johnston in The Conflict of Laws in Hong Kong (2005). Theory 4 was initially endorsed (albeit with radically differing conclusions) by Mr. Coleman and Mr. Barlow. Later,
upon reflection, Mr. Coleman thought that Theory 4 was invalid and disavowed any further reliance on it. Theory 4 relies on Sect. 6 of the International Organizations and Diplomatic Privileges Ordinance (Cap. 190) (IODPO). That provides:

‘Notwithstanding any provision to the contrary contained in any Ordinance, the international custom relating to the immunities and privileges as to person, property or servants of sovereigns, diplomatic agents, or the representatives of foreign powers for the time being recognized by the People’s Republic of China shall, in so far as the same is applicable mutatis mutandis have effect in Hong Kong.’

[13] “Mr. Johnston’s book (at para. 4.043) notes that there is an ambiguity in the section. Does the expression ‘for the time being recognized by the [PRC]’ refer to ‘sovereigns, diplomatic agents, or the representatives of foreign powers’ or does the expression modify ‘international custom’? The book concedes that the former reading is ‘the more natural linguistic meaning’. But the author suggests that the latter reading is ‘arguable’. If the latter reading is taken, the author suggests that, by IODPO Sect. 6, ‘the international custom relating to … sovereigns’ will have to be determined by reference to ‘international custom … for the time being recognized by the [PRC]’. Consequently, to determine Hong Kong law on sovereign immunity, I must (according to the author) hear expert evidence on the doctrine of sovereign immunity as applied under Mainland law.

[14] “Such exercise of considering expert evidence on Mainland law is no easier than that of deciding the scope of sovereign immunity under Hong Kong law by reference to a survey of prevailing state practice.

[15] “There is the evidence of the Letter which I have already mentioned. But, on the footing of Theory 4 being correct, both FG and the DRC have advanced expert affidavit evidence on sovereign immunity under PRC law. The gist of that evidence is that the law on sovereign immunity in the PRC may not be as clear-cut as the Letter states.

[16] “There is no doubt that until recently the Mainland took the absolute immunity position. Nonetheless, despite what is stated in the Letter, there are indications of a possible change in the position regarding sovereign immunity in the Mainland. This is because on 14 September 2005 the PRC signed the United Nations Convention on Jurisdictional Immunities of States and Their Property. That Convention adopts a restrictive approach in relation to state immunity. The Convention has not yet been signed by a sufficient number of states and so has not yet come into force. Some 30 signatories are required and to date only about
half-a-dozen states have signed. Nor has the Convention been enacted by the
PRC to form part of Mainland domestic law. But, having signed the Convention,
the PRC Government must be taken to have at least indicated its acceptance of
the wisdom of the provisions therein.
[17] “Mr. Coleman (when advocating Theory 4) relied heavily on the
Convention as evidence that the PRC had moved (or was moving) from an
absolute to a restrictive immunity position. Mr. Barlow, on the other hand,
argued that the fact that the Convention had not yet come into effect, whether
in the PRC or elsewhere, must be construed as a strong pointer that the absolute
immunity theory remained valid in the Mainland. In contrast, Ms. Cheng
submitted (and Mr. Coleman later agreed) that the IODPO has nothing to do
with sovereign immunity. According to Ms. Cheng, the IODPO merely regulates
the recognition of diplomatic immunity and diplomatic privileges enjoyed by
representatives of sovereign states or international institutions (such as the
United Nations) in Hong Kong.
[18] “I have summarized the four principal theories advocated by counsel in
deerence to the time spent in hearing submissions on them. But at the end of the
day I think that it is unnecessary to express any settled view on the validity of the
theories. This is because I do not believe that, on the facts, the relevant
transaction here is of a commercial nature. Thus, even if it were supposed on the
basis of one theory or other that Hong Kong law adopts a restrictive approach,
I do not believe that the transaction here falls within the exception to sovereign
immunity recognized by the restrictive approach.
[19] “If I had to express a provisional view, it would be that Theory 1 seems the
more correct and straightforward analysis. This is because I have difficulties with
Theories 2, 3 and 4.
[20] “Insofar as Theory 2 is concerned, I doubt that Basic Law Arts. 13 and 19
have the effect that this Court has no jurisdiction to adjudicate on claims of
sovereign immunity. A Court determining such a matter does not embark on an
exercise involving ‘foreign affairs relating to the HKSAR’. The Court is not
conducting foreign affairs. Nor, to my mind, is the Court adjudicating upon any
act of state. All the Court is doing is deciding what customary international law
is on a matter and whether the law so discerned forms part of Hong Kong
domestic law. If the law is part of Hong Kong domestic law, the Court merely
applies it much in the same way as it is bound to apply any other domestic law.
[21] “Theory 3, on the other hand, seems overwrought. By this I mean that the
theory’s components do not all sit comfortably together. Brownlie, Principles of
Public International Law (7th ed.) states of sovereign immunity (at p. 330):
It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasize that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law. Moreover, the practice of states is far from consistent and, as the comments of governments relating to the draft articles produced by the International Law Commission indicate, there is a persistent divergence between adherents of the principle of absolute immunity and that of restrictive immunity.

Given that is an accurate summary of the present position, I am sceptical that a survey of the general practice of states will lead to any meaningful result.

[22] “Further, if Ms. Cheng is right that it would be anomalous for Hong Kong to take one position (restrictive immunity) while the PRC Government took another (absolute immunity), what is the point of conducting a survey of other states? In reality, Ms. Cheng must be inviting me to treat the Letter as practically conclusive. However, in light of the signing of the Convention by the PRC, I have difficulty in doing just that. The Convention must be some evidence of a trend in customary international law, even if only in relation towards ‘the law as it should be if it was to accord with good policy’ (sometimes referred to as de lege ferenda).

[23] “In Trendtex (an authority which Ms. Cheng herself urged on me), Lord Denning MR, commenting on state practice relating to sovereign immunity in his time, said this (at 556D-557B):

Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. ‘... We must take the current when it serves, or lose our ventures.’: Julius Caesar, Act IV, sc.III.

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering the rules of English law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.”
“I understand this to mean that ascertaining customary international law does not mean taking a poll of states and assessing what is the practice of the majority. The Court can look to what the trend is. Consequently, if Lord Denning’s dictum is right, in reaching any conclusion about customary international law, I cannot ignore the Convention and the trend which it signifies. The Convention is an important piece of evidence as to customary law. But the Letter is silent on the Convention and the significance of the PRC’s signing that document. I am therefore at a loss on how the stance stated in the Letter is to be reconciled (if at all) with the signing of the Convention.

“On Theory 4, I agree with Ms. Cheng’s stance. It seems to me that the IODPO Sect. 6 does not concern the doctrine of sovereign immunity, but merely the privileges and immunities of diplomats and other similar representatives.”

II. RESTRICTIVE SOVEREIGN IMMUNITY AND COMMERCIAL TRANSACTION

“Let me now explain why I do not regard the transaction here as being of a commercial nature. Assume that under the CA, JVA, SCA and SJVA, the Entry Fees are ultimately payable to the DRC (as alleged by FG and contrary to the case advanced by the 2nd to 5th Defendants). This is the hypothesis most favourable to FG since obviously, if the DRC were not involved at all, there would be no basis for executing against the Entry Fees. Even then, I do not think that the payment of Entry Fees can constitute a commercial transaction of the nature excepted by the restrictive approach.

“First, consider the context of the CA, JVA, SCA and SJVA. They appear to have been executed within the umbrella cooperation agreements between the PRC and DRC mentioned in the Memorandum. That is not a normal attribute of a routine commercial transaction among businessmen or traders operating to make a profit for their own account. It is true that the Chinese side has entered into the CA, SCA, JVA and SJVA through corporate entities. But those entities are state enterprises. That the PRC has chosen to implement the umbrella understanding between itself and the DRC through state-owned companies cannot detract from the fact that, in reality, the transaction is the working out of a cooperative venture between two sovereign states.

“Second, consider the nature and scale of the undertaking under the CA, JVA, SCA and SJVA. That undertaking is massive and ambitious. In consideration for the transfer to the JVC [Joint Venture Company] of the right to exploit extensive copper and cobalt reserves in the DRC (amounting to some
10,616,070 tons), the Chinese Party will build extensive infrastructure in the DRC. That infrastructure comprises railroads, asphalted and non-asphalted roads, urban networks, airports, hospitals, hydroelectric and electric stations, buildings, houses, health centers and universities. The agreements provide for no more nor less than the development of the whole of the DRC for the economic benefit and well-being of its citizens.

[29] “Contrary to Mr. Coleman’s submission, I am unable to characterize a development project of the scale envisaged as a routine trading operation. This is not, for example, a mere requisition of supplies for use in government offices or the engagement of a ship for cargo trading. Few (if any) commercial organizations would be able to carry out a massive undertaking of the sort envisaged without state backing. It seems to me that, in this particular instance, the project is possible (perhaps only possible) because it is being driven by two governments (the DRC and PRC) as opposed to private entities.

[30] “Third, consider the provisions of the CA, SCA, JVA and SJVA. They are not the terms which one would expect or find in a conventional trading contract. Thus, for example, the JVC is to enjoy special tax and customs advantages (including exemptions from import and export duties) in relation to its DRC operations. The flow of capital (free from the risk of expropriation) is stipulated by the JVA as is the promise of any preferential rights legislated by the DRC in the future. Relevant visas and work permits are also assured for expatriate staff of the JVC. These are terms which only states can stipulate in the exercise of their sovereign power.

[31] “Fourth, consider the Entry Fees. These seem to be in the nature of an up-front payment in consideration of the grant of a licence to exploit the DRC’s mineral rights. Such payment strikes me as only one which a state or government can exact. Here the DRC is allowing its natural resources or heritage to be used for the direct benefit of its people.

[32] “None of the matters which I have just highlighted suggest a purely commercial transaction within the contemplation of the restrictive approach. On the contrary, the matters under consideration are more the hallmarks of the exercise by states of sovereign authority in the interests of their citizens.

[33] “In the course of submission, Mr. Coleman pressed upon me the fact that, in various speeches in relation to the agreements here, representatives of the DRC government at the highest level have described the proposed undertaking as a ‘commercial’ venture. But it is important to look at context. Ultimately, whether a transaction is or is not a ‘commercial’ venture within the terms of the restrictive approach is a question of law. The label given by different ministers to a transaction in their speeches cannot be conclusive.
[34] “In my view, in their speeches the DRC government ministers were saying no more than that, the proposed venture was a proper use of their country’s resources. The DRC’s heritage (its Government was in effect saying) was not being uselessly squandered or surrendered. The transaction was ‘commercial’ in the sense of being ‘a good deal’ from which everyone would benefit. In particular, the populace of the DRC would be obtaining much-needed and valuable infrastructure.

[35] “It follows that, even if Hong Kong adheres to the doctrine of restrictive immunity, the relevant transaction as a whole (including the payment of Entry Fees) does not fall within the commercial trade exemption. See, generally, the useful discussion (albeit ultimately inconclusive on the facts of that case) in Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania and another (No. 2) [2007] 2 WLR 876 (CA), at paras. 131-133.”

III. WAIVER OF SOVEREIGN IMMUNITY

[36] “That leaves the question whether the DRC waived the right to invoke state immunity. Mr. Coleman contends that the DRC waived its immunity by submitting to the ICC arbitrations which produced the awards. In particular, Mr. Coleman submits that waiver may be inferred from one or more of the following matters:

(1) Article 28(6) of the ICC Rules 1998 (which governed the two ICC arbitrations). This provides:

‘Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.’

(2) The 1st and 2nd ICC awards were made in Switzerland (Zurich) and France (Paris) respectively.
(3) Swiss law adopts a restrictive approach on state immunity.

[37] “On Art. 28(6), Mr. Coleman argues that the submission to ICC arbitrations amounted to an agreement to abide by the ICC Rules. Given the

undertaking in Art. 28(6) to ‘carry out any Award without delay’, the DRC (Mr. Coleman submits) must be presumed to have waived any right to claim immunity from enforcement of the awards against it. Mr. Coleman cites Creighton v. Qatar (2000) XXV Ybk Comm Arb 458[-460] in support. There the French Cour de Cassation mentioned agreement to Art. 24(2) of the ICC Rules 1975 as an example of a waiver of immunity from execution. Art. 24(2) was in similar terms to Art. 28(6).

[38] “On the seats of the two arbitrations, Mr. Coleman points out that (like Hong Kong) Switzerland and France are parties to the [1958] New York Convention. Implicit in the submission to arbitration in Switzerland and France (Mr. Coleman reasons) must have been an acceptance of the possibility of the awards being enforced in any New York Convention state (such as Hong Kong). On this, Mr. Coleman notes Art. III of the New York Convention. [Quotation of Art. III omitted.]

[39] “As for Swiss law, Mr. Coleman stresses that it does not distinguish between waiver of immunity as to jurisdiction and waiver of immunity as to enforcement. A submission to arbitration in Switzerland is treated as both a waiver of immunity from jurisdiction and enforcement.

[40] “I am not persuaded that there has been waiver by the DRC of immunity in respect of the enforcement of the two ICC awards.

[41] “First, the issue is whether the DRC has waived the right to claim immunity from execution in Hong Kong. The law distinguishes between waiver of immunity in relation to suit and waiver of immunity in relation to execution. The fact that a state has waived immunity in respect of a suit does not of itself imply that it has also waived immunity from execution in respect of any judgment or award arising from such suit. See, for example, Dicey, Morris & Collins on the Conflict of Laws (14th ed., 2006), p.280 (n. 52) (in the context of the State Immunity Act 1978) and In re Suarez [1917] 2 Ch 131 (involving diplomatic immunity against execution). It follows that I cannot infer anything from the mere fact that the DRC submitted to two arbitrations.

[42] “Second, am I able to infer a waiver from the additional fact the two arbitrations were subject to the ICC rules? Let me assume for this purpose that the DRC’s submission to ICC arbitrations constituted an agreement to abide by the ICC Rules 1998 (including Art. 28(6)).

[43] “I should only find waiver if there has been clear and unambiguous conduct on the part of the DRC which can be characterized as inconsistent with an intention to invoke immunity from execution. Mr. Barlow (citing Dicey, Morris & Collins, p. 285 (at para. 10-028)) submits that no less than an express written statement of waiver or an express declaration of waiver before the Court would
suffice. But, for the purposes of the present argument, I shall assume that it is
eough to found waiver if there is clear conduct which is at variance with
claiming immunity from execution.

[44] “I am not persuaded that Art. 28(6) is any clear statement or evidence of
waiver. I read that Article as saying no more than that the DRC waives a right of
recourse (that is, challenge) against the award to the extent that the DRC can
validly waive such right. The Article says nothing about (and does not deal with)
waiving the right of immunity from execution in some other jurisdiction in
relation to an adverse award.

[45] “It is true that under Art. 28(6) the DRC undertakes to carry out an award.
But that is far from saying that the DRC waives its right to plead immunity from
the jurisdiction of a foreign court in relation to the enforcement of the award. An
undertaking to carry out something is not the same thing as surrendering an
immunity.

[46] “With respect, I do not think that Creighton can be right insofar as it was
there suggested that submission to an ICC arbitration is without more
tantamount to a waiver of immunity from execution. I do not think such
conclusion logically follows from the premise.

[47] “Third, I cannot infer from the simple fact that the awards were obtained
in New York Convention states that:

(1) the DRC agreed that the awards could be enforced against it in other New
York Convention states; and
(2) the DRC would not raise a plea of immunity against execution in the course
of enforcement proceedings in some other New York Convention state.

[48] “Art. III does not assist me. It is part of a binding agreement among
contracting states to the New York Convention. The DRC is not such a party.
The DRC may have been aware of Art. III when it submitted to arbitrations in
Switzerland and France. The DRC may also have been aware that the latter states
were parties to the New York Convention. But that does not logically signify a
blanket waiver of immunity and a wholesale acceptance that the awards can be
enforced against the DRC in any New York Convention state.

[49] “Consequently, I can see no explicit conduct on the part of the DRC which
can be said to be inconsistent with the maintenance of a stance of immunity from
execution.

[50] “Fourth, I do not think that recourse to Swiss law (whatever it might be)
advances FG’s argument. To begin with, enforcement being sought in Hong
Kong, I do not see why Swiss law is relevant. Further, that Swiss law adheres to
a restrictive approach cannot get around the fundamental difficulty which I have already identified. That is the difficulty that, in my view, the transaction here does not fall within the commercial exception envisaged by the restrictive approach. It would still be necessary, presumably even under Swiss law, to point to conduct which is inconsistent with the maintenance of a stance of immunity.”

IV. CONCLUSION ON IMMUNITY

[51] “I do not think that this Court has jurisdiction over the claim against the DRC. The DRC enjoys immunity from execution in connection with the enforcement here of the two awards. I do not find that the DRC has waived such immunity. It follows that FG’s application to register the two ICC awards so as to enforce the same as judgments of this Court against the DRC should be set aside.”

V. FORUM NON CONVENIENS

[52] “In light of my conclusion, it is unnecessary to deal with this issue. I only note that, had forum non conveniens been raised in isolation, I would have refused to stay this matter.

[53] “The suggestion is that the issue of sovereign immunity should be stayed to the Supreme People’s Court of Beijing. But it seems to me that the validity of the DRC’s claim to sovereign immunity is squarely within the competence and jurisdiction of the Hong Kong Court. There is no good reason why I should stay such issue to the Beijing Court.”

(....)
42. Supreme Court of India, 14 May 2008

Parties: Petitioner: TDM Infrastructure Private Limited (India)
        Respondent: UE Development India Private Limited (India)

Published in: 2008 (8) Supreme Court Reports 775

Articles: II(3) (by implication)

Subject matters: – appointment of arbitrator(s) by Indian Supreme Court only in international arbitration
               – body corporate is national of country of incorporation

Commentary Cases: ¶ 229

Facts

UE Development India Private Limited (UE) entered into a contract with the National Highway Authority of India for certain works. By three contracts concluded between April and August 2002, UE subcontracted part of the works to TDM Infrastructure Private Limited (TDM). The contracts contained a clause referring disputes to arbitration in India under the provisions of the Indian Arbitration Act.

A dispute arose between the parties. On 22 March 2007, TDM served a notice of arbitration on UE. When the parties could not agree on an arbitrator, TDM petitioned the Supreme Court of India to appoint a sole arbitrator.

The Supreme Court, per S.B. Sinha, J, held that it lacked jurisdiction to appoint the arbitrator, as it may only make appointments in international commercial arbitrations, that is, in arbitrations where at least one of the parties
In the present case, clause (ii) applied as TDM was incorporated in India and, as such, it could only have Indian nationality. It was irrelevant that its central management and control were allegedly exercised in Malaysia, that its directors and shareholders were residents of Malaysia and that its Board of Directors sat there. As a consequence, the arbitration was between two Indian companies and could not be deemed international, and the Supreme Court lacked jurisdiction to appoint an arbitrator.

Excerpt

(....)

[1] “One of the contentions raised by the respondent is that the petitioner company being registered in India, this Court has no jurisdiction to pass an order for appointing an arbitrator. It was urged that the Company in law must be held to be situated in India notwithstanding that the directors are foreign nationals as for all intent and purport, the Company incorporated in India would always be controlled in India.

[2] “Mr. Sumeet Kachwah, learned counsel appearing on behalf of the petitioner, would submit that in view of the provisions contained in Sect. 2(1)(f) read with Sect. 11(6) of the [Arbitration and Conciliation Act 1996, see below], this Court alone has the jurisdiction to appoint an arbitrator as the central management and control of the petitioner company is exercised in Malaysia inasmuch as the term ‘central management’ would mean that its day to day management does not take place in India.

[3] “Drawing our attention to the fact that the Indian Income Tax Act, 1961 contains a similar provision, it was urged that the test which should be applied in a case of this nature is the real business test as propounded by the House of Lords in De Beers Consolidated Mines Limited v. Howe (Surveyor of Taxes) ((1906) AC 455) which has been approved by this Court in V.R.N.M. Subbayya Chettiar v. Commissioner of Income Tax, Madras (1950 SCR 961) and McLeod and Company Ltd. v. State of Orissa and Others ((1984) 1 SCC 434). The terms ‘nationality’, ‘domicile’ or ‘residents’ must be interpreted, Mr. Kachwah would submit, having regard to the text and context in which they are used. Our attention in
1. “Sects. 2(1)(a), 2(1)(b), 2(1)(f), 2(6), 2(7) and 2(8) of the 1996 Act read as under:

‘2(1) In this Part, unless the context otherwise requires,—
(a) ‘arbitration’ means any arbitration whether or not administered by permanent arbitral institution;
(b) ‘arbitration agreement’ means an agreement referred to in Section 7;
...
(f) ‘international commercial arbitration’ means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:
(i) an individual who is a national of, or habitually resident in, any country other than India; or
(ii) a body corporate which is incorporated in any country other than India; or
(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
(iv) the Government of a foreign country;
...
(6) Where this Part, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.
(7) An arbitral award made under this Part shall be considered domestic award.
(8) Where this Part—
(a) refers to the fact that the parties have agreed or that they may agree, or
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

[6] “Whereas Part I of the 1996 Act deals with domestic arbitration, Part II thereof deals with the Foreign Award. The term ‘International Commercial Arbitration’ has a definite connotation. It inter alia means a body corporate which is incorporated in any country other than India. However, according to the petitioner, it is a company whose central management and control is exercised in any country other than India and, thus, despite the fact that the company is incorporated and registered in India, its central management and control being

(b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.’

Sects. 11(1), 11(5) and 11(9) read as under:

‘11. Appointment of arbitrators
(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
...
(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
...
(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.’

Sect. 28 of the 1996 Act reads as under:

‘28. Rules applicable to substance of dispute
(1) Where the place of arbitration is situated in India –
(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
(b) in international commercial arbitration –
(i) the arbitral tribunal shall decided the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.
(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositore only if the parties have expressly authorised it to do so.
(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”
exercised in Malaysia, it will come within the purview of clause (iii) of Sect. 2(1)(f) of the 1996 Act.

[7] “Whenever in an interpretation clause the word ‘means’ is used, the same must be given a restrictive meaning. ‘International Commercial Arbitration’ and ‘Domestic Arbitration’ connote two different things. The 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although clause (iii) of Sect. 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company. Sub-sct. (6) of Sect. 2 of the 1996 Act leaves the parties free to determine certain issues. That freedom shall include the right of the parties to authorize any person including an institution, to determine the same. Thus, in a case of this nature, the court shall not interpret the words in such a manner which would be opposed to the intention of the parties. A statute which provides for an arbitration between the parties and a taxing statute must be interpreted differently. The term ‘International Commercial Arbitration’ even does not find place in the UNCITRAL Model Law. It finds place only in the English Arbitration Act which has also not been given effect to.

[8] “Part II of the 1996 Act deals with enforcement of foreign awards. The 1996 Act keeping in view the scheme of the statute must be read in its entirety. It takes into consideration various situations. Power of this Court to appoint an arbitrator would arise in view of Sub-sct. (12) of Sect. 11 of the 1996 Act only if it is to be held that the dispute has arisen in relation to an international commercial arbitration. Whether, thus, an agreement falls within the purview of Sect. 2 (1)(f) of the 1996 Act is the core question. Sect. 2(1)(f) speaks of legal relationship whether commercial or otherwise under the law in force in India. The relationship has to be between an individual who is a national of or habitually resident in any country other than India as specified in clause (i) of Sect. 2(1)(f). ‘Nationality’ or being ‘habitually resident’ in respect of a body corporate in any country other than India should, in my view, receive a similar construction.

[9] “Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.
“The learned counsel contends that the word ‘or’ being disjunctive, clause (iii) of Sect. 2(1)(f) of the 1996 Act shall apply in a case where clause (ii) shall not apply. We do not agree. The question of taking recourse to clause (iii) would come into play only in a case where clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of clause (iii) of Sect. 2(1)(f) would not arise. The Chief Justice of India or his designate, furthermore, having regard to Sub-sect. (9) of Sect. 11 of the 1996 Act must bear in mind the nationality of an arbitrator. The nationality of the arbitrator may have to be kept in mind having regard to the nationality of the respective parties.

“Only in a case where, however, a body corporate which need not necessarily be a company registered and incorporated under the Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

“Chapter VI of the 1996 Act dealing with making of an arbitral award and termination of proceedings in this behalf plays an important role. In respect of ‘international commercial arbitration’ clause (b) of Sub-sect. (1) of Sect. 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of Sub-sect. (1) thereof shall apply. When, thus, both the companies are incorporated in India, in my opinion, clause (ii) of Sect. 2(1)(f) will apply and not the clause (iii) thereof.

“Sect. 28 of the 1996 Act is imperative in character in view of Sect. 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

“Russell on Arbitration, 23rd edition, p. 357, in his commentary on English Arbitration Act, 1996, shows that although a distinction has been made between a domestic and non-domestic arbitration but the provisions relating to domestic arbitration had not been brought into force.

“Sect. 85 of the English Arbitration Act, 1996 which provides for a modification of Part I in relation to domestic arbitration agreement reads, thus:
85. Modification of Part I in relation to domestic arbitration agreement

(1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.

(2) For this purpose a “domestic arbitration agreement” means an arbitration agreement to which none of the parties is:

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

(3) In subsection (2) “arbitration agreement” and “seat of the arbitration” have the same meaning as in Part I (see sections 3, 5(1) and 6).

Sub-sect. (4) of Sect. 1 of the English Arbitration Act, 1975 is also to the same effect.

[16] “It is of some significance to notice that whereas the 1996 Act lays emphasis on one of the parties being outside India; the English Arbitration Act for the purpose of domestic arbitration agreement excludes a body corporate which is incorporated and whose central control or management is exercised in a State other than United Kingdom. Thus, under the English Arbitration Act, what is being considered is domestic arbitration agreement where a body corporate is incorporated in a State other than United Kingdom; whereas under the 1996 Act only a body corporate which is only incorporated in a State outside India shall be included within the meaning of the international commercial arbitration.

[17] “Reference to the provisions of Indian Income Tax Act, 1961, in my opinion, is not apposite. Taxing statutes are enacted for a different purpose. They provide for compulsory exaction.

(....)

[18] “An interpretation should ensure certainty in determination of jurisdiction as to which court should a disputant approach for appointment of an arbitrator under Sect. 11 of the Act. Else, the question is always mooted as to whether a company is controlled outside India or not and accordingly would have to be determined in each and every case, if an objection is raised. The interpretation of the Act, as suggested hereinafter, would lead to determination of jurisdiction of either the High Court or this Court with certainty. In Subbayya Chettiar v. IT Commissioner, Madras [AIR 1951 SC 101], this Court, while dealing with the issue of Hindu Undivided Family and the residence of the family endorsed the
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definition of Patanjali Sastri J. (in the same case before the Madras High Court) as follows:

“Control and management” signifies, in the present context, the controlling and directive power, “the head and brain” as it is sometimes called, and “situated” implies the functioning of such power at a particular place with some degree of permanence, while “wholly” would seem to recognize the possibility of the seat of such power being divided between two distinct and separated places.’

In that case, this Court, while dealing with the definition contained in Sect. 4 of the Income Tax Act was mainly concerned with a Hindu Undivided Family and not a Company. Furthermore, in the findings of Patanjali Sastri, J., there is a direct reference to ‘some degree of permanence’.

[19] “A difficulty in having a clear definition of domicile has been noticed by this Court (albeit in a different context) in Central Bank of India Ltd. v. Ram Narain [AIR 1955 SC 36] stating:

‘Writers on Private International Law are agreed that it is impossible to lay down an absolute definition of “domicile”. The simplest definition of this expression has been given by Chitty, J. in Craignish v. Craignish wherein the learned Judge said: “That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.” But even this definition is not an absolute one. The truth is that the term “domicile” lends itself to illustrations but not to definition. Be that as it may, two constituent elements that are necessary by English law for the existence of domicile arc: (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. It is also a well established proposition that a person may have no home but he cannot be without a domicile and the law may attribute to him a domicile in a country where in reality he has not. A person may be a vagrant as when he lives in a yacht or wanderer from one European hotel to another, but nevertheless the law will arbitrarily ascribe to him a domicile in one particular territory. In order to make the rule that nobody can be without a domicile effective, the law assigns what is called a domicile of origin to every person at his birth. This prevails until a new
domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country.’

[20] “In Unit Construction Co. Ltd. (supra) on a question as to whether subsidiary companies of a holding company based in South Africa would be deemed to be domiciled in England, it was held:

‘My Lords, I do not read the reference to the ordinary constitution of a limited liability company as evidencing an intention to make any addition to the test indicated by Lord Loreburn in the De Beers case. I think that all Sir Raymond Evershed was saying was that, in almost every case, the articles of association of a limited company vest the control of the company in the board of directors and that accordingly, if you found out that the board of a company habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be, if, for instance, the control was vested not in the board but in managing agents. It seems to me that, in the circumstances disclosed in the Case Stated, the commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the appellant company, have been compelled to find that the African subsidiaries had no residence anywhere. Moreover, it may well be asked what the position would have been had the business of each of the African companies been conducted by their duly appointed boards but, in disregard of the articles, all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but counsel for the Crown shrank from carrying his argument to this logical conclusion. Counsel for the Crown suggested that, unless the application of Lord Loreburn’s principle was made in accordance with the Court of Appeals interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeals view, if they amended the relevant articles (not a very difficult process in the case
of a hundred per cent subsidiary). Moreover the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated. My Lords, I do not think that adherence to the test laid down by Lord Loreburn and to the application thereof which, as I think, has hitherto been adopted namely, that the question where the central control actually abides is a question of fact for the decision of the commissioners will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies, and had the commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion.”

[21] “The domicile of a company being an artificial person would depend upon the nature and purport of the statute. (See McLeod and Company Ltd. (supra).) In the said decision itself, however, it is noticed that the nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its personality. However, for the purpose of taxation, test of residence may not be registration but where the company does its real business and where the central management and control exists. A distinction, thus, exists in law between a nationality and the residence. Furthermore, there exists a dispute that all the Board meetings take place only in Malaysia. In a matter involving determination of jurisdiction of a court, certainty must prevail which cannot be determined by entering into a dispute question of fact.

[22] “For the reasons aforementioned, I am of the opinion that this Court has no jurisdiction to nominate an arbitrator. The application is dismissed with costs.”
43. Supreme Court of India, 25 August 2008

Parties: Petitioner: Great Offshore Ltd. (nationality not indicated)
Respondent: Iranian Offshore Engineering & Construction Company (nationality not indicated)

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Articles: II(2) (by implication)

Subject matters: – arbitration agreement “in writing”
– signed charterparty
– fax is acceptable means of transmission

Commentary Cases: ¶ 205 + ¶ 207

Facts

In March 2004, Iranian Offshore Engineering & Construction Company (IOEC) concluded a contract with Oil and Natural Gas Corporation Limited (ONGC) to carry out construction work on certain ONGC installations in India (the ONGC Project). By a charterparty of 26 October 2004, IOEC hired a specialized offshore construction barge and an anchor handling tug (the vessel combination) from Great Offshore Ltd. (Great Offshore) to execute offshore work for Phase I of the ONGC Project.

Phase I of the project was completed in November 2004. On 20 June 2005, IOEC faxed a letter to Great Offshore, expressing its intention to use the vessel combination for Phase II of the ONGC Project. On 23 June, Great Offshore faxed an offer to IOEC; IOEC replied by fax on the same day by a Letter of Intent (LOI) stating that it was “a firm and unconditional letter of intent … for award of contract for charter hire” of the vessel combination but noting that the agreement was subject to IOEC providing a suitable barge acceptable to Great Offshore. On 4 August 2005, Great Offshore informed IOEC that it no longer needed a barge as mentioned in the LOI.

On 13 August 2005, IOEC faxed a letter to Great Offshore, suggesting that additional provisions be incorporated in a new draft of the contract – namely,
that IOEC be allowed to make certain modifications to the vessel combination and that Great Offshore pay an outstanding amount from the preceding contract – and stating that it would be willing to finalize the contract before 30 August. On 22 August 2005, Great Offshore sent a letter to IOEC setting out the points of agreement reached in respect of the contract. On the same day, it faxed a signed charterparty agreement (CPA) bearing its seal to IOEC. On 8 September 2005, IOEC’s head office sent a signed copy of the CPA to its local office; on 12 September, Mr. Ali Rahmati, for IOEC, forwarded it to Great Offshore. The CPA contained a clause for arbitration of disputes in India under the Indian Arbitration and Conciliation Act 1996.

By an e-mail of 14 September 2005, Great Offshore requested a signed original of the CPA as soon as possible in order to make the necessary arrangements. On the same day, IOEC replied by e-mail that the CPA was “ready in our office and will be hand[ed] over to you”. On 23 September 2005, however, it faxed a letter asking Great Offshore to pay the outstanding amount due for the Phase I work, demanding that it grant IOEC the right to sublet the vessel combination and stating that it could not “conclude the charter party agreement until the above issues are settled”. These requests were reiterated in subsequent letters. In turn, Great Offshore requested IOEC by a letter of 30 September 2005 to provide the signed and stamped original CPA as well as an irrevocable line of credit; this letter mentioned IOEC’s statement that the CPA was “ready” in IOEC’s office.

On 10 October 2005, Great Offshore informed IOEC that the vessel combination had arrived at the selected location but would not be mobilized until Great Offshore received the line of credit. By a letter of the same day, IOEC replied that the terms of the agreement were still under negotiation and that no contract had yet been concluded; by subsequent letters, it again requested that Great Offshore pay the outstanding amount due for Phase I. On 21 October 2005, Great Offshore sent IOEC a letter detailing the sequence of events and arguing that a CPA had been validly concluded. IOEC replied on 26 October by alleging that the copy of the CPA signed by IOEC was a forgery.

The parties were not able to settle their dispute and Great Offshore filed a petition in the Supreme Court of India, seeking the appointment of a sole arbitrator.

The Supreme Court, per Dalveer Bhandari, J, held that the parties had validly concluded a charterparty agreement and therefore appointed an arbitrator. The Court reasoned that it need not reach a decision as to the validity of the LOI of 23 June 2005 because the CPA dated 22 August 2005, which bore the parties’ signatures, established prima facie the existence of a valid charterparty agreement.
between the parties. IOEC failed to prove that it was a forgery, as alleged: though hypothetically Great Offshore could have fabricated the fax header “IOEC Head Office” on the signed copy of the CPA that was sent to IOEC local office and then forwarded to Great Offshore, that was “highly unlikely”.

The Supreme Court then considered whether the arbitration clause in the CPA was valid under the applicable law, the Indian Arbitration Act 1996. It noted that under the Act an arbitration agreement must be in writing, signed by the parties or contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. Here, the CPA was signed by both parties and had been validly communicated by fax.

The Court dismissed IOEC’s arguments that no signed original of the CPA was filed in the proceedings, that the CPA was not signed on each page and that it did not bear IOEC’s seal. It reasoned that the purpose of the Act – and of the UNCITRAL Model Law on which it was modeled – was to minimize the supervisory role of courts in the arbitral process. Adding requirements to the Act’s clear provisions would rather enhance the court’s role and would in the Court’s opinion result in an increased expenditure of money and time. The Court added that what was “even more worrisome is that the parties’ intention to arbitrate would be foiled by formality”, a stance that “would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties’ intention to arbitrate is upheld”.

Excerpt

1. VALID CHARTERPARTY

[1] “… I turn to the parties’ main submissions. The applicant contends, inter alia, that the faxed copy of the charter party agreement (faxed CPA) dated 22
August is a binding, concluded contract. The applicant gives four reasons for this assertion.

(1) First, the faxed CPA is signed by both parties.
(2) Second, the applicant’s statement to this effect was not denied in the pleadings....
(3) Third, the respondent admitted in its letter dated 14 September that the original CPA ‘... is ready in our office and will be hand[ed] to you’. The applicant argues that because the applicant had already signed the original CPA, there was nothing left for the respondent to do but sign. Hence, by saying it was ‘ready’, I may infer that it was signed.
(4) Fourth, the respondent’s letter of 10 October did not deny the fact that the original CPA was signed by the respondent and was waiting in the respondent’s office, even though the applicant had asserted as much in its letter dated 30 [September]. It was not until 26 October that the respondent deemed it necessary to deny this fact.

[2] “The respondent contends that because the original signed copy was never given to the applicant, the parties were in negotiations at all times. With respect to the faxed CPA, it points to the fact that the respondent did not sign every page. It gives further weight to the fact that the faxed copy was not sent vide fax from the respondent to the applicant; rather, it was first sent vide fax from the respondent’s main office to its local branch.

[3] “Learned counsel for the respondent states in its written submission that ‘... the respondent failed to even sign the formal contract document that the applicant had sent to it for its signature’. It argues that because the original CPA was not signed by the respondent, the Court will have to find a contract, if any, in the correspondence. According to Mulla:

‘In construing whether or not a particular agreement does or does not amount to a contract, the court would look for the intention of the parties, the nature of the transaction, the language employed in the informal agreement and other relevant circumstances. None of these is conclusive in itself.... The fact that the parties contemplate that the letters or an informal agreement would be superseded by a more formal one, does not prevent it from taking effect as a contract. If the letter of intent is acted upon, especially for a length of time, the court is likely to hold the parties bound by the contract.’
(See Mulla, *Indian Contract and Specific Relief Acts*, 13th ed. pp. 317-318.)

[4] "In *Dresser Rand S.A. v. M/s Bindal Agro Chemical Ltd. & Another*, AIR 2006 SC 871 at p. 884 at para. 34, a two-Judge Bench of this Court emphasized that whether letters of intent rise to the level of being a contract hinges on the terms of the letter itself. It observed as under:

'It is no [doubt] true that a Letter of Intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a Letter of Intent, it may amount to acceptance of the offer resulting in a concluded contract.... But the question whether the letter of intent is merely an expression of intention to place an order in future or whether is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided by reference to the terms of the letter.'

[5] "The respondent’s main submission is that it never actually concluded a contract and that, if anything, the applicant mistakenly thought that the respondent’s LOI of 23 June was an offer. Why else would the applicant have sent its acceptance on 4 [August]? Its attack against the LOI as a contract is two-fold. First, it argues that the parties cannot leave a major piece of the contract open for future negotiation. Second, it contends that the parties were not eye-to-eye, or ad idem on the points.

[6] "According to the respondent, the applicant’s assumption that the respondent’s 23 June LOI read with the applicant’s 4 August letter is misplaced. The LOI of 23 June read with the applicant’s letter of 4 August does not form a contract because a contract cannot leave a major part of its terms open to future negotiation. The respondent relies on *May & Butcher Limited v. The King* (1934) 2 KB 17, for the proposition that an agreement in which some critical part of the contract matter is left undetermined is no contract at all.

[7] "In its assertion that the applicant’s LOI of 23 June was conditional, it points to the following language from the same LOI: ‘this agreement is subject to IOEC providing a suitable barge and AHT acceptable to GE Shipping for a period of 45-55 days on mutually agreed rates for commencement between 25 October and 10 November 05 for BHN MOL project works’. The respondent’s
supplying the barge to the applicant for 45-55 days went unmet when the applicant said it would not need this barge.

[8] “In addition, the respondent argues that this condition was material to the contract, as evidenced by the fact that the respondent only agreed to increase the duration of the work from 170 to 200 days if it got paid for supplying the barge. By doing so, the respondent was attempting to offset the costs it would incur by having the applicant’s vessel combination for an extra 30 days.

[9] “Furthermore, the respondent claims that no contract could arise from its LOI of 23 June because the parties were not ad idem, i.e., in agreement on each point. Along these lines, Chitty on Contracts (29th ed. Vol. 1 at p. 134) has observed: ‘When parties carry on lengthy negotiations, it may be difficult to say when and whether a contract has been concluded. The court must then look at the whole correspondence and decide, whether on its true construction, the parties had agreed to the same terms.’

[10] “In M/s. Rickmers Verwaltung GmbH v. Indian Oil Corporation Ltd., AIR 1999 SC 504 at p. 509 para. 12, this Court reiterated this stand: ‘Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence.’ (See also: Dresser Rand S.A. v. M/s. Bindal Agro Chemical Ltd. & Another, AIR 2006 SC 871 at p. 879 para. 21 (affirming the same).)

[11] “The respondent argues that they were still negotiating the terms and conditions. It cites to its letter of 13 August and the applicant’s letter of 22 August as evidence of continued negotiations. In the respondent’s letter dated 13 August, it suggests that a number of changes be made to the ‘new draft contract’. ‘Draft’ suggests that nothing had been finalized. Moreover, the letter lists a number of issues that were still open to negotiation. The applicant’s letter of 22 August, however, addressed the proposed changes.

[12] “The respondent concedes that while it said it would sign and finalize the contract by 30 August, it changed its mind on 27 August and conveyed the message that it would not enter the agreement until all outstanding issues were resolved. Like the applicant’s counsel, the respondent also makes use of the fact that the applicant did not object to the respondent’s letter dated 13 August. The applicant should have said that there was no question of finalizing the contract when it had already been finalized. I note that this argument seems unfair because the applicant could not have gotten the faxed CPA from the respondent until 8 September at the earliest, as that is the date that appears on the fax. According to the applicant, it received the faxed copy on 12 September.
“Of course, all of the respondent’s arguments become moot if the faxed CPA dated 22 [August] is valid. In the instant case, the burden to prove that a valid contract containing an arbitration clause existed first rested on the applicant, as it was the applicant that was moving this Court. However, upon producing the faxed CPA that, on its face, appears legitimate, the onus shifted to the respondent to prove that it was forged. It appears, prima facie, to be legitimate because it bears the heading ‘08-Sep-2005 13:52 from IOEC Head Office to Allahverdi’ (hereinafter the ‘fax header’). This is an important piece of evidence that makes its genuineness more probable than not. Hypothetically, the applicant could have fabricated the fax header. But that is highly unlikely and presumes much more than what is expected in normal human conduct especially when that conduct concerns the forgery of an executive officer’s signature. It should not be forgotten that this case is between sophisticated companies, not warring family members that dispute the authenticity of a will.

The respondent could argue that it handed over an unsigned copy of the faxed CPA and that the applicant forged it after the fact. Such an assumption is equally dubious. Why would the respondent go through the trouble of returning the applicant’s 22 August CPA unsigned, when it had been routed vide fax through its Head Office?

There is no evidence to suggest that the faxed CPA was forged. To the contrary, the evidence we do have is the faxed CPA bearing the parties’ signatures coupled with correspondence between the parties. The correspondence, as it is more than just a pleading, adds additional weight to the applicant’s story. The applicant’s letter of 21 October corroborates the allegation that Ali Rahmati delivered the faxed CPA to the applicant on 12 September. The date of delivery of 12 September fits the timeline provided on the fax header, as the respondent could only have delivered the faxed CPA after 8 September. Moreover, it appears that having received the faxed CPA on 12 September, the applicant was prompted to ask for the original vide e-mail on 14 September. Once again, the dates match up.

The fax header, on its face, suggests that the document is genuine. This conclusion is bolstered by the above-mentioned correspondence. Thus, I find that the applicant had discharged its initial burden of sufficiently proving that the faxed CPA was not forged. The onus shifted to the respondent to prove that its signature was forged. With no evidence to support its assertion, the respondent cannot discharge its onus. Therefore, I find that the faxed CPA is legitimate and is not a product of forgery. As such, I need not look for the existence of a contract on the basis of the LOI of 23 June.”
II. VALID ARBITRATION AGREEMENT

[17] “The question then becomes whether the faxed CPA is valid under the relevant law. Here, the purported contract provides that the Arbitration and Conciliation Act, 1996 (26 of 1996) is to be used ... (p. 3 of faxed CPA dated 22 August 2005). In the preceding contract the same Act was used. Therefore, it comes as no surprise that the parties have not objected to the same in the instant case.

[18] “Sect. 7 [of the Act]2 squarely deals with the present controversy. This Court has taken note of Sect. 7(3) & 7(4)(a)’s requirement that the arbitration agreement be in writing and signed by the parties. According to the learned counsel for the applicant, affixing a seal under Sect. 7 of the Act is not a requirement. (See: Bihar State Mineral Development Corporation & Another v. Encon Builders (1) (P) Ltd. (2003) 7 SCC 418 at p. 423 para. 13 (one of the essential elements of an arbitration agreement is that ‘the parties must agree in writing to be bound by the decision of such tribunal’) and K.K. Modi v. K.N. Modi & Others (1998) 3 SCC 573 at p. 585 para. 21 (‘there are, of course, the statutory requirements of a written agreement.... Vide Sect. 2 Arbitration Act, 1940 and Sect. 7 Arbitration and Conciliation Act, 1996’).

[19] “The respondent makes much of the fact that the ‘faxed CPA’ of 22 August is (1) a copy, not the original; (2) is stamped by one, not by both parties; (3) one of the parties did not sign every page; and (4) it was first sent vide fax.

2. Sect. 7 of the Indian Arbitration and Conciliation Act 1996 provides:

“(1) In this part, ‘arbitration agreement’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in:
(a) a document signed by the parties;
(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

“Sect. 7 defeats all four assertions. First, there is no requirement that the arbitration agreement be an original. Where the statute has gone to great lengths to define exactly what is meant by the term ‘in writing’, we are precluded from adding another term to definition. Indeed, ‘it is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so’. (See: Justice G.P. Singh’s Principles of Statutory Interpretation, 11th ed., 2008, at p. 62.63, citing to Renula Bose (Smt.) v. Rai Manmathnath Bose, AIR 1945 PC 108, p. 110; Stock v. Frank Jones (Tiptan) Ltd., (1978) 1 All ER 948, p. 951; Assessing Authority-Cum-Excise and Taxation Officer, Gurgaon & Another v. East India Cotton Mfg. Co. Ltd., Faridabad (1981) 3 SCC 531.)

An exception to this rule can be made. But before adding words to a statute, ‘... the Court must be abundantly clear of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have used, had the error in the Bill been noticed’. (See: Justice G.P. Singh’s Principles of Statutory Interpretation, 11th ed., 2008 at p. 75 citing to 31 Inco Europe Ltd. v. First Choice Distribution (a firm) (2000) 2 All ER 109, at p. 115 (HL)). As I mention below, one of the main objectives of the Arbitration and Conciliation Act, 1996 is to minimize the role of the Court; adding additional requirements to the Act is antithetical to such a goal.

Second, the plain language of Sect. 7 once again governs my conclusion. Sect. 7 does not require that the parties stamp the agreement. It would be incorrect to disturb the Parliament’s intention when it is so clearly stated and when it in no way conflicts with the Constitution.

Third, nothing in Sect. 7 suggests that the parties must sign every page. Once again, if I take the respondent’s argument to its logical conclusion, I would have no choice but to read language into the Act that is not there. Even if the faxed CPA is construed as a ‘document’, it need only be ‘signed by the parties’ pursuant to Sect. 7(4)(a). Every page does not need to be signed. If it is considered a ‘document’, then this requirement would be met. As established above, both parties signed the faxed CPA in the signature box at the bottom of Part I. That said, the faxed CPA more closely fits within Sect. 7(4)(b)’s requirements.

Fourth, Sect. 7(4)(b) states that an agreement is in writing if it is contained in ‘an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement’. This Section covers agreements that are sent via facsimile ('fax') as they are ‘other means of telecommunication’. ‘Fax’ is defined as ‘a machine that scans documents
electronically and transmits a photographic image of the contents to a receiving machine by telephone line’ or ‘a document received by such a machine’. (See: Chambers 21st Century Dictionary, Allied Publisher’s Limited (1996).) This definition clearly provides that a fax falls under ‘other means of telecommunication’. Thus, faxed agreements are acceptable under Sect. 7 of the Act.

[25] “Sect. 7(4)(b) further requires us to ask whether a record of the agreement is found in the telecommunication, in this case a fax. What could be a better record of the agreement than the signatures of the parties themselves? As noted above, with no evidence to indicate that the respondent’s signature was forged, the faxed CPA stands on its own as the record of agreement. Likewise, Sect. 7(4)(b) stands satisfied.

[26] “The court has to translate the legislative intention especially when viewed in light of one of the Act’s ‘main objectives’: ‘to minimize the supervisory role of Courts in the arbitral process. (See: Statements of Objects and Reasons of Section 4(v) of the Act.) If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimizing it. Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties’ intention to arbitrate would be foiled by formality.

[27] “Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties’ intention to arbitrate is upheld. Adding technicalities disturbs the parties’ ‘autonomy of the will’ (l’autonomie de la volonté), i.e., their wishes. (For a general discussion on this doctrine see Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, [Sweet] & Maxwell, London, 1986 at pp. 4 and 53).

[28] “Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want: an efficient, effective and potentially cheap resolution of their dispute. The autonomie de la volonté doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. (See Preamble to the Act.) The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts’ directions should be to achieve the legislative intention.

[29] “One of the objectives of the UNCITRAL Model Law reads as under: ‘the liberalization of international commercial arbitration by limiting the role of
national courts, and by giving effect to the doctrine “autonomy of will”, allowing the parties the freedom to choose how their disputes should be determined’. (See Policy Objectives adopted by UNCITRAL in the preparation of the Model Law, as cited in Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, [Sweet] & Maxwell, London (1986) at p. 388 (citing UN doc. A/CN.9/07, paras. 16-27.)

[30] “It goes without saying, but in the interest of providing the parties a comprehensive review of their arguments, I note that once it is established that the faxed CPA is valid, it follows that a valid contract and a valid arbitration clause exist. This contract, the faxed CPA, does not suffer from a conditional clause, as did the Letter of Intent. Thus, the respondent’s argument that the parties were not ad idem must fail.

[31] “I have heard the learned counsel appearing for the applicant and the respondent at length. I have carefully reviewed the entire correspondence between the parties. The charter party agreement that had been signed by the applicant and the respondent clearly indicated that the parties have entered into a valid and concluded contract. The other correspondence between the parties also leads to a definite conclusion: the parties have entered into a valid contract containing an arbitration clause. Since a dispute has arisen between the applicant and the respondent, it needs to be referred to the arbitrator.”

III. CONCLUSION

[32] “On consideration of the totality of the facts and circumstances, I am clearly of the opinion that the applicant is entitled in law to an order for appointment of a sole arbitrator. Consequently, I request Hon’ble Justice S.N. Variava, the retired Judge of the Supreme Court, to accept this arbitration. The learned arbitrator would be at liberty to fix his own fee. I direct the parties to appear before the learned arbitrator on 8 September 2008 or any date convenient to the learned arbitrator.

[33] “Before parting with this arbitration petition, I would like to make it abundantly clear that the learned arbitrator shall not be bound by any observations which have been made in this judgment. The observations have been made only to decide this arbitration petition.”
ISRAEL

Ratification: 5 January 1959
No Reservations

3. District Court, Jerusalem, 13 January 2009, HP (Jer) 6203/07

Parties: Petitioner: Zeevi Holdings Ltd. (in receivership) (Israel)
         Respondent: The Republic of Bulgaria

Published in: No information available at time of publication

Articles: I(1); V; V(2)(b)

Subject matters: – forum non conveniens
                  – grounds for refusal of enforcement are exhaustive
                  – enforcement v. execution
                  – public policy and agreement for execution of award
                    in state other than enforcement state

                  [17] = ¶ 524 (agreement for execution of award in
                  state other than enforcement state)

Facts

In 1999, Zeevi Holdings Ltd. (Zeevi) and the Republic of Bulgaria entered into an agreement for the sale and purchase of 75 percent of the shares of the Bulgarian national airline, Balkan Bulgarian Airline (BBA). The agreement provided for arbitration in Paris under the UNCITRAL Arbitration Rules. Art. 15.3 of the agreement provided:

1. The General Editor wishes to thank Dr. Daphna Kapeliuk, Radzyner School of Law, Interdisciplinary Center, Herzliya, for her invaluable assistance in translating this decision from the Hebrew original and summarizing its contents.

“The decision of the arbitrators will be final and binding. Such decision or award will not be subject to appeal. The execution of an award against the seller may be conducted only in Bulgaria in accordance with the provisions of Bulgarian Law.”

A dispute arose between the parties and UNCITRAL arbitration proceedings ensued in Paris. The tribunal rendered a final award holding, by a majority vote, that the Republic of Bulgaria shall pay Zeevi the sum of US$ 10,360,143 plus interest within thirty days of the award. Zeevi sought enforcement of the award in the District court of Jerusalem. The motion for enforcement was issued to the Republic of Bulgaria through the Israeli Ministry of Foreign Affairs.

Bulgaria filed a petition to dismiss the motion for enforcement, arguing that the Israeli court was a forum non conveniens as Art. 15.3 of the 1999 agreement granted Bulgarian courts exclusive jurisdiction to enforce the award. Bulgaria further argued that Zeevi breached the agreement between the parties by filing the motion for enforcement of the award and that the award would be binding on the parties only if executed in Bulgaria. Accordingly, and in light of Art. 15.3 of the agreement, the enforcement of the award would be contrary to the public policy of Israel. Bulgaria further argued that the motion should be dismissed because execution proceedings would follow the enforcement of the award in Israel, in contradiction with the universal principle of *pacta sunt servanda*.

In response, Zeevi argued that the 1958 New York Convention makes it possible to enforce foreign arbitral awards in all Contracting States and that a distinction should be made between enforcement and execution proceedings. It argued that Art. 15.3 of the agreement referred to the execution of the award, not to its enforcement; thus, it was irrelevant in the enforcement stage. Zeevi also argued that it feared it could not execute the award in Bulgaria, as it could be assumed from Bulgaria’s refusal to perform its obligations under the award.

By the present decision, the District Court of Jerusalem, per Justice Sternberg-Eliaz, J, denied Bulgaria’s motion and enforced the award. On the claim of forum non conveniens, the court held that motions for the enforcement of foreign arbitral awards “should be dealt with with caution, as far as the convenience of the forum is concerned”. It noted that many states, including Israel, have signed the 1958 New York Convention in order to facilitate the enforcement of awards made outside the jurisdiction of the country where enforcement is sought. Under the Convention, enforcement can be denied only on the grounds listed in Art. V. Since forum non conveniens is not a listed ground, the court dismissed Bulgaria’s argument.

The Jerusalem court then dealt with Bulgaria’s claim that enforcement of the
award would violate Israeli public policy. It examined Art. 15.3 of the 1999 agreement in light of the principle that favors an interpretation that maintains jurisdiction rather than denies it, and concluded that Art. 15.3 determined the place where the award could be executed against Bulgaria, not the court having jurisdiction to recognize and enforce the award, as “execution” is not the same as “recognition and enforcement”, the term used in the Convention.

Finding none of the grounds for refusal listed in the Convention, the district court granted enforcement, noting that enforcement “is the highlight and display window of the judicial system” and that making enforcement of court decisions and arbitral awards difficult only “harms public trust and respect for the law”.

Excerpt

[1] “The motion [for the enforcement of the award] is subject to the [1958 New York Convention]. The Convention was ratified by the state of Israel on 5 January 1959 and came into force on 7 June 1959. The Regulations for the Execution of the New York Convention (Foreign Arbitration) 1978 establish the procedures for the enforcement of foreign arbitral awards and apply the Civil Procedure Regulations 1984 as long as these do not contradict the Regulations for the Execution of the Convention.

(.....)

[2] “Before us is an agreement between a group of purchasers, one of which is the petitioner [Zeevi Holding Ltd.], and a foreign sovereign for the purchase of 75 percent of the shares of the Bulgarian national airline, Balkan Bulgarian Airline Company [BBA]. The agreement provides for Bulgarian substantive law. The parties also agreed that any dispute shall be referred to arbitration under the UNCITRAL Arbitration Rules in Paris. Art. 15.3 of the purchase agreement provided that the execution of any award against the respondent may be conducted only in Bulgaria in accordance with the provisions of Bulgarian law. This is the basis for the respondent’s claim that Israel is a forum non conveniens for the enforcement of the award.

[3] “A motion for the enforcement of a foreign award should be dealt with with caution, as far as the convenience of the forum is concerned. First, as will be explained, the enforcement proceedings have no direct connection to the country where enforcement is sought. In order to ease the difficulty of enforcing arbitral awards rendered outside the jurisdiction of the country where enforcement is sought, the members of the United Nations signed [the New York Convention]. The Convention facilitates the proceedings and the conditions for
the recognition and enforcement of arbitral awards rendered in each of the member states. The connection to the State of Israel, and to any of the other member states, arises from joining the Convention, which requires submission to its provisions.

[4] “Moreover, the burden of proof for convincing the court that Israel is a forum non conveniens to enforce the foreign award rests on the respondent....

[5] “Note that this is not a 'standard' motion to confirm or set aside the award pursuant to the grounds listed in Sect. 24 of the Arbitration Law [which applies to domestic awards], but a special procedure for the recognition and enforcement of a foreign arbitral award, which can be opposed on limited grounds listed in Art. V of the Convention.

[6] “Based on the above, the respondent’s argument of forum non conveniens is dismissed.

[7] “All that is left is to discuss the ground for refusing to enforce the award stated in Art. V(2)(b) of the Convention: ‘the recognition or enforcement of the award would be contrary to the public policy of that country’.

(...)

[8] “Is the enforcement of the award contrary to Israeli public policy? The respondent’s argument rests on the meaning of Art. 15.3 of the purchase agreement, which states:

‘The decision of the arbitrators will be final and binding. Such decision or award will not be subject to appeal. The execution of an award against the seller may be conducted only in Bulgaria in accordance with the provisions of Bulgarian law.’

(...)

[9] “Art. 15.3 distinguishes between enforcement and execution.

(...)

[10] “In order to ascertain the legal meaning of the text on the basis of its literal meaning, we use the rules of purposive interpretation, that is, uncovering the linguistic meaning of the text which fulfills the purpose of the agreement.

(...)

[11] “When the court has to choose between two interpretations, one which maintains its jurisdiction and one which denies it, it will tilt towards the one that maintains its jurisdiction....

[12] “Equipped with the appropriate tools, we shall now go on an interpretation journey. Art. 15.3 of the agreement provides for the place of execution of the obligations which will be imposed on the Bulgarian government, as distinguished
from the place of the court which will recognize and enforce the award:

‘The execution of an award against the seller may be conducted only in Bulgaria in accordance with the provisions of Bulgarian Law.’

[13] “The term ‘execution’ is not the same as the term ‘recognition and enforcement’ which appears in the Convention, and as such it does not create any obstacle to enforcing the award in Israel pursuant to the Convention. The Article refers to the execution stage, but does not limit the place for enforcing the award, as claims the respondent. After the completion of the enforcement stage according to the Convention, the door will be open for the execution of the obligations set out in the award, and at that stage a question will arise as to the place where such proceedings will be filed, if these proceedings will be at all possible in the case of a sovereign.

[14] “The Supreme Court has distinguished between its jurisdiction to act with respect to securing the execution of an award in Israel and its jurisdiction to decide the core of the dispute in a foreign arbitration held in a foreign country pursuant to a foreign law.

(…..)

[15] “International public policy is limited in Art. V(2)(b) of the Convention to the public policy recognized in the country where the award is enforced. Public policy was compared to an ‘unruly horse’ on which riding is difficult and dangerous.

(…..)

[16] “The Convention and case law encourage the recognition and enforcement of foreign arbitral awards, similarly to the policy concerning domestic awards, which favors their confirmation over their setting aside. Public policy benefits from enforcing arbitral awards. Enforcement is the highlight and display window of the judicial system. An obstacle in enforcing final judgments and arbitration awards harms public trust and respect for the law.

[17] “The court shall not dismiss a motion to recognize and enforce a foreign award, unless it is convinced that one of the grounds for refusal to enforce listed in Art. V of the Convention exists. A motion to enforce will be approved except for this exhaustive list. Note that an agreement on the place of execution of awards subject to the Convention is not a ground for refusal to enforce according to Art. V of the Convention.

(…..)

[18] “The award is enforced.”
ITALY

Accession: 31 January 1969
No Reservations

176. Corte di Appello [Court of Appeal], Rome, 19 June 2006, no. 2968

Parties: Plaintiff: Technip Italy S.p.A. (Italy)
Defendant: Eati Limited (Hong Kong SAR)


Articles: V(2)(b)

Subject matter: – public policy and determination of broker’s fee

Commentary Cases: ¶ 524 (determination of broker’s fee)

Facts

On 8 September 1996, Technip Italy S.p.A. (Technip) and Eati Limited (Eati) concluded a contract under which Eati would act as broker for Technip. The contract did not determine the amount of the fee to be paid to Eati, which was left to future determination in negotiations between the parties.

A dispute arose between the parties. By an award of 31 August 2004, an arbitral tribunal in London found in favour of Eati, awarding it a “success fee”. Eati sought enforcement of the award in Italy. On 17 February 2005, the President of the Rome Court of Appeal granted enforcement in ex parte proceedings. Technip filed an opposition against the enforcement order, arguing that the award violated public policy because Eati’s fee had been determined by the arbitral tribunal, whereas it should have been determined by the parties.

The Rome Court of Appeal dismissed Technip’s opposition. The court reasoned that while the brokerage contract indeed provided that the parties would determine Eati’s fee in negotiations subsequent to the contract’s conclusion, that fee could be determined by the arbitrators when filling the gaps...
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

in the contract. The court noted that the parties had in fact expressly asked the arbitrators to fill the gap in the contract in respect of the fee by asking them a specific question to this aim. Hence, the award was not at odds with either international or Italian public policy.

Excerpt

[1] “[Technip’s] opposition pursuant to Art. 840 CCP¹ is unfounded and must be denied; as a consequence, the President’s order of 17 February 2005 that enforced the impugned arbitral award in Italy is affirmed....

[2] “This said, we note first that by its sole and complex ground for opposition Technip alleges that the award of the foreign arbitrators violated international public policy and Art. 840 CCP because [the arbitrators] determined the fee owed [to Eati] under the (qualified) agency contract concluded by the parties on 8 September 1996 without being authorized to do so.

[3] “This objection, though [admissible], cannot be granted. It is true that the parties wished to leave the determination of the ‘fee’ owed to Eati ... for its brokerage work to future negotiations. However, the contested arbitral determination of the fee owed to [Eati] does not appear to violate the [parties’] contractual autonomy in this respect, since the amount of the fee – if not fixed by the parties – could well be determined when filling the gaps in the contract, on the basis of laws or schedules of fees, usages or equity (see the [Italian] law on agency contracts ...).

[4] “We must not forget that this ‘integrative’ determination of the fee was concretely entrusted to the arbitrators through a specific question that was accepted or in any event not contested in the arbitration by [Technip]....

[5] “Hence, there is no violation, as alleged, of [the parties’] contractual autonomy in respect of the determination of the fee (the so-called ‘success fee’ [English original]).

[6] “It follows that the contested foreign award is perfectly in accordance not only with international public policy but also with [Italian] public policy. Technip’s opposition under Art. 840 CCP must therefore be rejected and as a consequence the impugned foreign award must be enforced in Italy....”

1. Art. 840 of the Italian Code of Civil Procedure provides for the possibility to file an opposition against the decree of the President of the court of first instance granting or denying enforcement of a foreign award ex parte. It also sets out the manner of and conditions for the opposition proceedings and the grounds on which enforcement may be denied, which reflect the grounds in Art. V of the 1958 New York Convention.

177. Corte di Cassazione [Supreme Court], First Civil Chamber, 14 June 2007, no. 13916

Parties:
Plaintiff: Rudston Products Limited (nationality not indicated)
Defendant: Conceria F.lli Buongiorno (Italy)

Published in:
Giustizia Civile (2008, nos. 7-8) p. 1767

Articles: V(1)(a)

Subject matters:
– exchange of telefax communications
– functional interpretation of “in writing” includes telefax

Commentary Cases: ¶ 504; [1] = ¶ 503

Facts

Rudston Products Limited (Rudston) and Conceria F.lli Buongiorno (Buongiorno) negotiated a contract for the sale of sheep hides. Rudston sent Buongiorno a signed standard-form offer by telefax. Buongiorno signed the offer and returned it to Rudston, also by telefax. Rudston’s offer contained a clause for arbitration of disputes at the Skin, Hide & Leather Traders Association Ltd. (SHLTA) in England.

A dispute arose between the parties in respect of the contract. On 22 October 1991, a SHLTA arbitral tribunal rendered an award in favor of Rudston in the amount of UK£ 5,651.21. On 22 December 1998, Rudston sought enforcement of the award in Italy. On 11 February 1999, the President of the court of appeal granted an order for enforcement. In the ensuing opposition proceedings, Buongiorno opposed enforcement arguing that there was no valid arbitration clause between the parties because the acceptance telefax supplied by Rudston did not bear Buongiorno’s original signature. On 24 June 2002, the court of appeal of Naples granted Buongiorno’s argument and denied enforcement of the SHLTA award.

The Italian Supreme Court reversed the lower court’s decision, finding that the arbitration clause at issue was validly concluded through “an exchange of
letters or telegrams” as provided for in the 1958 New York Convention. It was undisputed that the parties had exchanged telefax communications, and in the Court’s opinion a telefax is “undoubtedly correspondence in writing” as only written documents can be transmitted by telefax. The Court noted that the communications exchanged by the parties were even signed, which constant jurisprudence deems unnecessary as long as the communications’ provenance can be ascertained. Here, Buongiorno did not dispute that it sent the acceptance telefax and its name appeared as the sender in the activity report at the top of the fax itself.

It was irrelevant that Rudston was not in possession of Buongiorno’s original signature of the acceptance, since this could not in any way affect the validity of a telefax as a means of concluding a valid arbitration clause under the Convention or disprove that the fax came from Buongiorno.

The Supreme Court finally disagreed with the court of appeal’s argument that a telefax is less reliable than the telexes and telegrams mentioned in the New York Convention, because the latter require an intermediary, the mail service.

Excerpt

[1] “By its only ground for appeal, [Rudston] alleges violation and/or incorrect application of Arts. II(1)-(2), IV and V of the [1958 New York Convention] and Arts. 839, 840 and 807(2) CCP,¹ and defective reasoning. [It argues that], when

1. Art. 839 of the Italian Civil Code (CCP) reads:

"The party wishing to enforce a foreign award in the Republic shall file a petition with the president of the court of appeal of the district in which the other party has its domicile; if that party has no domicile in Italy, the court of appeal of Rome shall have jurisdiction. The petitioner shall supply the original award or a certified copy thereof, together with the original arbitration agreement or an equivalent document, or a certified copy thereof. If the documents specified in the second paragraph are not written in Italian, the petitioner shall in addition produce a certified translation thereof. The president of the court of appeal, after having ascertained the formal regularity of the award, shall declare by decree the efficacy of the foreign award in the Republic unless:

(1) the subject matter is not capable of settlement by arbitration under Italian law;

(2) the award contains provisions contrary to public policy."

Art. 840 Italian CCP reads:

"An opposition may be filed against the decree granting or denying enforcement of the foreign award by filing a writ of summons with the court of appeal within thirty days of communication of the decree denying enforcement or notification of the decree granting enforcement.
After the filing of the opposition, the proceedings shall be held in accordance with Article 645 and following in so far as they are applicable. The court of appeal decides with a judgment subject to recourse before the supreme court.

The court of appeal shall refuse the recognition or the enforcement of the foreign award if in the opposition proceedings the party against which the award is invoked proves the existence of one of the following circumstances:

1. The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State where the award was made;

2. The party against which the award is invoked was not informed of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case in the proceedings;

3. The award decided upon a dispute not contemplated in the submission to arbitration or in the arbitration clause, or exceeded the limits of the submission to arbitration or of the arbitration clause; nevertheless, if the decisions in the award which concern questions submitted to arbitration can be separated from those concerning questions not so submitted, the former can be recognized and enforced;

4. The composition of the arbitration tribunal or the arbitration proceedings was not in accordance with the agreement of the parties or, failing such an agreement, with the law of the place where the arbitration took place;

5. The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made.

If an application for the setting aside or suspension of the effects of the award has been made to the competent authority indicated at number 5) of the third paragraph, the court of appeal may adjourn the decision on the recognition or enforcement of the award; on the request of the party seeking enforcement it may, in the case of suspension, order the other party to give suitable security.

Recognition or enforcement of a foreign award shall be refused also where the court of appeal shall ascertain that:

1. The subject matter is not capable of settlement by arbitration under Italian law;

2. The award contains provisions contrary to public policy.

In all cases, the provisions of international treaties shall be applicable.

Art. 807(2) Italian CCP reads:

“The written form requirement is considered complied with when the intention of the parties is expressed by telegram or telex.”

award was rendered falls on the party opposing enforcement. Since no such proof was given ... by Buongiorno, there can be no doubt as to the full validity of the clause at issue.

[2] "In fact, in the present case the telefax contained a standard-form contract (an offer of contract) bearing [Rudston’s] signature as well as the arbitration clause, and [Buongiorno] signed and returned the form, again by telefax.

[3] "Hence, contrary to the opinion of the Naples court of appeal, the contract concluded by telefax and consequently the arbitration clause therein contained were in writing as required by the New York Convention and by the Code of Civil Procedure, as it is undisputable that [only] written documents are transmitted by telefax. Thus, the requirement of Art. II(2) of the New York Convention that the arbitration clause must be contained in an exchange of letters in order to be valid, is met.

[4] "Jurisprudence has in fact recognized that an arbitration clause contained in an exchange of letters is valid even when any of the letters or both are not signed, as long as their provenance can be ascertained otherwise. Rudston notes that in the present case it was accepted that Buongiorno returned the signed contract form by telefax, since this was not disputed in the proceeding and results in any case from the contract concluded by telefax (whose original was supplied in the proceeding in accordance with Art. 839 CCP). That the fax came from Buongiorno is confirmed by the activity report at at the top of the telefax, and by the fact that Buongiorno itself does not dispute that it sent it.

[5] "Hence, the reasons given in the attacked decision are totally erroneous, to the extent that the court of appeal concluded that a telefax does not meet the written form requirement of the New York Convention on the basis of a comparison between telex and telegram (which it deemed appropriate instruments for a valid arbitration clause because of the presence of an intermediary in the communication) and telefax, which allegedly does not offer the necessary guarantee because it is transmitted by a direct telephone line installed at the customer’s. Also the reference to Art. 807(2) CCP rather than Art. II of the New York Convention in the attacked decision is erroneous, since [the latter] as lex specialis applies to the present case.

[6] "This ground [for appeal] is founded. Pursuant to Art. II(1) of the New York Convention (which as lex specialis applies to the present case), each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Art. II(2) then provides that agreement in writing means an
arbitration clause in a contract or an arbitration agreement, signed by the parties ‘or contained in an exchange of letters or telegrams’.

[7] “This provision – whose aim is to facilitate commercial exchanges by making it possible to conclude contracts at a distance – clearly equates [an arbitration clause] contained in an exchange of correspondence to an arbitration clause contained in a contract or in an agreement signed contextually by the parties, both if this exchange takes place through traditional letters and if it takes place through other communication means, as long as there is a written document. A telefax is undoubtedly correspondence in writing; more precisely, it is a manner of electronic mail aimed at accelerating the transfer of correspondence through remote reproduction over telephone networks and facsimile terminals (Supreme Court, 24 November 2005, no. 24814). Hence, the only problem that can arise in this respect is not whether a telefax falls within the scope of Art. II of the New York Convention, but whether it does in fact come from the party to which it is attributed.

[8] “Since in the present case the offer of contract, containing the arbitration clause and signed by Rudston, was sent by telefax and Buongiorno returned the signed form again via telefax, we do not understand the juridical relevance of Buongiorno’s argument that Rudston ‘never had the telefax allegedly bearing Buongiorno’s original signature in its possession’. The lack of possession of the document bearing the original signature of the acceptant does not affect the validity of the telefax as a means of remote transmission of the intention to contract in the sense of Art. II of the New York Convention, nor does it disprove that the telefax came from Buongiorno. Buongiorno does not dispute that it accepted the offer by returning the form, in which the offer was contained, by telefax. If the conclusion of the contract is not contested, we do not see how the provenance of the telefax can be doubted in respect of the arbitration clause.

[9] “It ensues from the above that [Rudston’s] appeal must be granted and the attacked decision must be annulled. It is irrelevant to argue that Art. 807(2) CCP, equating telex to telegram, intended to stress the fact that in both cases there is an intermediary in the communication. The presence of an intermediary does not per se guarantee provenance from the contracting party and thus make a telegram or telex, from this point of view, more reliable than a telefax.”

(…..)
178. Corte di Cassazione [Supreme Court], First Civil Chamber, 8 October 2008, no. 24856

Parties: Appellant/Respondent: Globtrade Italiana srl (Italy)
Appellee/Petitioner: East Point Trading Ltd (Cyprus)

Published in: Giustizia Civile Massimario (2008, no. 10) p. 1456

Articles: IV(1)(a)

Subject matters: – authenticated original arbitral award
– certified copy of arbitral award
– authenticated original arbitral award submitted later than “at the time of application”

Commentary Cases: ¶ 402 + ¶ 404 + ¶ 405

Facts

On 15 May 2001, an appellate arbitral tribunal of the Grain and Feed Trade Association (GAFTA) in London rendered an award in a dispute between Globtrade Italiana srl (Globtrade) and East Point Trading Ltd (East Point). East Point sought enforcement of the GAFTA award in Italy.

On 4 September 2001, the President of the Court of Appeal in Trieste granted enforcement. Opposition proceedings followed. On 28 February 2003, the Trieste Court of Appeal affirmed the enforcement order.

The Italian Supreme Court reversed the lower court’s decision, holding that East Point failed to submit the duly authenticated original award or a certified copy thereof. The Court reasoned that the 1958 New York Convention creates “a fully autonomous micro-system” in respect of both the substantive and the procedural requirements for requesting enforcement of a foreign award. Supplying the duly authenticated original award or a duly certified copy thereof is a necessary condition for the admissibility of the enforcement proceedings under the Convention. The Court added that compliance with this condition must be ascertained by the court even if the issue is not raised by the parties. Further, the formalities for authentication in the enforcement state must be
observed: in the present case, the “Anglo-Saxon practice”, where authentication of a document by a notary public is unknown, could not apply.

The Supreme Court concluded that failure to supply the duly authenticated original award or a certified copy thereof together with the application prevents courts from dealing with requests for enforcement; it also confirmed its jurisprudence that this defect cannot be cured, though it does not exclude the possibility to commence new enforcement proceedings.

On the facts of the case, the Court concluded that East Point had indeed failed to supply the necessary documents for requesting enforcement and as a consequence the court of appeal erred in granting enforcement of the award.

Excerpt

[1] “By its first ground for appeal, [Globtrade] alleges violation of Art. 839(2) CCP and Arts. III and IV(1)(a) of [the 1958 New York Convention] (ratified in Italy by Law no. 62 of 19 January 1968) and argues that [the lower court’s decision is] contradictory, illogical and lacks reasons. It maintains:

(a) that in the attacked decision the court of appeal first stated that [the New York Convention] applies to the enforcement of foreign arbitral awards and then erroneously held that the condition in Art. IV(1)(a) of the Convention was complied with because allegedly ‘the original’ award was ‘submitted’;
(b) that the Convention provides that ‘the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof …’;
(c) that in the present case [East Point] supplied a copy of GAFTA award no. 3900 and more precisely the copy that the GAFTA secretariat sent to East Point after East Point paid the fees of the arbitral tribunal;
(d) that the fact that the award is a copy also appears from the letter of the GAFTA secretariat, which states that it is sending ‘a copy of the appellate arbitral award dated today, 15 May 2001’;
(e) that undisputedly this copy is not certified, since it bears no mention of its conformity to the original, which is likely filed with GAFTA;

1. Art. 839(2) of the Italian Code of Civil Procedure (CCP) reads:

“(2) The petitioner shall supply the original award or a certified copy thereof, together with the original arbitration agreement or an equivalent document, or a certified copy thereof.”
(f) that the attacked decision therefore erred in holding that East Point supplied the original award together with its application and in failing to recognize that the copy should have been certified as being conform to the original;

(g) that even if it were held, as did the court of appeal, that the award supplied by the applicant was the original award, the court of appeal erred in not holding that the award should have been authenticated as required by Art. IV Convention, which provides that the original award must be authenticated;

(h) that in the present case the original award was not authenticated; hence, the court of appeal could not deal with East Point’s request for enforcement and should have denied enforcement of the award in the opposition proceedings.

[2] “This ground [for appeal] is founded. The court of appeal first noted that ‘[Globtrade] argues that [East Point] did not supply the original award and arbitration agreement or certified copies thereof, as required under Art. IV of the New York Convention’. It then recognized that it was necessary to ‘examine, even ex officio, the issue of the correct commencement of the enforcement proceedings, thus also to review if, independent of the exequatur granted by the President, the necessary documents were supplied at that time’. However, [the court] then held that the ‘original award was supplied and only the situation in respect of the arbitration agreement is open to discussion because [that agreement] was contained in an original document, but that document was a telefax having its usual characteristics (printed source, date etc.)’.

[3] “As to the submission of the award, which is the target of this first ground for appeal, we must note that this censure – in particular where it is argued, as described above, that the attacked decision erred ‘in holding that East Point supplied the original award together with its application and in failing to recognize that the copy should have been certified as being conform to the original’ – does not imply that there is a ground for revocation under Art. 395(4) CCP.\(^2\) The factual error which justifies revocation presumes that the decisive fact – which was either undisputedly absent from the file of the case but was deemed to exist by the court, or was positively ascertained in the file but was deemed

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2. Art. 395(4) Italian CCP reads:

“If the judgment is the result of an error of fact emerging from the proceedings or from documents of the hearing, such error shall be deemed to exist when the decision is based on supposition of a fact, the truth of which is undisputedly impossible to prove, or else when the non-existence is presumed of a fact, the truth of which is positively ascertained, and in either case if the fact did not constitute a point of dispute on which judgment was to be passed.”

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non-existent by the court – was not one of the issues on which a decision was
dually rendered, that is, was not discussed in the proceedings and specifically
declared in the attacked decision (Supreme Court, 27 March 2007, no. 7469;
Supreme Court, 2 April 2007, no. 8220; Supreme Court, 9 May 2007, no.
10637). As mentioned above, in the present case the court of appeal explicitly
recognized that ‘[Globtrade] argues that [East Point] did not supply the original
award and arbitration agreement or certified copies thereof, as required under
Art. IV of the New York Convention’ and recognized in any case that it was
necessary to ‘examine, even ex officio, the issue of the correct commencement
of the enforcement proceedings, thus also to review if, independent of the
exequatur granted by the President, the necessary documents were supplied at
that time’.
[4] “This said, we note that the [1958 New York Convention], ratified in Italy
by Law no. 62 of 19 January 1968, provides in its Art. III that ‘Each Contracting
State shall recognize arbitral awards as binding and enforce them in accordance
with the rules of procedure of the territory where the award is relied upon,
under the conditions laid down in the following articles’. It then provides, in Art.
IV(1), that ‘To obtain the recognition and enforcement mentioned in the
preceding article, the party applying for recognition and enforcement shall, at
the time of the application, supply: (a) The duly authenticated original award or a
duly certified copy thereof’.
reproduced in Arts. 839 and 840 CCP (which constitute Chapter VII of Title VIII
of Book IV of the Code of Civil Procedure on foreign awards, first introduced
with Law no. 25 of 5 January 1994 in addition to the existing provisions, so that
the Law on Arbitration] no longer ends at Art. 831 CCP but continues to Art.
840 CCP) – create a fully autonomous micro-system, either because treaty
provisions (in respect of both the requirements for enforcement of the foreign
award and the grounds to oppose enforcement) prevail over the provision in the
Code of Civil Procedure, or because of the Convention’s completeness and self-
sufficiency. [This is true] not only in respect of the substantive requirements for
the enforcement of a foreign award by the Contracting States, but also in respect
of procedural requirements. The powers of the States are limited to the mere
determination of the kind of procedure to be followed for enforcing the award
(Supreme Court, 7 June 1995, no. 6426).
[6] “In the system of the Convention, supplying the ‘duly authenticated’
original award or a duly certified copy thereof is a necessary condition for the
admissibility of the enforcement proceedings. Compliance therewith must be
ascertained on the court’s initiative, independent of the claims and objections of the party.

[7] “On the contrary, the authentication formalities established by the law of the enforcement court, that is, the procedural law of the enforcement State, do play a role in accordance with Art. III of the Convention. It is not possible to follow the ‘Anglo-Saxon practice’, in which, as argued by East Point, ‘a notary public who issues an authentication does not even exist’.

[8] “Hence, the failure to supply the ‘duly authenticated’ original award or a certified copy thereof together with the application prevented the court of appeal from examining the request for enforcement (Supreme Court, 14 March 1995, no. 2919). As repeatedly held by our jurisprudence, this submission is a procedural pre-requisite rather than a condition for the action; its existence – while it remains possible to file a new request for enforcement of the award – must be verified in respect of the moment where the action was commenced; its lack prevents a decision on the merits and in particular enforcement (Supreme Court, 26 May 1981, no. 3456; Supreme Court, 12 February 1987, no. 1526; Supreme Court, 12 November 1992, no. 12187; Supreme Court, 20 September 1995, no. 9980).

[9] “In the present case, we have examined the file of the case, as we were allowed to do because a procedural error [error in procedendo] was alleged. It appears therefrom that the award supplied by the claimant together with the request for enforcement, even if it must be deemed to be the ‘original’ award (and thus not a ‘copy’ which in any case would not be duly certified) is not ‘duly authenticated’. The failure to provide, together with the request for enforcement, the ‘duly authenticated’ award as provided by Art. IV(1)(a) Convention prevented the court of appeal from dealing with the request for enforcement of the foreign award in Italy.

[10] “This ground shall be granted....”
179. Corte di Cassazione [Supreme Court], Plenary Session, 19 May 2009, no. 11529

Parties: Plaintiff: Louis Dreyfus Commodities (nationality not indicated)
Defendant: Cereal Mangimi s.r.l. (Italy)

Published in: Corriere Giuridico (no. 7, 2009) pp. 902-903

Articles: II(1); II(3)

Subject matters: – incorporation of arbitration clause by general reference to standard conditions (no)
– arbitration clause does not extend to related contract
– power of attorney to sign arbitration clause
– seat of arbitration determines international nature of arbitration


Facts

Cereal Mangimi s.r.l. (Cereal Mangimi) and Louis Dreyfus Commodities (Dreyfus) entered into a contract for the sale of French corn. The contract referred to the INCOGRAIN Terms no. 12, which contain an arbitration clause.

A dispute arose between the parties when Dreyfus allegedly failed to deliver part of the corn. Cereal Mangimi commenced an action against Dreyfus in the Court of First Instance of Bari, in Italy, seeking damages; it also sought damages for breach of another contract between the parties, which did not contain an arbitration clause. The court found that the Italian courts had jurisdiction over both claims and found in favor of Cereal Mangimi. The Bari Court of Appeal affirmed the lower court’s decision, holding that there was no valid arbitration clause between the parties because the contract had been concluded by representatives whose power of attorney had been given orally rather than in writing.

The Supreme Court affirmed the appellate decision. It first reasoned that though future disputes may be referred to arbitrators by specific arbitration
clauses in writing, agreements derogating from the jurisdiction of state courts 
must be interpreted restrictively. Hence, the arbitration clause in the contract 
between the parties did not extend to the related contract on which Cereal 
Mangimi also relied against Dreyfus.

The Court then considered whether the power of attorney to conclude an 
arbitration clause must also be in writing. It noted that in the past it answered 
this question under the law applicable to the specific case: thus, an oral power of 
atorney was valid in respect of contracts concluded in countries which did not 
require the written form, while it was invalid in respect of contracts to which 
Italian law applied. It is “doubtful” however whether this principle still applies 
after the entry into force of the 1994 Italian arbitration law reform, which 
“appears” to link the capacity to enter into an arbitration clause and the capacity 
to enter into the main contract.

In the present case, however, it was unnecessary to reach a conclusion on the 
above issue, since the INCOGRAIN arbitration clause was not validly 
incorporated into the contract between the parties. The Supreme Court 
reaffirmed its jurisprudence that only an express and specific reference to an 
arbitration clause in a separate document (per relationem perfectam reference) 
meets the 1958 New York Convention’s requirement of an arbitration 
agreement in writing; a general reference (per relationem imperfectam reference) 
such as the reference to the INCOGRAIN Terms in the contract between the 
parties does not suffice. The Court noted the “considerable difficulties” created 
in respect of the written form requirement by the practice of arbitration clauses 
contained in separate documents to which the contract refers, which is common 
in international commerce.

Excerpt

[1] “Pursuant to [the 1958 New York Convention], ratified by Law no. 62 of 
1968, and to Art. 808 CCP,1 disputes that have not yet arisen may be referred

1. Art. 808 of the Italian Code of Civil Procedure (CCP) reads:

“*The parties may establish, in their contract or in a separate document, that disputes arising out of 
the contract be decided by arbitrators, provided such disputes may be made subject to an 
arbitration agreement. The arbitration clause must be contained in a document meeting the form 
required for a submission agreement by Article 807. 
The validity of the arbitration clause must be evaluated independently of the underlying contract: 
nevertheless, the authority to enter into the contract includes the authority to agree to the 
arbitration clause.”*
for a preliminary and possible decision to foreign arbitrators in so-called foreign arbitration (such as the one at issue, since the seat of the arbitration was abroad though both parties are Italian companies and performance is to take place in Italy) by an arbitration clause that is laid down in writing ‘ad substantiam’ and that exactly identifies the future disputes arising out of the main contract.

[2] “Agreements derogating from the jurisdiction of state courts must be interpreted restrictively and in case of doubt it must be deemed that those courts have jurisdiction. Hence, a contractual clause in the main contract which derogates from Italian jurisdiction in favor of a foreign arbitrator does not extend to disputes concerning related contracts.

[3] “Art. II of the [New York] Convention provides that…. [Quotation of Art. II Convention omitted.] The written form requirement concerns solely the arbitration clause; by operation of Art. 1392 CC it extends to the power of attorney given to the representative who stipulated [the arbitration clause].

[4] “Jurisprudence held in the past that, in the absence of a provision in a treaty, where the arbitration clause was contained in contractual documents that were not signed directly by the parties but rather by agents, mandataries or brokers on their behalf, the form of the power of attorney or authorization was determined by the law applicable to the specific case. Thus, [that jurisprudence] held that an oral power of attorney was valid in respect of contracts stipulated in France or Great Britain, because the law of those countries does not require the written form for the mandate to conclude arbitration clauses, while it deemed that an oral power of attorney was ineffective – and the arbitration agreement invalid – where Italian law applied.

[5] “It is doubtful whether this principle continues to be valid after Art. 808(3) CCP was modified by Art. 3 of the Law of 5 January 1994, no. 25, which stated that ‘The validity of the arbitration clause shall be evaluated independently from the underlying contract: nevertheless, the capacity to enter into the contract includes the capacity to agree to the arbitration clause’. The second sentence of this paragraph appears to have eliminated the necessary correspondence between ‘the capacity to agree to the arbitration clause’ and the power of representation in respect of the stipulation of that clause, rather linking the former, exclusively,

2. Art. 1392 of the Italian Civil Code (CC) reads:

“A power of attorney has no effect unless it complies with the formal requirements for the contract to be concluded by the representative.”
to the ‘capacity to enter into the contract’. If this latter capacity exists, then by this fact alone there is also the capacity to agree to an arbitration clause.

6 “The effect of this special provision is an exception – in respect of the arbitration clause only – to the principle of Art. 1392 CC, according to which [exception] the validity of the power of attorney (whether oral or in writing) should be evaluated not necessarily in relation to that clause but only in relation to the contract to which [the clause] refers.

7 “However, in the present case we need not take a position on the above issue in order to reach a decision, because in any event the mere reference to the INCOGRAIN Terms no. 12 (which contain the arbitration clause) does not meet the written form requirement for a derogation from the jurisdiction of the Italian courts.

8 “This Plenary Session notes that the practice of the so-called per relationem arbitration clauses – that is, [clauses] contained in a separate act or document to which the contract refers, which is especially frequent in international commerce – has created considerable difficulties also in respect of the compliance with the written form requirement. Italian jurisprudence distinguishes two cases, depending on whether the contract makes an express and specific reference to the arbitration clause (the so-called per relationem perfectam reference) or a general reference: that is, it merely refers to the document or [standard] form containing the arbitration clause (the so-called per relationem imperfectam reference). In the first case the arbitration clause is deemed to have been validly stipulated. In the second case, on the contrary, the formal requirements under the New York Convention are not met.

9 “As a consequence, it must be affirmed that the Italian courts have jurisdiction, since there is no derogation in favor of foreign arbitration.”
JORDAN

Ratification: 15 November 1979
No Reservations


Parties: Appellant: Sucres et Denrées (SUCDEN) (nationality not indicated)
Respondent: Horizon International Food Trade Co. Ltd (Jordan)

Appellants: (1) Korean-Polish Shipping Co. Ltd, owners of the CHOPOL 2 (Poland);
(2) The West of England Ship Owners Mutual Insurance Association (Luxembourg);
(3) West of England Ship Owners Insurance Services Limited (UK)
Respondent: Horizon International Food Trade Co. Ltd (Jordan)

Published in: Available online at <www.adaleh.info> (subscription required)

Articles: I; II(1); II(3)

Subject matters: – manner of ratification of 1958 New York Convention
– bill of lading

Commentary Cases: ¶113 + ¶ 211

1. The General Editor wishes to thank Dr. Omar M. H. Aljazy, Aljazy & Co., Amman, for his invaluable assistance in providing this decision and translating it from the Arabic original.
Facts

On 2 July 2004, Sucres et Denrées – SUICDEN (SUICDEN), Korean-Polish Shipping Co. Ltd. (Korean) and Horizon International Food Trade Co. Ltd (Horizon) entered into a charterparty in Paris. The contract concerned the carriage of 1,400 tonnes of Brazilian white sugar from Brazil to the Jordanian port of Aqaba on board the CHOPOL 2. Korean was the owner of the vessel; SUICDEN was the vessel’s charterer and the seller of the sugar; Horizon was the sugar’s buyer and receiver. The charterparty contained a clause referring disputes to arbitration in London under the rules of the London Maritime Arbitrators Association (LMAA). A bill of lading incorporating the terms of the charterparty was issued on 10 August 2004.

When the vessel arrived in Aqaba on 15 September 2004, the sugar was found to be damaged. An inspection carried out on behalf of insurer The West of England Ship Owners Insurance Services (West Services) showed that part of the sugar was solidified, that part was “dirty, frothy and smelly” and that some sacks had rotted. Dirty sugar was cleaned at Horizon’s expense and sold to Iraq at a lower price; sugar contained in rotten sacks was repackaged in smaller sacks and sold on the local market. The inspection also showed that the weight was lower than the weight contractually agreed.

On 17 May 2005, Horizon sent a judicial warning to SUICDEN, seeking compensation for the damage to and shortage of the cargo; subsequently, it commenced an action in the Amman Court of First Instance against, inter alia, SUICDEN, Korean, West Services and The West of England Ship Owners Mutual Insurance Association (West Association). SUICDEN and, separately, Korean, West Services and West Association filed petitions seeking referral of the dispute to LMAA arbitration in London.

On 4 June 2006, the Amman Court of First Instance dismissed both petitions and refused to refer the dispute to arbitration. On 30 April 2007, this decision was affirmed by the Amman Court of Appeal. Both courts held that the arbitration clause in the bills of lading was null and void pursuant to the Jordanian Maritime Commercial Law, which provides for the nullity of clauses excluding the jurisdiction of the Jordanian courts over disputes arising out of shipping or maritime carriage documents.

SUICDEN appealed to the Supreme Court (the first appeal); Korean, West Association and West Services also filed an appeal to the Supreme Court (the second appeal).

The Supreme Court reversed the lower court’s decision, finding that the prohibition of arbitration in the Jordanian Maritime Commercial Code did not
apply as it was superseded by the 1958 New York Convention and the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules), which as international treaties prevail over domestic law.

The Court dismissed the appellants’ argument that the Hamburg Rules are not in force in Jordan because, though ratified, they were not approved by the National Assembly. The Court reasoned that only treaties imposing financial commitments on Jordan or negatively affecting the public or private rights of Jordanians require approval by the National Assembly. This is not the case of the Hamburg Rules, which recognize the right of a Jordanian citizen to freely agree, in a contract concluded outside Jordan with a foreign party, to refer a dispute to arbitration abroad.

Nor was the approval of the National Assembly necessary for the ratification of the New York Convention. The Court noted that it had held in previous decisions that the New York Convention does not affect the sovereignty of the Jordanian State, impose additional or different burdens on it or affect the private or public rights of Jordanians. Hence, there was no need to seek the approval of the National Assembly in respect of this Convention.

Having concluded that both Conventions are in force in Jordan, the Court held that the parties had validly entered into an arbitration agreement, since the bill of lading issued in respect of the shipment of Brazilian sugar expressly referred to the terms and conditions of the charterparty, including the arbitration clause.

The Court added that the prohibition in the Maritime Commercial Code would not apply even in respect of a domestic contract, because that provision is superseded domestically by the Jordanian Arbitration Law No. 31 of 2001.

Excerpt

[1] “On 30 May 2007, two appeals were submitted in this lawsuit to challenge the decision of the Amman Court of Appeal in case No. 2836/2006 of 30 April 2007, which decision dismissed two appeals and upheld the challenged decision issued on 4 June 2006 by the Amman Court of First Instance in applications No. 1219/T/2005 and No. 1447/2005, submitted in civil lawsuit No. 1944/2005. This latter decision dismissed two petitions [filed by SUCDEN, Korean, West Services and West Association] on the ground of the existence of an arbitration clause and postponed the determination of legal fees and expenses until final settlement of the original lawsuit, returning the documents to their original state in order to proceed with the lawsuit until determination of legal fees and expenses at the conclusion of the final settlement.”
I. GROUNDS FOR THE FIRST APPEAL

[2] The Supreme Court summarized the grounds for the first appeal, filed by SUCDEN against Horizon, as follows.

“(1) International treaties rank higher than domestic laws and shall prevail: the Amman Court of Appeal [consequently] erred in the application and interpretation of the law when interpreting and applying it in the appealed decision for the purpose of replying to [SUCDEN’s] first ground [for appeal].

(2) The [1958] New York Convention has been ratified and all the relevant legal and constitutional steps have been duly completed; it does not violate the sovereignty of Jordan or the public and private rights of Jordanians. The Amman Court of Appeal [consequently] erred in the application and interpretation of the law when interpreting and applying it in the appealed decision for the purpose of replying to the appellant’s second and third ground [for appeal].

(3) The New York Convention has a direct impact on the present application because it concerns procedural matters: the Amman Court of Appeal [consequently] erred in the application and interpretation of the law when it failed to take into account that the New York Convention has a direct impact on the present application because it concerns procedural matters, and that its application to this case does not violate the law according to the [Supreme] Court’s jurisprudence.

(4) The United Nations Convention on the Carriage of Goods by Sea is in force and does not violate the sovereignty of Jordan: the court of appeal and, before it, the Court of First instance [consequently] erred in the application and interpretation of the law when they held that the United Nations Convention on the Carriage of Goods by Sea is not in force because it was not approved by the National Assembly and does not prevail over domestic law because it violates the private rights of Jordanians. The courts erred when they considered that the United Nations Convention on the Carriage of Goods by Sea, to which Jordan has acceded, and which was duly published in the Official Gazette without the ratification of the National Assembly, is not in force and does not prevail over domestic laws because it affects the private rights of Jordanians.

(5) The Arbitration Law [No. 31 of 2001] is a private law in respect of the Maritime Commercial Law and must therefore prevail. The Amman Court of Appeal erred when it failed to consider that Arbitration Law No. 31 of 2001 is a private law in respect of the Maritime Commercial Law and must prevail, and that there is no place for the application of Art. 215 Maritime Commercial Law in light of Arbitration Law No. 31 of 2001.
(6) The court of appeal erred by failing to apply Art. 9 of Arbitration Law No. 31 of 2001, which states the following:

‘Arbitral agreements may only be concluded by natural or juridical persons having capacity to dispose of their rights. Arbitration is not permitted in matters where compromise is not allowed.’

For the above reasons, [SUCDEN] bids to accept the appeal formally and to dismiss the appealed decision substantively.


II. GROUNDS FOR THE SECOND APPEAL

[4] The Supreme Court summarized the grounds for the second appeal, filed by Korean-Polish Shipping Co. Ltd., The West of England Ship Owners Mutual Insurance Association and The West of England Ship Owners Insurance Services Limited (collectively, the three appellants) against Horizon, as follows.

“(1) The [three appellants] found the Amman Court of First Instance at fault because of its contradiction of and clear failure to comply with the provisions and rules of international law and conventions and international treaties to which the Hashemite Kingdom of Jordan has acceded and which it has ratified. Those treaties, on which the three appellants relied in their petition to dismiss the original lawsuit because of the presence of an arbitration clause, were: the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg), the [1958 New York Convention] and the Vienna Convention on the Law of Treaties of 1969, as well as Jordanian Constitutional, Civil, Arbitration and Civil Procedural Law, English Law and the London Maritime Arbitrators Association (LMAA) Terms of 2002.

(2) The Amman Court of First Instance also erred when it ruled that the United Nations Convention on the Carriage of Goods by Sea – which is acceded to by Jordan and was duly published in the Official Gazette without approval by the National Assembly – is not in force and does not prevail over domestic law because it violates the private rights of Jordanians.

(3) The Court [of Appeal] erred in upholding the Amman Court of First Instance’s interpretation of Art. 33 of the Jordanian Constitution [see below at
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

[20]], which was applied by the Supreme Court of Cassation, and before it by the Higher Council for Interpreting the Constitution, to the enforcement of [the New York Convention].

(4) The Amman Court of Appeal erred in upholding the decision of the Amman Court of First Instance where that Court ruled that the arbitration clause stipulated in the bills of lading (the merits of this lawsuit) was null and void under Art. 215(b) of the Maritime Commercial Law, which states that:

‘Notwithstanding the provisions in any other law, any term or agreement shall be void if it deprives the Jordanian courts of their jurisdiction in relation to disputes that arise out of shipping or maritime carriage documents.’

[5] “For the above reasons [the three appellants] bid to accept the appeal formally and to dismiss the appealed decision substantively.
[6] “On 27 June 2007, [Horizon’s] attorney presented a list of replies, requesting formal approval thereof, formal and substantive dismissal of the appeal and confirmation of the appealed decision.”

III. DECISION

1. Background

[7] “Following deliberation, this Court finds that the claimant (Horizon International Food Trade Co. Ltd) submitted this lawsuit No. 1944/2005 before the Amman Court of First Instance against Respondents.... The value of the claim for the purpose of fees is US$ 950,414 or the equivalent amount of Jordanian Dinars 674,794.”

[8] The Supreme Court set out the facts of the case and continued: “On 17 May 2005, [Horizon] sent judicial warning No. 16229/2005 to [SUCDEN], requesting compensation for the damages that occurred to the shipment of sugar. Though notified, [SUCDEN] refused to pay without a lawful excuse, which in turn led [Horizon] to commence proceedings. During the course of the proceedings, several petitions were submitted. The Court of First Instance decided thus:

(1) In respect of Petition No. 1448/2005, submitted by [SUCDEN] on non-adversarial grounds, the Court considered this petition to be one of [SUCDEN’s]
JORDAN NO. 2

Pleas, included it in the lawsuit and held that it would be determined together with the final settlement.

(2) In respect of Petitions No. 1447/T/2005, submitted by [SUCDEN], and No. 1219/T/2005, submitted by [the three appellants], the Court decided to merge [those petitions] in accordance with the provisions of Art. 109(a) and (b) of the Law of Civil Procedure – and to suspend the proceedings in order to examine them jointly. These petitions sought dismissal of lawsuit No. 1944/2005 before consideration of the merits on account of the existence of an arbitration clause.

The summary of the Petitions is that [Horizon] submitted lawsuit No. 1944/2005 before the Court of First Instance against [all respondents] and others to claim the amount of US$ 950,414 or the equivalent in Jordanian Dinars as a compensation for the damages to and the depreciation of the cargo loaded under bills of lading unto the vessel belonging to Korean-Polish Shipping Co. Ltd, the owners of the CHOPOL 2. [The Petitions are] based on the fact that the parties to the shipping contract (the shipper and the carrier) agreed to implement the provision of the charter, which sets out in the bill of lading the provisions, conditions and exceptions therefor, including the arbitration clause. These provisions apply to the bill of lading and must be deemed an integral part thereof pursuant to:

(i) Arts. 10, 12 and 27 of the Jordanian Arbitration Law No. 31 of 2001; 2

2. Art. 10 of the Jordanian Arbitration Law no. 31 of 2001 reads:

"a. An arbitration agreement shall be in writing otherwise it is void. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams, faxes or telexes or other means of telecommunication which provide a record of the agreement.

b. The reference in a CONTRACT to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference [to such clause] is clear in regarding that clause as a part of the contract.

c. If the parties agree to arbitration while a court is reviewing the dispute, the court shall refer the dispute to arbitration and its decision shall be deemed as an arbitration agreement in writing."

Art. 12 Arbitration Law reads:

"a. A court before which an action is brought in a dispute which is the subject of an arbitration agreement shall dismiss the case if the defendant so requests before entering into the substance of the dispute.

b. Bringing an action as referred to in paragraph (a) of this article, does not preclude the commencement or continuation of the arbitral proceedings or the issuance of the arbitral award, unless otherwise agreed by the two parties."
Art. 27 Arbitration Law reads:

"The two parties are free to agree on the place of arbitration in the Kingdom or abroad; failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case and the convenience of the parties in respect of such place. Nonetheless, the arbitral tribunal may meet at any place it considers appropriate to perform any of the arbitral procedures such as the hearing of the parties to the dispute, witnesses or of experts or for reviewing documents or the inspection of goods or property or for consultation among its members, or for any other thing."

All translations published on the website of the Jordanian Business Laws (JCDR) <www.jordanianbusinesslaws.com> (subscription required).

3. Art. 24 of the Jordanian Civil Code reads:

"The provisions of the preceding section shall not be applicable if there is a provision repugnant thereto in a special law or in an international treaty in effect in the Hashemite Kingdom of Jordan."

This decision in turn was not accepted by [the three appellants], which decided to challenge the decision independently. [SUCDEN] proceeded similarly on the grounds mentioned in its statement of plea. On his part, [Horizon’s] attorney submitted a reply to the appeals.

2. Grounds for the Decision

[The appellants] disagree with the [lower] court’s holding that the arbitration clause agreed upon in the carriage contract signed in Paris by the shipper on the one hand and the carrier/shipowner and the receiver ([Horizon]) on the other is null and void because it precludes the jurisdiction of the Jordanian courts and because the United Nation Convention on the Carriage of Goods by Sea of 1978 (Hamburg Rules) has not been ratified.

We find on this point Art. 22(2) of the United Nation Convention on the Carriage of Goods by Sea of 1978, to which Jordan has acceded and which the Council of Ministers has approved, states that:

‘Where a charter-party contains a provision that disputes arising there under shall be referred to arbitration and a bill of lading issued pursuant to the charter party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.’

It is proved by the bill of lading attached to [Horizon’s] file that all the conditions and exceptions stated in the charterparty for the carriage of sugar dated 2 July 2004, including the arbitration clause, apply to the shipment and are deemed an integral part thereof.

Based on the above, the arbitration clause in the shipping documents applies to [Horizon] pursuant to Art. 22(2) of the UN Convention mentioned above. We also find that Sect. 31 of the charterparty for the carriage of sugar, signed in Paris on 2 July 2004, states that all disputes in relation to the charter must be referred to arbitrators in London; the same section indicates how to choose the arbitrators and determines [the rules for the arbitration].

[Horizon] commenced this proceeding requesting the [present] appellants to pay the damages and compensate for the shortage that occurred to the goods following the shipment for the reasons mentioned in the appeal. The appellants sought dismissal of the petition on the basis of the arbitration clause, arguing that the competent body to determine the dispute is an arbitral tribunal sitting in
London. The two courts deciding on the merits dismissed the petition, holding that the Hamburg Rules could not be applied to the facts of this petition because the National Assembly did not ratify that UN Convention and the constitutional steps therefor were not duly completed.

[16] “First, the appellants argue that Arbitration Law No. 31 of 2001 must be applied, as it postdates the Maritime Commercial Law and limits the exclusive referral of disputes arising from maritime transport contracts to Jordanian courts, as provided for in Art. 215 of the Maritime Commercial Law; [they also argue] that the Arbitration Law is a private law and must therefore apply pursuant to Art. 5 of the Civil Law.

[17] “This Court finds that its Plenary Session held in case No. 325/2002 that private law prevails over public law, and that if the public law was issued after the private law, the private law shall be deemed to be an exception to the public law. If the private law was issued after the public law, the private law shall contain the public law, and it is deemed that the provisions in the public law do not amend the provisions of the private law unless by specific provisions.

[18] “We find that the Arbitration Law of 2001 applies to every arbitration agreed upon in the Kingdom relating to a civil or commercial dispute between private or public law persons. Accordingly, the Arbitration Law does not apply in respect of disputes outside the Kingdom (Supreme Court of Cassation, decision No. 2233/2004). In the present case, the arbitration agreement was signed in Paris and the arbitrators’ meeting took place in London, so that there is no place to discuss the conflicting domestic laws in this case.

[19] “We find that the jurisprudence and the judiciary agree that international treaties signed by countries rank higher than domestic laws and shall prevail even if their provisions contradict domestic laws. The courts are the specialized authority in applying international treaties; therefore they, not the parties to the dispute, choose which laws and conventions should be applied, as the principle of public policy so dictates. International treaties and conventions, however, must have gone through the constitutional stages in the country where the dispute is taking place.

[20] “In order to ascertain whether the [United Nations] Convention on the Carriage of Goods by Sea – to which Jordan has acceded following the decision of the Council of Ministers posted in Official Gazette No. 44874 of 16 April 2001 – which allows parties to refer disputes regarding the transport of goods to [the courts of several places], has (not) passed through its constitutional stages, and whether the consent of the National Assembly is necessary, we must look at Art. 33 of the Jordanian Constitution, as amended by amendment 1958 No. 1, where it states that:
The King declares war, concludes peace and ratifies treaties and agreements.

Treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms.\textsuperscript{4}

[21] “The Higher Council for the Interpretation of the Constitution, in its decision No. 1 of 1962, interpreted the terms ‘treaties’ and ‘agreements’ in Art. 33 as signifying that ‘treaties’ in its general meaning refers to an agreement entered into by two or more countries, whether it relates to their political or economic interests, and that in its specific meaning [‘agreements’] it refers to important international agreements of a political nature such as alliance treaties. On the other hand, if countries sign agreements that do not concern their political affairs, jurisprudence has referred to those as ‘agreements’. Hence, the use of the term ‘agreements’ after ‘treaties’ in Art. 33 shows that the legislators’ intention was to differentiate between the two terms, depending on whether the treaty in that article is between two or more countries and whether it relates to non-political affairs.

[22] “Based on the above, the Constitution requires the approval of the National Assembly for the following agreements and treaties:

(1) Treaties and agreements which are concluded by the Hashemite Kingdom of Jordan with other countries and impose financial commitments on the Treasury;
(2) Treaties and agreements which are concluded by the Hashemite Kingdom of Jordan with other countries and affect the public or private rights of Jordanians. Affecting those rights means a negative impact on the private and public rights of Jordanians, either the rights stated in Chapter 2 of the Constitution (Arts. 5-23) or other related rights, which leads to disregarding private or public rights.

[23] “Art. 215(b) of the Maritime Commercial Law states the following:

‘Notwithstanding the provisions in any other law, any term or agreement shall be void if it deprives the Jordanian courts of their jurisdiction in

relation to disputes that arise out of shipping or maritime carriage documents.

[24] “The agreement of a Jordanian citizen (either a natural or a legal person) concluded outside the Kingdom with a foreign party to resolve a dispute between them in another country, that is entered into freely and without the interference of another party, and is approved by both parties, does not violate Art. 27 of the Arbitration Law No. 31 of 2001, does not affect the private or public rights of Jordanians and does not affect the sovereignty of the Kingdom, provided the enforcement of the arbitral award is in accordance with the legal system of Jordan and is granted or refused according to the national laws of the Kingdom, that is, the Enforcement of Foreign Awards Law No. 8 of 1952.

[25] “Accordingly, the fact that Jordan has ratified the United Nations Convention on the Carriage of Goods by Sea without the approval of the National Assembly does not infringe the Constitution.

[26] “We also find that the Hashemite Kingdom of Jordan has acceded to the New York Convention on arbitral awards and has ratified it in accordance with the declaration printed in the Official Gazette No. 3585 of 16 November 1988.

[27] “The recognition of arbitral awards also includes written agreements, freely entered into by the parties, to refer disputes that have arisen or may arise between them to arbitration in accordance with Art. II of the Convention (International Commercial Arbitration, book by Dr. Faouzi Sami, p. 41, 1997) And since this Court has held that the New York Convention does not affect the sovereignty of this country, does not alter or impose additional burden on it and does not affect the private or public rights of Jordanians, there is no need to present it [for approval] to the National Assembly (Supreme Court of Cassation, decision No. 2233/2004 and No. 2996/99).

[28] “As a result, the arbitration agreement for arbitration in London signed outside the Kingdom by the parties to the dispute in this case does not violate the Constitution and is in agreement with the international treaties to which Jordan has acceded, whether the New York Convention or the Hamburg Rules, which latter applies here since it ranks higher than Art. 215(B) of the Jordanian Commercial Maritime Law.

[29] “The appealed decision was based on the nullity of the arbitration clause under Art. 33 of the Constitution, which article was examined and defined, before its amendment, in decision No. 2 of 1955 of the Higher Council for the Interpretation of the Constitution. [However,] this article cannot apply and could not be relied on in the appealed decision; it was a violation of the law and the challenged reasons must be reversed.
JORDAN NO. 2

[30] “We decide to reverse the appellate decision and return the case to the lower court for further proceedings.”
KENYA

Accession: 10 February 1989
1st Reservation

1. High Court, Mombasa, 5 July 2002, Civil Suit No. 388 of 2000

Parties: Applicant: Glencore Grain Ltd (nationality not indicated)
Respondent: TSS Grain Millers Ltd (nationality not indicated)

Published in: [2002] Kenya Law Reports, pp. 1-24; also available online at <www.kenyalaw.org>

Articles: III; IV(1)(a); IV(1)(b); V(1)(a); V(1)(b); V(2)(b)

Subject matters: – procedural aspects of enforcement
– award submitted for enforcement must be stamped (Kenyan Stamp Duty Act)
– certified copy of arbitral award and arbitration agreement
– submission of applicable arbitration rules is condition for requesting enforcement
– short-form arbitration clause
– review of merits of award (no)
– due process and lack of proof of communication
– due process and appointment of arbitrator on party’s behalf
– public policy and illegal contract

Commentary Cases: [5]-[17] + [32]-[37] = ¶ 301; [18]-[22] = ¶ 404; [23]-[25] = ¶ 401; [26]-[28] = ¶ 507 (short-form arbitration clause); [29]-[31] + [38]-[39] = ¶ 504 + ¶ 502; [40]-[44] = ¶ 511 (no proof of communication of arbitration documents; appointment of arbitrator on party’s behalf); [45]-[55] = ¶ 518 + ¶ 524 (illegal contract)
By a contract of 18 June 1998 Glencore Grain Ltd (Glencore) agreed to sell and deliver to TSS Grain Millers Ltd (TSS Millers) within Mombasa 10,000 metric tons of US No. 2 white corn. Payment was by means of a Letter of Credit to be opened within seven days from the date of the contract. It was contractually agreed that if TSS Millers failed to open the Letter of Credit, Glencore could either terminate the contract or extend the delivery period with the days of the delay in opening the Letter of Credit, with TSS Millers bearing the consequences of the delay. Clause 5 of the contract provided: “All other terms and conditions as per GAFTA 200.” Clause 4 was an arbitration clause reading: “Arbitration as per GAFTA 125 in London, English Law to govern.”

TSS Millers failed to open the Letter of Credit within the agreed time limit. Instead of exercising one of the options provided for in the contract, Glencore decided to amend the contract and deliver white maize of South African origin rather than US No. 2 white corn as originally agreed, at a lower price. It sent an amended invoice and required TSS Millers to open a Letter of Credit for the amended delivery before 15 August 1998. On 30 August 1998, TSS Millers received samples of the white maize, which was already in Mombasa, and had them tested by SGS Kenya Ltd (SGS), a quality-control company. SGS issued a report establishing that the maize was not fit for human consumption, whereupon TSS Millers declined to accept and sign the proposed amended contract and to comply with the request to open a Letter of Credit.

On 12 November 1998, Glencore commenced GAFTA arbitration proceedings, claiming that TSS Millers was in breach of contract. TSS Millers did not appoint an arbitrator and GAFTA appointed an arbitrator on its behalf. On 22 March 2000, a panel of three arbitrators found in favor of Glencore. On 9 August 2000, Glencore filed an application in the High Court in Mombasa, seeking leave to enforce the GAFTA award. On 22 September 2000, TSS Millers filed an application to deny enforcement and set aside the award.

The High Court, per Onyancha J, denied enforcement of the GAFTA award on several grounds and granted TSS Millers’ application to set it aside. The court held at the outset that TSS Millers’ application was filed timely – that is, within three months of the serving of the award – since Glencore’s argument that the award was served on 22 March 2000 was not sufficiently supported by a “too sketchy” GAFTA Proof of Delivery (POD) report. The court accepted instead TSS Millers’ contention that it was served with the award on 13 September 2000, when it received Glencore’s enforcement application, to which the award was attached.
The court then held that Glencore’s application for leave of enforcement should be dismissed, first, on procedural grounds because it did not state the grounds on which it was based and was not supported by an affidavit bearing the relevant facts and evidence, as required by a general rule of Kenyan procedural law that also applies to enforcement applications.

The court further noted, enforcement should be denied because Glencore did not submit a duly certified copy of the award and arbitration agreement. The court noted that the copy of the arbitral award filed with the application was certified to be a true and correct copy by the Director-General of GAFTA, who was not shown to be a notary public or otherwise qualified to certify or authenticate the award. The certificate by a London notary public also supplied by Glencore merely attested to the authenticity of the GAFTA certificate and the signature of the GAFTA Director-General, rather than the authenticity of the award itself. Similarly, the copy of the contract containing the arbitration agreement was not certified as a true copy of the original, since the certification was by an individual whose qualification was not shown on the document.

The court added that enforcement should also be refused because Glencore failed to supply the applicable GAFTA arbitration rules together with the arbitration agreement and award.

The High Court did hold that the arbitration agreement in the 18 June 1998 contract was valid, dismissing TSS Millers’ argument that the short-form wording was too vague. It added that it could not review the arbitrators’ finding that there was a valid arbitration agreement between the parties, although it found it difficult to understand why the arbitrators so held, since the amended contract was not signed by TSS Millers.

Equally, the court reasoned that it had no jurisdiction to review the arbitrators’ holding that the dispute underlying the award fell within the scope of the arbitration agreement even if the 18 June 1998 contract provided that if TSS Millers failed to open a Letter of Credit, Glencore had only two options (terminate the contract or extend the delivery period) rather than the one it took (commencing arbitration). The court held that it had no jurisdiction to determine a matter which was properly before the arbitral tribunal, “however unhappy it may feel about it”.

The court held that there were three more grounds on which enforcement should be refused. First, the GAFTA award was not stamped. The Kenyan Stamp Duty Act requires that instruments executed outside of Kenya must be stamped before being “used, brought into force, or registered within Kenya”. The court reasoned that the relevant provisions of the Stamp Duty Act are of general
application unless expressly excluded and they are not so excluded by the Kenyan Arbitration Act.

Second, there was no proof – such as fax activity reports or certificates of posting – that TSS Millers was served with the arbitration documents, from the notice of arbitration to the award, so that GAFTA was not entitled to select an arbitrator on its behalf.

Third, enforcement should be denied on grounds of public policy. The amended contract underlying the award would have the effect of releasing to the Kenyan people maize unfit for human consumption; hence, it was illegal both by express provision of law and “in the loose meaning” because it was contrary to “the basic legal and/or moral principles or values in the Kenyan society”. The court added that while it is Kenya’s public policy to enforce international arbitration agreements, a court must “balance the competing rights: the public policy in protection of matters in favour of international arbitral awards, contracts or judgments and public policy in protection of matters more favourable to the welfare of Kenyan people”.

Excerpt

(....)

[1] “When [Glencore] filed their application dated 9 August 2000 through their Advocate Mr. Khanna, they annexed the following documents:

(1) A Certificate of Attestation by one Richard Graham Rosser, Notary Public of the City of London, to the effect Glencore Grain Ltd v. TSS Grain Millers Ltd (Onyancha J) that the signature set and subscribed at the foot of the document (i.e., Certificate) by one Pamela Maureen Kirby Johnson, The Director-General of GAFTA, was genuine.

(2) A Certificate by Pamela Maureen Kirby Johnson confirming that the arbitral award dated 22 March 2000 filed with the certificate in (1) above, was a true and correct copy of the said arbitral award.

(3) A Certificate of the true copy (so certified by one Richard Butler) of the Contract Agreement dated 18 June 1998 between Glencore and [TSS Millers].


(....)
“Glencore did not show to be basing its application upon any grounds as required under Order 50 rule 7 of the Civil Procedure Rules. However, TSS Millers, in respect to their application gave various grounds. They stated:

1) that they received the award only on 13 September 2000 upon request through their Advocate by a letter dated 11 September 2000;
2) that the arbitrators had based the said arbitral award on an amended contract never agreed upon or executed by them, which amounted to an error of law apparent on the face of the arbitration award that the enforcement of the award will occasion gross miscarriage of justice and prejudice, to them contrary, to public policy of Kenya;
3) that the arbitrators’ approach was so astoundingly irregular and partial that the resultant conclusions therefrom amounted to a misconduct on their part;
4) that there is an error on the face of the record of the award as the arbitrators failed to make a finding as to whether Glencore had in fact duly performed its part of the contract as to entitle it to damages against TSS Millers;
5) that arbitral award dealt with matters and issues not provided in or contemplated by the contract executed by the parties, thus dealing with matters beyond the scope of the reference and enforcement of the contract against Kenya’s public policy;
6) that the award is not supported by law and enforcement thereof will be against public policy since the effect thereof is unjust.

Most of these grounds were not brought to the fore by Mr. Adera Advocate [for TSS Millers] who had filed the application but to this I will revert later.

In supporting Glencore’s application Mr. Khanna argued several issues which would be better highlighted at this stage. He stated that:

i) His clients’ application dated 9 August 2000 did not require an affidavit in its support because the Arbitration Rules of 1997 rule 9 does not provide for or seek for a supporting affidavit, nor therefore a replying affidavit;
ii) That the granting of leave to enforce an arbitral award or to reject it must be confined to Sect. 37 of the Act only and to no other legal provision;
iii) That the enforcement of the award is not against public policy of Kenya;
iv) That the validity of the award itself has not been challenged since TSS Millers voluntarily chose not to attend and defend the prosecution of the reference;
v) That the application by TSS Millers for the rejection of the enforcement of the award was out of time by three months having been served on 28 March 2000.
Mr. Taib for TSS Millers raised several grounds in opposition. He was holding a brief for Mr. Adera who had earlier appeared for TSS Millers. He included the following grounds:

1. That enforcement of the award would be against Kenya’s public policy in that the maize which Glencore purported to sell to TSS Millers for human consumption in Kenya was found to be totally unfit for human consumption.
2. That the application dated 9 August 2000 for enforcement did not conform with Order 50 Rule 7 and was fatally incurable.
3. That relevant application was fatally bad in law in not being supported by an affidavit of support contrary to Order 50 Rule 3 or 7.
4. That the award cannot be enforced by the court because no duly authenticated or duly certified award or true copy of the original copy itself was filed for enforcement or if certified, was not certified by a qualified person according to law.
5. That the arbitration agreement upon which the award is based was not annexed to this award under consideration contrary to Sect. 3(1) of the Arbitration Act 1995 as read with Art. 36(2) and Sect. 3(6).
6. That Glencore’s position being that the original contract between the parties was amended and that the amended contract was the one relied upon, the latter was not in writing as the original and was therefore not also annexed as required as per Sect. 4(2) of the Act.
7. That both parties were corporations and that any contracts signed by them must be under corporation seal unless exempted by their individual Memorandum and Articles of Association.
8. That the arbitration award was not stamped under Kenya’s Stamp Duty Act (Sects. 19 and 23) and was therefore not only incapable of being filed and registered in the Court Registry, but also was not admissible as evidence or enforceable by any court of law.
9. That TSS Millers was not given an opportunity to put up its case in that the Arbitration body failed to effectively communicate with them as per Sect. 9 of the Act.
10. That the number of arbitrators contravened Sect. 11 of the Act and Sect. 12 also.
11. That the place of the award contravened Sect. 32(4)-(5) of the Act.”

(....)
I. TIMELINESS OF APPLICATION FOR ENFORCEMENT

[5] “The first issue to decide is whether or not TSS Millers’s application dated 29 September 2000 opposing Glencore’s application dated 9 August 2000 was out of time. Mr. Khanna argued (i) that it was out time because the arbitral award was served on TSS Millers on 22 March 2000. The latter was supposed to file any challenging application within 3 months; (ii) That they filed their application under consideration on 22 September 2000, three months out of time; (iii) That they knew they were out of time and that is why they found a need to include in their above mentioned application a prayer for leave to file the application out of time. But Mr. Adera who argued that application did not stress this prayer although he did not abandon it either.

[6] “TSS Millers’ answer to the question was that they were not served with the arbitral award on 29 March 2000 but on 13 September 2000. They further argued that this service came about when TSS Millers were for the first time served with the Glencore’s enforcement application to which the copy of the arbitral award was annexed.

[7] “Glencore depended upon [a letter by GAFTA] dated 22 March 2000 stating that GAFTA sent to both parties copies of the award. This turned out to mean that GAFTA had sent the copies of the award by courier service. A copy of the delivery book record was annexed and identified to this court as Exhibit ‘SJH.2’ being a GAFTA POD [Proof of Delivery] Report. The 14th item thereon shows the following entry: ‘84014455722 22-Mar 00 – Kenya Others 28 Mar 00 915 – Signature’. This entry is underlined and was relied by Glencore as the evidence of service of the arbitral award under consideration on 22 March 2000.

[8] “I have considered this piece of evidence. It does not, in the form it was presented before this court, mean much. It is too sketchy. It does not clearly show that it was a service of any particular document to TSS Millers. It only shows a number ‘84014455722’ and another number ‘22’ – and a word spelt ‘Mar’ with two zeroes in front followed by words ‘Kenya others’ and again ‘No. 28’ and a word spelt ‘Mar’ with ‘00’ in front, before the figure ‘0915 – signature’. These words and figures cannot and did not, before this court, establish the service disputed. It possibly could have made sense if the courier company could have deponed an explaining affidavit to decipher the above figures and incomplete words. This omission may have been carelessly or inadvertently done. However, the omission did not help the court, nor did it help the party who relied on the vague entry.

[9] “This court has no hesitation therefore in finding that TSS Millers was not served with a copy of the arbitral award under consideration on 22 March 2000.
as claimed by GAFTA or Glencore. I accordingly accept TSS Millers’ contention that they were served with the award for the first time on 13 September 2000 and that they were therefore not out of time when they filed their application challenging the award on 22 September 2000.”

II. PROCEDURAL REQUIREMENTS FOR ENFORCEMENT ACTION

[10] “The Glencore’s application dated 9 August 2000 was not supported by any affidavit. Mr. Khanna said that that was an application to enforce an arbitral award under the rules made under Arbitration Act, 1995 specifically rule 9, and that such application did not need a supporting affidavit since the rules did not specifically state that such an application should need a supporting affidavit.

[11] “I find this quite interesting, coming from a senior counsel. However, Sect. 36 of the Arbitration Act states that an arbitral award ... upon application in writing to the High Court, shall be enforced subject to this Section and Sect. 37. Rule 9 of the Arbitration Rules states that an application under Sect. 36 of the Act shall be made by Summons in Chambers.

[12] “Would such an application be any different from those applications generally provided for under Order 50 rule 7? I think not. This means that the application for leave to enforce an award such as the one under consideration like any other must generally state the grounds of the application and be supported by an affidavit bearing the facts or evidence upon which it is based. Glencore’s application was accordingly not based on any facts or evidence as it should under Order 50 rule 7. The application was skeletal. There was no separate oral evidence coming from the applicant upon which the application would be based.

[13] “In cases where the Applicant’s supporting affidavit is found to be valueless or where it is struck out or expunged from the record for good reasons, the application, like in the case of Wahinya v. Wahinya, [1976] KLR, 96, at p. 97 was dismissed. It is my view and I so hold, therefore, that the Glencore’s application before this court seeking to enforce the arbitral award under consideration, does not only stand unsupported by any valid affidavit but is also not grounded on any ground as required under Order 50 rule 7 of the Civil Procedure Rules. It is my further finding that Order 50 rule 7 is a mandatory requirement. Indeed the correct legal position is that even where the supporting affidavit were found present and proper, the omission to ground the application would be fatal and incurable. In this case there is no supporting affidavit and also there are no grounds of the application. On either reason I would and do hereby dismiss Glencore’s application for enforcement of the arbitral award before the court.
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

[14] “Mr. Khanna further submitted that the granting of leave to enforce the arbitral award must be confined to Sects. 36 and 37 of the Arbitration Act, 1995 and that it cannot be considered as affected by any other law. He said this to stress the view that Order 50 and other legal provisions of general application should not be seen to affect arbitral awards.

[15] “This court does not share his above views which in my opinion are erroneous. The application of any law in my opinion will depend on the express provision of the same as interpreted by the courts of law and not otherwise. A good example is Order 50 itself. Rule one of the Order provides:

‘All applications to the court, save where otherwise expressly provided for under these rules, shall be by motion….’

[16] “This rule read together with rule 9 of the Arbitration Rules which provides that an application under Sect. 36 of the Act shall be made by summons in chambers, thus taking it off Order 50 rule 3 and placing it under Order 50 rule 7, would, in my view, mean that the Chamber Summons therein mentioned shall be a Chamber Summons in accordance with Order 50. I do not perceive any other clearer way rule 9 aforementioned can be interpreted. This means, as I have held above, that the application had to observe the mandatory requirements of Order 50 and not otherwise as Mr. Khanna canvassed.

[17] “I have already held that Glencore failed to do so and that the failure was incurable. What I find interesting about the failure is the fact that both Mr. Khanna and Mr. Taib were in April 2002 allowed by this court to file any relevant affidavits as they may deem fit. Mr. Taib proceeded to file a lengthy Replying Affidavit in opposition of the application which had not been filed earlier. But Mr. Khanna filed an affidavit in response to Mr. Taib’s Replying Affidavit not really in support of the application of 9 August 2000 or in response to Mr. Taib’s affidavit contents but in reply to TSS Millers’s Chamber application dated 22 September 2000. See para. 5 of his affidavit dated 24 April 2002. In paras. 8 and 9 of the same he asserted the position that Glencore’s application of 9 August 2000 for enforcement of the arbitral award, did not need a supporting affidavit nor did it, according to him, need grounds to support it as would be required under Order 50 rule 7 which have been referred to above. Indeed he went further to submit that even Mr. Taib’s replying affidavit was unnecessary and needed to be expunged from the record. I find Mr. Khanna’s position a very innovative one but one not supported by any law familiar to this court. Nor did he cite any precedent in support of his novel argument.”
III. CONDITIONS FOR REQUESTING ENFORCEMENT

1. **Duly Authenticated Original Award or Duly Certified Copy Thereof**

[18] “I now turn to the form and manner which the arbitral award under consideration was filed. Mr. Taib submitted that the award was not filed in its original form nor was it authenticated or certified as a true copy of the original. I have earlier on shown that a copy of the arbitral award No. 12618 dated 22 March 2000 was filed with the application dated 9 August 2000. It was court-stamped on 21 March 2000. Examination of the same confirms that the copy filed is a photocopy. Covering the photocopy in its original form, is a certificate by the Director-General of GAFTA, Pamela M. Kirby Johnson to the effect that the under-covered copy is a true and correct copy of the Award of Arbitration No. 2618 aforesaid. Further covering the two documents above is another certificate and an attestation by one Richard Graham Rosser, a Notary Public of London, England to the effect that the signature subscribed at the foot of the covered certificate was that of the said Director-General of the GAFTA whose identity he attested. The said Richard Graham Rosser also attests that the document his certificate covers, i.e. the certificate of Pamela Maureen Kirby Johnson, is genuine.

[19] “The question here is whether Mr. Richard Graham Rosser’s certificate and attestation can be taken to be an attestation and certificate of authentication of the arbitral award itself when it only refers to the document annexed to it which is the certificate of Pamela Maureen Kirby Johnson and not the award of arbitration itself. It is my view and I so hold, that whether or not a copy of a document is certified as a true copy of the original is a matter of fact, of course with legal implications. If it is so certified, it will carry or bear the stamp or seal of a legally qualified person on it. It will likely carry the date of such certification or authentication. In this application the arbitration award did not itself carry the seal or stamp of Richard Graham Rosser, the person shown as qualified to do the certification. It instead carried a certificate of Pamela Maureen Kirby Johnson who is not shown thereon to have been qualified to do the certification or authentication thereof as she did not show that she was herself a Notary Public or a Commissioner for Oaths. The end result accordingly is that the copy of arbitral award filed by Glencore through Mr. Khanna was not either certified or authenticated as mandatorily required under Sect. 36(2)(a) of the Arbitration Act.”
2. *Original Agreement or Duly Certified Copy Thereof*

[20] “Along with the arbitration award is the mandatory requirement to file with it an original copy of the arbitral agreement or certified or authenticated copy thereof under Sect. 36(2)(b) of the Arbitration Act. There is no doubt or dispute that the arbitral agreement or contract filed by Glencore herein was a photocopy. It was certified as true copy of the original by one Richard Butler. The qualification of Richard Butler is not shown on the seal or stamp affixed on the document. It cannot therefore be said or found that Richard Butler was qualified to carry out the certification. He is not shown to be a Notary Public or Commissioner for Oaths.

[21] “I therefore have not hesitation in holding that the certification was improper according to the law and that Glencore failed to file a certified copy of the arbitration agreement as required under Sect. 36(2)(b) of the Act. Since the court was not approached to nor did it otherwise make any other orders before the filing of or in relation thereto, it is my ruling that failure to comply with the said Sect. 36(1) and (2) of the Arbitration Act by Glencore was fatal. This in my view, and I so hold, renders the arbitral award and the arbitral agreement jointly and severally inadmissible in evidence in accordance with Sects. 2(1), 64, 66, 67 and 68(1)(e)-(f) of the Evidence Act.

[22] “The court in the case of *Ngigi Ngugi v. Njenga Waweru*, [1979] KLR at 254, had opportunity to consider closely the said Sections governing the admissibility or otherwise of secondary evidence. It held that the provisions of the Evidence Act cannot be ignored or slighted. It held further that a document being a mere copy of another and thus amounting to secondary evidence, which is not satisfied in accordance with the law is indeed inadmissible. This being a Court of Appeal decision, this court is bound by it. It is my opinion and I so hold therefore that the arbitral award and arbitral agreement are not admissible for the purpose of recognition and/or enforcement sought under Glencore’s application dated 9 August 2000.”

3. *Failure to Supply GAFTA Rules Together with Arbitration Agreement*

[23] “The next issue for consideration is whether Glencore filed the Rules called GAFTA 125 and 200 and if not, with what result. Mr. Taib for TSS Millers submitted that original or certified copies thereof were not filed with the arbitral contract or agreement. Perusal of the arbitral award on pp. 5 and 6 clearly confirms that the arbitral tribunal purportedly appointed under the arbitral contract, heavily relied on the GAFTA Rules 125 and 200 to conduct the arbitral
proceedings. In particular the appointment of arbitrators, communication of
documents between it and the parties, rules governing same etc. were all
probably done in accordance with GAFTA Rules. It is also in the arbitral
agreement signed by the parties herein on 18 June 1998 that GAFTA Rules
would govern any dispute arising between the parties although it did not specify
whether it would be some or all disputes arising that would be so referred.

[24] "To this situation Sect. 3(6) of the Act states:

‘Where a provision of this Act refers to the fact that the parties have agreed
or that they may agree or in any other way refers to an agreement of the
parties, such agreement includes any arbitration rules referred to in that
agreement.’…

This read together with Sect. 36(2)(b) which provides:

‘(2) Unless the High Court otherwise orders, the party … applying for
enforcement shall furnish … (b) the original arbitration agreement or a
duly certified copy of it.’

means that the arbitration agreement to be filed shall include the arbitration rules
to that agreement, in this respect, the ‘GAFTA’ rules.

[25] “I have perused the arbitration agreement or even the arbitration award in
this case, but find no copies of GAFTA rules 125 or 200 or even any. This means
the arbitral agreement filed under Sect. 36(2)(b) is incomplete either by
carelessness or inadvertence. Whichever is the case, it is my view that the arbitral
agreement filed herein considered as it is, is fatally defective. Glencore did not
at any stage of the conduct of these applications specifically seek to rectify the
deficiencies. The result is that the said agreement cannot for this purpose be held
to be an arbitral agreement as provided under Sect. 36(2)(b) which was
accordingly, also, not complied with. This therefore in my view makes the
arbitral award unenforceable.”

IV. VALID ARBITRATION AGREEMENT

1. Short Form

[26] “Mr. Taib for TSS Millers also submitted that the arbitral agreement clause
that purported to refer any disputes arising for arbitration by GAFTA was so
vague or uncertain that it should not have been relied upon for any purpose. He was referring to the arbitration clauses on p. 2 of the arbitral contract that states thus:

‘Arbitration as per GAFTA 125 in London, English Law to govern.’

[27] “Mr. Taib referred to the provisions of Sect. 3(1) of the Act, which states:

‘... “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not’. Mr. Taib then argued that since the arbitral agreement did not specify whether it was all or certain disputes that could be referred, it should be held to mean that it was too vague to form a contract.

[28] “I have considered this submission but find that it is not sustainable. In my view, if the parties wanted to exclude any specific or certain disputes from the arbitration they would have said so. The statement:

‘Arbitration as per GAFTA 125 London, English Law to govern’

to this court means that all disputes were left to GAFTA 125. To read it any other way would be to twist the meaning. I accordingly reject Mr. Taib’s view.”

2. “In Writing”

[29] “The next issue that Mr. Taib raised was whether the arbitral agreement filed herein was a written agreement within Sect. 4(2) of the Act which makes such mandatory. He submitted that while the original agreement signed by both parties was written and signed, the amended agreement, so amended by Glencore, was not signed by TSS Millers. He then asserted that since the amended agreement was not signed by TSS Millers, it failed to amount to a written agreement within Sect. 4(2) of the Act. He asserted that filing an agreement which never amounted to an agreement within the Section was a futile exercise as there was no agreement to go for arbitration.

[30] “I have considered this argument and while it is difficult to understand why the arbitral tribunal implied reached the conclusion that there was a proper arbitral agreement to arbitrate upon, nevertheless, this was an issue in respect of
which the tribunal had jurisdiction to decide and which it indeed decided. I hold that it is not open to this court to determine upon an issue which was properly before the tribunal and in respect of which this court has no jurisdiction.

[31] “The issue of the arbitral agreement not being sealed with the company seal of either TSS Millers and Glencore was also argued. It may be correct to state that the arbitral contract should have been sealed with the company seals to validate the same unless the Articles of Association of the same authorized them otherwise. It is my holding however that this would be also an issue to be validly raised before the arbitrators and not here.”

V. AWARD NOT STAMPED ACCORDING TO STAMP DUTY ACT

[32] “TSS Millers also contended that the arbitral award was not validly filed and registered and cannot be countenanced by this court for having been so filed unstamped contrary to Sects. 19 and 23 of Stamp Duty Act Cap 480, Laws of Kenya.

[33] “There is no dispute between the parties that the arbitral award was completed in England although there was a suggestion also that it may have been written in South Africa. In either case it was arrived at outside Kenya and only brought to Kenya for enforcement. Sect. 23 of the Stamp Duty Act reads:

‘Every instrument executed out of Kenya by any persons … shall before being used, brought into force, or registered within Kenya, be stamped …’.

[34] “Clearly, the arbitral award herein is an instrument which was required to be stamped under Sect. 23 aforesaid, before it could be used, brought into force or be registered in this court. So was the contract agreement filed at the same time as the arbitral award so long as the same can be considered to be an instrument that was to be registered in the arbitral process completed in England or South Africa, as the case may be. The fact that either document was not stamped in accordance with the mandatory Sect. 23 of the Stamp Duty Act, is also in my view not in dispute between the two parties herein. The immediate logical legal result of non-registration is provided by the Section itself. It is that such instrument cannot be used in any way for any purpose; it secondly cannot be brought into force; and finally, it cannot be registered.

[35] “Further results of non-stamping are provided in Sect. 19 of the said Stamp Duty Act which I also reproduce for clarity:
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

‘(1) Subject to the provisions of subsection (3) of this Section and to the provisions of Sects. 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except:
(a) In criminal proceedings; and
(b) In civil proceedings by a collector to recover stamp duty unless it is duly stamped.
(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.’

[36] “Under the above Section therefore non-stamping leads to the instrument being not: (1) received in evidence in any proceedings whatsoever except those exempted therein none of which is relevant in this case and (2) incapable of being filed, registered or acted upon. The joint effect of the two Sections above is to mandate and require this court:

(a) Not to use the arbitral award and probably the contract filed together with the arbitral award for any purpose.
(b) Not to enforce the arbitral award.
(c) Not to allow the filing and/or the registration of the said documents in this court’s registry.
(d) Not whatsoever to receive in evidence in this civil proceedings, the said arbitral award.
(e) Not to act upon the said documents in any way.

[37] “The court’s conclusion arising from the effect of Sects. 23 and 19 of Stamp Duty Act is that their joint effect is not only to authorize and mandate the court to refuse the arbitral award recognition and enforcement but also not to use them for any purpose, not to allow it to be filed or registered, not to receive it in evidence in civil proceedings and not to act upon them in any way. This view is still right in law in my opinion despite Mr. Khanna’s submission that no other law provisions should be applicable in relation to the recognition and enforcement of an international arbitral award such as this except Sects. 36 and 37 of the Arbitration Act. In my view Sects. 19 and 23 of the Stamp Duty Act are provisions of general application except where they are expressly excluded and they are not so excluded by the Arbitration Act.”
VI. NO ARBITRATION AGREEMENT IN RESPECT OF DISPUTE

[38] “Another issue raised by Mr. Taib for TSS Millers was that there was no dispute from the signed arbitral contract which was due or capable of being referred to arbitration in view of the fact that the contract provided that if TSS Millers failed to open a Letter of Credit as provided therein, there were only two options open to Glencore. Those were either to terminate the contract, or extend the delivery period within the number of days of the delay in opening the Letter of Credit. Glencore did not exercise either of the two options when TSS Millers failed to open the said Letter of Credit. And so Mr. Taib argued, Glencore chartered a totally new course not provided for in the contract when they proceeded to unilaterally amend the contract and proceeded to purport to enforce it.

[39] “It is the opinion of this court once again that this court has ordinarily no jurisdiction to consider and determine a matter which was properly before the arbitral tribunal such as this, however unhappy it may feel about it. It may be that Glencore acted outrageously in this matter. It may also be that GAFTA arbitration tribunal should have proceeded differently but I have already said, this is a matter properly within the jurisdiction of the tribunal and this court has ordinarily no jurisdiction over it under the Act.”

VII. DUE PROCESS

[40] “The issue of the service of arbitration documents from the whole start of the arbitral proceedings inclusive of the notices required to be served upon the parties and the service of the final arbitral award, was submitted by Mr. Taib, to have been defective and non-effective under the provisions of Sect. 9(1)-(2) of the Arbitration Act. Mr. Taib argued that TSS Millers were not served with the notice as to where and when the arbitration would take place by GAFTA. TSS Millers was therefore not exactly aware of the actual conduct of the arbitration, he argued.

[41] “I have examined the correspondences purportedly sent by GAFTA to TSS Millers in light of Sect. 9(1)-(2) aforesaid. It is common knowledge that when a fax is sent, a certificate is automatically produced by the fax machine certifying the successful communication sent. Also when a letter is sent by registered post a certificate of posting is issued. None of these were produced or proved to this court to confirm that all the documents purportedly communicated to TSS Millers as claimed by GAFTA or Glencore in these applications were indeed so
communicated and/or delivered as required under Sect. 9(1)-(2) aforesaid. For easy reference Sect. 9(1)-(2) provides as follows:

‘(1) Unless otherwise agreed by the parties –
(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; and
(b) the communication is deemed to have been received on the day it is so delivered.
(2) If none of the places referred to in sub-section (1)(a) can be found after making a reasonable inquiry a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.’

[42] “No evidence was deponed by Glencore to allege or prove that the said GAFTA, relied on other similar or different provision to or from those of Sect. 9 aforementioned to fulfill the purpose of the same. Nor did GAFTA refer or quote the exact rule they used in this respect. If GAFTA used the relevant GAFTA rules, the same can never be ascertained as no GAFTA rules were quoted in the award and none was annexed or filed by Glencore at the time of filing the award. It is under these circumstances that Sect. 9 of the Arbitration Act became relevant and applicable as it cannot be said to have been excluded by non-existing GAFTA rules.

[43] “Having found as above, it is my opinion and I so find that Mr. Taib’s assertion that his client was not effectively served and that he could not therefore be held to have known the actual time and manner of the arbitration proceedings, has substance and it is held hereby, to have been established on the balance of probability. It means therefore that communication from GAFTA about the selection of an arbitrator or arbitrators was not known to TSS Millers. How can they then be held to have failed to select their own arbitrator to entitle GAFTA to do selection for them? Under these circumstances, GAFTA had no power nor authority to select an arbitrator or two arbitrators on behalf of TSS Millers and doing so as GAFTA did, was contrary to the mandatory provisions of Sect. 37(1)(a)(iii).

[44] “This omission in my opinion and I do hold, inter alia, renders this arbitral award once again, not recognizable and not enforceable within the said Section. Upon the same grounds I do hold that TSS Millers was otherwise unable to present its case before the arbitral tribunal which as well, on its own, is a ground
upon which also I hold that the arbitral award is not to be recognized nor be enforced under the same Section as aforesaid.”

VIII. PUBLIC POLICY

[45] “The final issue argued by TSS Millers was that the arbitral award should not be recognized nor enforced because it is one against Kenya’s public policy. Mr. Taib submitted that the white maize of South African origin which was to be supplied under the amended arbitral agreement was certified to be unfit for human consumption under a certificate supplied by SGS (Kenya) Ltd. The latter as earlier shown is an international company recognized for establishing quality standards of goods usually sold or purchased between countries. Mr. Taib further argued that the maize ordered under the original arbitral agreement dated 18 June 1998 was for human consumption. The original contract, as established in evidence before this court was replaced by the amended one under which the maize of South African origin was to be eventually supplied for human consumption as originally intended. Glencore did not controvert this fact with an alternative quality report. So this court accepted the fact that the maize to be supplied under the contract was the maize certified as unfit for human consumption. Indeed Glencore, even before this court confirmed to have later sold the maize to a third party, Mombasa Maize Millers.

[46] “The question that must be considered and determined is whether or not such a contract or an arbitral award should be held to be against the public policy of Kenya. If this court comes to that conclusion it will refuse to recognize or enforce the arbitral award and vice versa.

[47] “A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word ‘illegal’ here would hold a wider meaning than just ‘against the law’. It would include contracts or acts that are void. ‘Against public policy’ would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive.

[48] “In this case before the court, the amount of the maize involved which could have been released under the relevant contract, to the Kenyan public for its human consumption is shown to be 10,000 metric tons. The health risk to the Kenyan people who would consume it if this happened, is unknown but could not be underestimated. The fact that the final arbitral award converts the said
amount of maize into a monetary value payable by TSS Millers, does not alter the illegality of the contract from which the arbitral award results. As stated by a court of law two centuries ago and I reiterate the words:

‘... it is not competent to any subject to enter into any contract to do anything which is detrimental to the interest of his own country, and that such a contract is in as much prohibited as if it had been expressly forbidden by an Act of Parliament’ – *Furtado v. Rovers* [1802], 3 Bos & P 191 at 198.

[49] “In my view, and I so do hold, the contract will be detrimental to a country because it is illegal by express provision of a country’s legislation. It will also be so illegal in the loose meaning because it is either void or morally wrong or is contrary to the principles expressed hereinabove in relation to a country’s public policy. It is within those meanings that Lindley, Lord Justice, in reference to such acts, contracts or arbitral awards, which he believed were against the public policy of England, stated in *Scott v. Brown* [1892] 2 K.B, 724 at 728:

‘No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.’

[50] “This court cannot have a better choice of words than those just quoted to categorically state that it cannot allow to be used to enforce the arbitral award the subject of these applications, which as hereinabove shown have been, in my view, shown to be illegal or void or immoral and therefore against the public policy of Kenya. It is under those circumstances therefore, also, that TSS Millers is, in my view, relieved of its possible obligations under the arbitral contract or any other contract that may have replaced it, not because this court wishes to do so per se, but because it is fully accepted by this court, that the transaction in question is objectionable under the public policy of Kenya.

[51] “To emphasize the seriousness of a country’s public policy of holding paramount its people’s welfare, Mr. Taib pointed to this court the recent policy of European countries move to destroy several millions of sheep and cattle and imposing strict restrictions to animal movement even against existing individual and corporate contracts with a view of protecting their people from exposure to health risks due to the suspected disease.
[52] “I do not agree more with Mr. Taib’s sentiments. I hold that position despite the fact that I am conscious of the fact that it is also in Kenya’s public policy to enforce international arbitral treaties and agreements such as the one under consideration with a view of sustaining such treaties and agreements as Kenya may be a signatory to. It is my holding, however, that this is a balancing process of two competing rights and this court in its discretion has to carefully balance the two, i.e. public policy in protection of matters more favourable to Kenyan people’s welfare and public policy in protection of matters more in favour of international arbitral treaties, contracts or judgments. In this case the court is persuaded to protect a public policy in favour of Kenyan citizen who would be exposed to a health risk as discussed hereinabove. Indeed in my opinion, a contract or an award whose effect would be to release to the public maize unfit for human consumption would itself be [tortious] as well as illegal within the legal meaning used hereinabove and accordingly the transaction or contract would be against Kenya’s public policy.

[53] “This court however, is in addition, conscious of the fact that the arbitral tribunal and not this court is ordinarily seized with the full jurisdiction to consider and determine the contractual issues arising therefrom. The money award that the tribunal made was accordingly within its jurisdiction. Under ordinary circumstances therefore this court may not have the legal authority to question the arbitral award made by the tribunal. But in issues concerning public policy of Kenya, this court will in addition to what has been held hereinabove, examine the award even at the stage of enforcement to determine whether or not the arbitral tribunal had jurisdiction in respect of the disputes relating to the underlying contract. As stated in the case of Westacre Investments v. Jugoinport, [1998] 4 All E.R 570 at p. 593,1 by Colman, J:

‘When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was undisputedly illegal at common law, an award in favour of the claimant would not be enforced, for it would be contrary to public policy that arbitrators should be entitled to ignore palpable and indisputable illegality.’

[54]  “In relation to the arbitral award before the court, it is in evidence that the arbitrators’ tribunal was informed by a fax letter written by TSS Millers dated 23 October 1999 to them, Exhibit ‘TSS 3B’ that the maize intended to be sold to them under the amended contract were white maize of South African origin which were of a quality unacceptable for human consumption. It was established before this court that the maize was indeed not fit for human consumption and the SGS report had been sent to Glencore’s agents. But this issue, from the arbitral award record, was not considered and determined by the tribunal. Instead the tribunal used the communication to assert the purchaser’s submission to the tribunal process.

[55]  “Had the tribunal considered this matter of refusal by TSS Millers to open the Letter of Credit, it would have established the cause to be that the maize to be supplied were not fit for human consumption of the Kenyan public, which would be against the public policy of Kenya. The tribunal would then have not enforced it. That is the task that has now been taken up by this court at this stage of enforcement of the award as underscored by the Westacre Investment case above. The upshot of that is that this court cannot enforce the award arising from what this court has found to be an award in respect of an illegal or [tortious] or immoral contract within the meaning of the words as used in respect to such contracts relating to or against public policy.”

IX. CONCLUSION

[56]  “The application under consideration by Glencore dated 9 August 2000 was for the recognition and the enforcement of the arbitral award numbered 12618 and dated 22 March 2000. The application by TSS Millers dated 22 September 2000 had the prayers that this court refus es and sets aside the said award of arbitration. This court considered both applications simultaneously as the issues raised and argued were directly related and a joint ruling was recommended by court and accepted by the parties. I have in this ruling considered the issues raised by the parties and made a finding in relation to each point raised. My finding in respect of every point or issue raised is independent and final in relation to the specific issue. I have accordingly indicated that each such a finding independently disposes of the two applications. The several findings therefore should be read as alternative and independent of one to another.

[57]  “The upshot of all the canvassing hereinabove is that Glencore’s application to this court for recognition and for enforcement of the Award of Arbitration dated 22 March 2000 is hereby refused and dismissed. The filing and registration
of the said award in the Courts Registry is hereby rejected and cancelled. The
application to the court to accept the arbitration award as a decree of the court
is hereby refused. TSS Millers’s application to reject the arbitral award and set
it aside is accordingly allowed. Costs of the two applications are to TSS Millers.
It is so ordered.”
MALAYSIA

Accession: 5 November 1985
1st and 2nd Reservation

3. Court of Appeal, Putrajaya, 26 February 2009, Civil Appeal No. W-02-449 of 2005

Parties: Appellant/defendant: Alami Vegetable Oil Products Sdn Bhd (Malaysia)
Respondent/claimant: Lombard Commodities Ltd (nationality not indicated)


Articles: I(1); IV(1)(b); V(1)(a)

Subject matters: – status of State party to 1958 New York Convention (United Kingdom)
– applicability of 1958 New York Convention to enforcement of non-contracting State award (no)
– nonsignatory defendant not bound to arbitration clause
– original arbitration agreement or certified copy required

Commentary Cases: [6]-[34] = ¶ 101; [35]-[37] = ¶ 507 (non-signatory);
[38] = ¶ 403

Facts

On 22 September 2000, Alami Group Sdn Bhd, as the charterer, entered into a Tanker Voyage Charterparty for the M/T LISBOA with Lombard Commodities Limited (Lombard), as agents of the owners of the vessel. The charterparty was on a VEGOILVOY standard form containing an arbitration clause
A dispute arose between the parties and Lombard commenced arbitration against Alami Group Sdn Bhd. An award was rendered in London on 10 July 2002. Lombard sought enforcement of the London award against Alami Vegetable Oil Products Sdn Bhd (Alami) in Malaysia. The High Court granted enforcement, denying Alami’s argument that it was not a party to the charter and the arbitration clause therein and that Lombard had not supplied the original arbitration agreement between Alami and Lombard or a duly certified copy thereof.

The Court of Appeal, before Abdul Malik Ishak, James Foong and Abdull Hamid Embong, JJCA, in an opinion by Abdul Malik Ishak, reversed the lower court’s decision. It first noted that Alami raised an objection in the appeal that it had not raised before the High Court, namely, that the award was unenforceable because the King (Yang di-Pertuan Agong) had not declared, by way of an order in the Malaysian Gazette, that the United Kingdom is a party to the 1958 New York Convention, as required under Sect. 2(2) of the Malaysian Convention on Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (the Act), which implements the 1958 New York Convention in Malaysia. Lombard submitted in reply that Sect. 2(2) provides conclusive as opposed to exclusive evidence that a State is a party to the New York Convention and that the Gazette notification is a directory rather than mandatory requirement. Lombard also challenged the binding effect of the Putrajaya court’s earlier decision in Sri Lanka Cricket (see below) – where the court held that a foreign award may only be enforced in Malaysia under the New York Convention if it appears from an order in the Gazette that the State of rendition is a contracting party to the Convention – arguing that that decision was rendered per incuriam.

The court of appeal dismissed Lombard’s objections and summarized its own decision as follows:

“(1) Applying the doctrine of stare decisis it was clear that the Sri Lanka Cricket case had provided an answer to the issues raised in the present appeal. This case decided that in the absence of a Gazette notification issued by the Yang di-Pertuan Agong declaring any state to be a contracting party to the New York Convention, the award of the arbitration held in that state could not be enforced in Malaysia. This means that the requirement of a Gazette notification declaring the United Kingdom as a party to the New York Convention is a statutory requirement mandated by Sect. 2(2) of the Act. The word ‘may’ that appears in Sect. 2(2) had been construed in the Sri Lanka Cricket case to carry the meaning ‘must’ and the further qualifying words after ‘may’ could have the effect of making a prima facie directory
statute into a mandatory one. Therefore Sect. 2(2) of the Act is mandatory in nature and the non-gazetting by the Yang di-Pertuan Agong entailed dire legal consequences against [Lombard] in that the English award could not be enforced under Sect. 3(1) of the Act. It was also clear that the decision in the *Sri Lanka Cricket* case was not made per incuriam and since it was not inconsistent with any later decision of the Federal Court it was binding on this court ....

(2) It is a fundamental principle of arbitration law that arbitration is a consensual form of dispute resolution and it is also a pre-condition that an award must be based on an arbitration agreement. However, the evidence adduced before the High Court showed that there was never an arbitration agreement between [Alami] and [Lombard] but an alleged charterparty between [Lombard] and a company known as Alami Group Sdn Bhd... (3) The High Court judge also failed to consider the failure on the part of [Lombard] to produce an original arbitration agreement between [Alami] and [Lombard] or a duly certified copy of the same in compliance with Sect. 4(b) of the Act....

Excerpt

1. BACKGROUND

[1] “This is an appeal by the appellant – Alami Vegetable Oil Products Sdn Bhd – against the decision of the learned High Court judge who gave leave and ordered the enforcement of an English arbitration award dated 10 July 2002 (award) against the appellant in reliance on Sect. 27 of the Arbitration Act 1952 and the Convention on Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (the Act) on application by the respondent – Lombard Commodities Ltd.

[2] “The appellant is a company incorporated and registered under the laws of Malaysia as a limited company. The appellant has never had any dealings with the respondent and did not enter into any arbitration agreement with the respondent.

[3] “The respondent purportedly commenced an arbitration proceedings against a limited company known as the Alami Group Sdn Bhd.

[4] “The appellant never participated in any arbitration with the respondent. The respondent has not produced an original arbitration agreement between the
appellant and the respondent or a duly certified copy thereof between the appellant and the respondent as is required by Art. IV[(1)]{(b)} of the Act.

[5] “His Majesty the Yang di-Pertuan Agong has not declared, by way of an order, in the Gazette that United Kingdom is a party to the New York Convention.”

II. ANALYSIS

1. No Gazette Notification of United Kingdom as Party to 1958 New York Convention

a. The respondent’s submissions

[6] “Before us, an objection not taken before the learned High Court judge was advanced for the very first time. It was this. That the award is unenforceable because United Kingdom has not been gazetted under Sect. 2(2) of the Act. Sect. 2(2) of the Act enacts as follows:

‘The Yang di-Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention.’

[7] “The respondent submits that Sect. 2(2) of the Act merely provides conclusive evidence as opposed to exclusive evidence that any state is a party to the New York Convention. The respondent also submits that the provision does not make it mandatory for a Gazette notification to be issued before a state is declared a party to the New York Convention and that the provision is merely directory in terms.

[8] “Now, in determining whether United Kingdom is a contracting state to the New York Convention, reference should be made to the provisions in the New York Convention itself. Factually speaking, United Kingdom gave its accession to the New York Convention on 24 September 1975 thereby concluding its status as a party to the New York Convention on even date (see p. 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958). Flowing from this, the respondent argues that there should be no question of United Kingdom’s status as a contracting state to the New York Convention merely because the Yang di-Pertuan Agong did not issue a Gazette notification to that effect.
“Unfortunately, a contracting state is not defined in the Act. But Art. VIII(2) of Schedule 2 of the Act is worded in this way:

‘This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.’

And this means that once ratified, the contracting states shall deposit the instruments of ratification with the Secretary-General of the United Nations.

“It is the stand of the respondent that the instruments of ratification which are deposited with the Secretary-General of the United Nations provide exclusive evidence in declaring that United Kingdom is a contracting state to the New York Convention. And because of this, the respondent says that the award should be enforced as a Convention Award by virtue of United Kingdom’s membership in the New York Convention.

“The respondent says that an analogy of the facts of the present appeal can be drawn from the case of the Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners & Ors [1984] 1AC 426, a decision of the House of Lords, and the brief facts of the case may be stated as follows. An arbitration was conducted in Kuwait against an English company and the award was made on 1 September 1973. Publication of the said award took place on 15 September 1973. On 23 March 1979, the originating summons was filed in United Kingdom for the purpose of enforcing the arbitration award. Dispute arose as to whether the award could be enforced as a Convention award bearing in mind that Kuwait ratified the New York Convention on 27 July 1978 whereas United Kingdom ratified the New York Convention on 23 December 1975 – well after the arbitration award was made and published. On 12 April 1979, an order in council equivalent to a Gazette notification was made declaring Kuwait as a party to the New York Convention.

“The High Court held that the award was not a Convention award by virtue of the fact that Kuwait only became a member of the New York Convention after the award was made. On appeal to the Court of Appeal, the decision of the High Court was reversed. The Court of Appeal was merely concerned with the status of Kuwait as a contracting party to the New York Convention when proceedings to enforce the award commenced. The House of Lords in the Kuwait case upheld the decision of the Court of Appeal. In dismissing the appeal, the only issue considered by the House of Lords was in regard to the ambit of the definition of a Convention award. And the fact that the order in council which was equivalent

to a Gazette notification was only made after the enforcement proceedings were commenced was not an issue that was considered in either of the appellate courts.

[13] “Now, using the Kuwait case as a leverage, it is the submission of the respondent that the fact that no Gazette notification was ever issued by the Yang di-Pertuan Agong is a non-issue. It is argued, applying the facts of Kuwait, that the fact that United Kingdom was already a party to the New York Convention when proceedings to enforce the said award were initiated ought to be the sole concern of this court. It is argued by the respondent that the recognition of any contracting state to the New York Convention is clearly stated in the New York Convention itself. If a particular state, for instance, does not comply with Arts. VII(2) and XV of the New York Convention, which forms part and parcel of Schedule 2 of the Act, then it is submitted on behalf of the respondent that the Yang di-Pertuan Agong will have no power to gazette such states as contracting states.

[14] “It seems that the respondent is arguing that the sole factor in determining whether United Kingdom is a contracting state to the New York Convention is hinged solely on United Kingdom’s compliance with the New York Convention. What the respondent is saying boils down to this. That the Yang di-Pertuan Agong’s lack of Gazette notification should not have any bearing on United Kingdom’s status as a contracting state to the New York Convention.”

b. The court’s view

[15] “We are of the view that the learned High Court judge erred in ordering the enforcement of the award because, as a matter of law, the award was unenforceable for the simple reason that United Kingdom has not been gazetted under Sect. 2(2) of the Act.

[16] “Gopal Sri Ram [CA speaking for this court in Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Lanka) v. World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd) [2006] 3 ML] 117; [2006] 2 CL] 316, after considering Kuwait’s case, rightly took the position that the requirement of gazetting was mandatory and was not purely an evidential requirement which could be satisfied in any other way. In a well written judgment, our learned brother Gopal Sri Ram [CA had this to say (see pp 322-324):

‘6. From the general speech made by Mr. Thomas of counsel for the plaintiff we were able to discern three submissions on the way in which, he says, Sect. 2(2) is to be interpreted. First, the section is merely permissive or directory and not mandatory, because it uses the expression “may” in the
phrase ‘The Yang di-Pertuan Agong may, by order in the Gazette, declare ...’. Therefore it does not matter that there is no Gazette notification. His second submission is that Sect. 2(2) is merely evidential in nature. In other words, once there is a Gazette notification then that notification may be produced as conclusive evidence that the country concerned is a party to the Convention. Since it is merely a question of proof, it is open to his client to produce any other acceptable evidence to prove that the country in which the award was made is a party to the Convention. This method of proof includes producing secondary evidence through publications available on the internet. His third and more general submission is that the Act should be read purposively so as to promote the intention of Parliament to permit the enforcement of foreign arbitral awards in a summary fashion.

7. With respect, these submissions of Mr. Thomas are devoid of any merit and are contrary to common sense. In the first place, the word “may” when read in the context of Sect. 2 and indeed the whole Act means “must”. If His Majesty (in effect the Federal Cabinet by virtue of Art. 40(1) of the Federal Constitution, see Teh Cheng Poh v. Public Prosecutor [1979] 1 MLJ 50) wishes to extend the benefit of the summary method of enforcement provided for by Sect. 3(1) to a particular award then it is logical that he must by Gazette notification declare the country in which that award was made to be a party to the Convention. If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement.

8. That the context in which a word appears is of primary importance was emphasised in Kali Pada Chowdhury v. Union of India AIR 1963 SC 134. Gajendragadkar J (delivering judgment for himself, Sinha C], Wanchoo and Shah JJ) said:

“Whether or not the word ‘may’ means ‘may’ or it means ‘shall’ would inevitably depend upon the context in which the said word occurs.”

9. Further, it is a salutary guide to construction that:

“When certain requirements are prescribed by a statute as preliminary to the acquisition of a right or benefit conferred by the statute, such prescriptions are mandatory for the acquisition of the right or benefit.” See, GP Singh’s Principles of Statutory Interpretation (9th ed.).
10. Now, apply that here. If the Act was not there, the plaintiff would have had to sue on the award in an action at common law. Or it would have to register the award as a judgment in the Singapore court and then seek to register and enforce that judgment under the Reciprocal Enforcement of Judgments Act 1958. The right to enforce a Convention award pursuant to Sect. 3(1) of the Act is therefore a benefit that the plaintiff would not but for the Act have. Hence, the requirement of gazetting a country as a party to the Convention must have been intended by Parliament to be mandatory in effect.

11. In the second place, for the reasons already given, once it is determined that Sect. 2(2) is mandatory in nature, the argument that it is evidential falls to the ground. What Sub-sect. 2 does is to require His Majesty to gazette a country as a party to the Convention and once that is done, no further proof of that fact is necessary. All that one has to do is to produce the Gazette and thereafter no evidence shall be admitted to contradict the contents of the Gazette. That is the effect of the conclusive evidence limb of Sect. 2(2). See Re Warren [1870] 4 SALR 25.

12. In the third place, while we agree that the modern approach to interpretation of written law is to examine the purpose of the particular statute (see Pepper v. Hart [1993] 1 All ER 42, at p. 50 per Lord Griffiths; Sect. 17A of the Consolidated Interpretation Acts 1948 and 1967) we are unable to see how that is of any assistance to the plaintiff. In our judgment the purpose of the Act is to give effect to the New York Convention subject to certain reservations. One of the steps that Parliament intended that the executive should take to give the Act efficacy is to issue a Gazette notification declaring one or more countries as a patty or as parties to the Convention. That is the intention to which we are now giving effect. It may be that the executive has not acted for all these years on grounds of comity and reciprocity. Or perhaps it is an oversight. For we notice that although Malaysia has not issued a Gazette notification pursuant to Sect. 2(2), Singapore has in 1985 included Malaysia in its Gazette as a Convention party. In our judgment the time has come for the Attorney General’s Chambers to look into this matter.

13. As a last ditch effort, counsel for the plaintiff said that his client will be left remediless. That, we think, is quite wrong. There is nothing to prevent the plaintiff from having the award registered as a judgment in the Singapore High Court and then to seek registration of that judgment in this country pursuant to the Reciprocal Enforcement of Judgments Act 1958.’
‘The ratio decidendi of *Sri Lanka Cricket* can be summarized in this way. That since no *Gazette* notification was issued by the Yang di-Pertuan Agong declaring Singapore as a contracting state to the New York Convention, the award of the arbitration held in Singapore could not be enforced in Malaysia.

[18] “The respondent, before us, seeks to challenge the decision of *Sri Lanka Cricket* and submits that that decision was made per incuriam. To support that submission, we were referred to the English Court of Appeal case of *Young v. Bristol Aeroplane Co Ltd* [1944] 1 KB 718, and in particular to a passage in the said judgment delivered by Lord Greene MR where His Lordship observed at p. 729 of the report:

‘The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.’

[19] “We beg to disagree and we categorically say that *Sri Lanka Cricket* is binding on this court. It was a decision not made per incuriam. It is ideal to refer to the judgment of Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645, in particular to p. 13 (MLJ) and p. 660 (CLJ), where His Lordship gave a narrow meaning to the words ‘per incuriam’. This was what His Lordship said:

‘A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words “per incuriam” are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle Ltd v. Wakeling* [1955] 2 QB 379, 406 as a “decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong”.'
“And Francis Bennion, *Statutory Interpretation*, 3rd ed. (1997) at p. 115, carried this passage:

‘The basis of the per incuriam doctrine is that a decision given in the absence of relevant information cannot safely be relied on. This applies whenever it is at least probable that if the information had been known the decision would have been affected by it.’

“Lord Goddard CJ in *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 (CA) at p. 196 had this to say about ‘per incuriam’:

‘What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.’

“On the same subject matter, Sir John Donaldson MR in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 at p. 1228 had this to say when he delivered his speech for the Court of Appeal:

‘I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision.

That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.’

“The principles set out in *Young v. Bristol Aeroplane Co Ltd* are these. That the court will generally be bound to follow its own decisions, subject to three exceptions. Firstly, where there are two conflicting decisions, it is obvious that only one of them can be followed. Secondly, a decision must not be followed if it is inconsistent with a later House of Lords’ decision, even if the Lords did not expressly overrule it. Thirdly, a decision which was given per incuriam need not be followed.
[24] “To this, I must add the famous passage of Lord Hailsham in Cassell & Co Ltd v. Broome And Another [1972] AC 1027, particularly at p. 1054D-E:

‘The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v. Bristol Aeroplane Co Ltd [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.’

[25] “But more apt to the occasion and to the present appeal at hand would be the speech of May LJ in the case of Ashville Investments Ltd v. Elmer Contractors Ltd [1988] 2 All ER 577 at p. 582; [1988] 3 WLR 867 at p. 873 where he said:

‘In my opinion the doctrine of precedent only involves this: that when a case has been decided in a court it is only the legal principle or principles on which that court has so decided that bind courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts. The ratio decidendi of a prior case, the reason why it was decided as it was, is in my view only to be understood in this somewhat limited sense.’

[26] “Now, the Divisional Court in Police Authority for Huddersfield v. Watson [1947] 1 KB 842, when exercising its appellate jurisdiction, held that the principles laid down in Young v. Bristol Aeroplane Co Ltd, were equally applicable to itself. Unfortunately, the Divisional Court in Huddersfield v. Watson did not give any clear guidance as to whether the Young principles would apply equally to judicial review and appeals.

[27] “Here, the respondent failed to show to us that the decision in Sri Lanka Cricket was inconsistent with a later decision of the Federal Court and should therefore not be followed by us. As it stands now, there is no conflicting decision to that of Sri Lanka Cricket by the Federal Court. For these reasons, the decision in Sri Lanka Cricket cannot be said to be per incuriam.

[28] “Translated loosely, the doctrine of ‘ratio decidendi’ means ‘the reasons for decision’. There is one kernel of truth in the decision which sets out the reasons as to why the judge decided in the way he did. The Judicial Dictionary by KJ Aiyar, 13th ed. at p. 819 defines the words ‘ratio decidendi’ in this way:

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‘It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts (Regional Manager v. Pawan Kumar Dubey [1976] 3 see 334 at p. 338; AIR 1976 se 1766; Jahangir Khan v. State of Bihar [1998] 1 Pat LJR 912 (Pat).’

[29] “There is a doctrine known as the doctrine of stare decisis which states that like cases must be decided alike, and that the ratio decidendi of a particular case will apply to subsequent cases and would provide the ‘answer’ to the legal question posed by the current case. Taken in this context, Sri Lanka Cricket certainly provides the ‘answer’ to the present appeal.

[30] “It cannot be argued that the requirement of a Gazette notification declaring United Kingdom as a party to the New York Convention is superfluous. It is a statutory requirement mandated by Sect. 2(2) of the Act.

[31] “It is manifest that the word ‘may’ that appears in Sect. 2(2) of the Act as construed by our brother Gopal Sri Ram JCA in Sri Lanka Cricket carries the meaning ‘must’. It must be borne in mind that the use of further qualifying words after ‘may’ could have the effect of making a prima facie directory statute into a mandatory one. Thus, in In re Shuter (No 2) [1960] 1 QB 142, for instance, the court considered the Fugitive Offenders Act 1881 which provided that, if a fugitive committed to prison awaiting his return abroad was not returned within one month of committal, a superior court ‘may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody’. The court reasoned that if ‘may’ meant ‘may’, then it would be quite unnecessary to have the words ‘unless sufficient cause is shown to the contrary’. Therefore ‘may’ meant ‘shall’. Likewise here, in interpreting the word ‘may’ that appears in Sect. 2(2) of the Act, one must take into consideration the further qualifying words ‘and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention’ which appear towards the end of Sect. 2(2) of the Act and in order to give effect to those qualifying words, one would conclude that the word ‘may’ that is employed in Sect. 2(2) of the Act means ‘must’.

‘The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.’

[33] “The ‘general scope and objects’ of the Act can be seen from its preamble which states that it is:

‘An Act to give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on the 10th June 1958, and to provide for matters connected therewith or ancillary thereto.’

[34] “And if the award is to be enforced in Malaysia as provided for in Sect. 3(1) of the Act by way of an action, it is mandatory for the Yang di-Pertuan Agong to declare by way of a Gazette notification that United Kingdom is a party to the New York Convention. Here, the Yang di-Pertuan Agong elects not to make an order in the Gazette that United Kingdom is a party to the New York Convention and this would prevent any enforcement of the award under Sect. 3(1) of the Act. Put differently, it can be said that Sect. 2(2) of the Act is mandatory in nature and the non-gazetting by the Yang di-Pertuan Agong entails dire legal consequences against the respondent in that the award cannot be enforced under Sect. 3(1) of the Act.”

2. No Arbitration Agreement

[35] “The award too is unenforceable because there was never an arbitration agreement in existence between the appellant and the respondent. The appellant is not the Alami Group Sdn Bhd and, further, it is a fundamental principle of arbitration law that arbitration is a consensual form of dispute resolution and it is also a fundamental pre-condition that an award must be based on an arbitration agreement. Again, our learned brother Gopal Sri Ram JCA in Bauer (M) Sdn Bhd v. Daewoo Corp [1999] 4 MLJ 545; [1999] 4 CLJ 665, speaking for this court, aptly said at p. 561 (MLJ) and p. 683 (CLJ) about the issue of jurisdiction in this way:

‘To begin with, it is important to recognize that the foundation of an arbitrator’s jurisdiction is the agreement entered into between the
disputants. Absent such an agreement, there is no jurisdiction. And as a general rule mere participation in proceedings before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction.

[36] “It is apparent that the evidence that was adduced before the learned High Court judge clearly showed that there was never an arbitration agreement between the appellant and the respondent. The respondent’s evidence alone suggested that there was no such agreement. For this exercise, it would be ideal to refer to the first affidavit of Edward Eurof Lloyd-Lewis that was affirmed on 3 December 2002 as seen at pp. 279-280 of the appeal record and at para. 4 thereof he deposed as follows:

‘There is now produced and shown to me marked “ELL-L1” a true copy of a Tanker Voyage Charterparty in the “vegoilvoy” form stamped “Owners Copy of Original” dated 22 September 2000 between Lombard Commodities Limited and Alami Group Sdn Bhd in respect of the MT LISBOA.’

And the Tanker Voyage Charter Party as seen at p. 283 of the appeal record is self-explanatory and it reads as follows:

‘CHARTER PARTY made as of 22 September 2000, at London and between Lombard Commodities Ltd as agents to Owners (hereinafter called the “Owner”) of the good Panama flag MT LISBON (hereinafter called the “Vessel”) and Alami Group SDN BHD charterer (hereinafter called the “Charterer”).’

[37] “It can be surmised that the purported parties to the alleged charterparty are the respondent and a company known as Alami Group Sdn Bhd and not the appellant. In any event, there is no signature or acceptance whatsoever by the Alami Group Sdn Bhd to the alleged charterparty. Consequently, even if the respondent were to contend that it had an agreement with the Alami Group Sdn Bhd, it can be argued that even the latter entity was not a party to the arbitration agreement.

[38] “There is one other matter that has to be highlighted. The learned High Court judge failed to consider the failure on the part of the respondent to
produce an original arbitration agreement between the appellant and the respondent or a duly certified copy of the same in compliance with Sect. 4(b) of the Act."

III. CONCLUSION

[39] “For the reasons adumbrated above, we unanimously allowed this appeal. Deposit to be returned to the appellant. We set aside the order of the High Court dated 9 March 2005 with no order as to costs since this issue was not raised before the learned High Court judge by the appellant. Appeal allowed with no order as to costs.”
NETHERLANDS

Ratification: 24 April 1964
1st Reservation

31. Gerechtshof [Court of Appeal], Amsterdam, 28 April 2009, Case No. 200.005.269

Parties: Appellant: Yukos Capital s.a.r.l. (Luxembourg)
Appellee: OAO Rosneft (Russian Federation)

Published in: Available online at <http://zoeken.rechtspraak.nl> (LJN: BI2451)

Articles: V(1)(a); V(1)(b); V(1)(e); V(2)(b)

Subject matters: – enforcement of set-aside award
– public policy and illegal tax construction

Commentary Cases: [2]-[23] = ¶ 516; [25]-[26] = ¶ 524 (illegal tax construction); [27]-[28] = ¶ 511 (no postponement of hearing); [29] = ¶ 504

Facts

In July and August 2004, Yukos Capital s.a.r.l. (Yukos Capital) and the Russian company OJSC Yuganskneftegaz (Yuganskneftegaz) entered into four loan agreements under which Yukos Capital lent certain amounts to Yuganskneftegaz. Both Yukos Capital and Yuganskneftegaz were part of the Yukos Group, which also included Yukos Oil Company, a Russian company which held all the shares in Yuganskneftegaz. The loan agreements contained a clause providing for arbitration of disputes at the International Commercial Arbitration Court (ICAC) at the Chamber of Trade and Industry of the Russian Federation.

On 19 December 2004, all ordinary shares in Yuganskneftegaz – 76.79 percent of the issued share capital – were sold for about €7 billion at an enforced auction following the tax assessments imposed on Yukos Oil Company by the...
Russian State. The buyer was a Russian company that had been incorporated only a few weeks before, Baikal Finance Group (Baikal). On 23 December 2004, Rosneft, an oil and gas company largely owned by the Russian State, bought the Yuganskneftegaz shares from Baikal.

On 27 December 2005, Yukos Capital commenced four arbitration proceedings against Yuganskneftegaz at the ICAC in Moscow. On 19 September 2006, the ICAC arbitrators issued four arbitral awards directing Yuganskneftegaz to pay about 13 billion ruble to Yukos Capital. On 1 October 2006, Yuganskneftegaz merged with Rosneft and ceased to exist.

Rosneft sought annulment of the ICAC awards in Russia. On 18 and 23 May 2007, the Arbitrazh (Commercial) Court of the City of Moscow granted Rosneft’s request to set aside the awards. This decision was affirmed by the Federal Arbitrazh Court for the Moscow District on 13 August 2007; on 10 December 2007, the Supreme Arbitrazh Court of the Russian Federation affirmed the appellate decision.

In turn, Yukos Capital sought enforcement of the awards in the Netherlands. On 20 December 2006, it obtained attachment of Rosneft’s assets held by a third party in the Netherlands. On 28 February 2008, the President of the Amsterdam Court of First Instance (Voorzieningenrechter) denied enforcement under the 1958 New York Convention because the awards had been set aside in Russia.

The Amsterdam Court of Appeal reversed the lower court’s decision and granted enforcement. The court reasoned that under the New York Convention a court requested to enforce a foreign award is not compelled to recognize a decision annulling that award in the country of origin without further ado, that is, without examining whether the annulment decision meets the private international law requirements for being recognized in the enforcement country.

The court of appeal held that in the present case the Russian setting aside decisions had no impact on the enforcement proceedings as they did not meet those requirements. The court reasoned that it was highly possible, even likely, that those decisions had been rendered on the instructions of the Russian executive and the courts had not been impartial and independent. The court based its conclusion on press articles and reports published by the Council of Europe and by non-governmental organizations, as well as on court decisions in England, Lithuania, Switzerland and the Netherlands, stating as a fact the usual

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1. Note General Editor. The President of the District Court is now called the “Voorzieningenrechter” which may be translated literally as “interim measures judge” or “provisional measures judge”. Since it is still customary in the context of international arbitration in the Netherlands to use the term “President of the District Court”, this terminology has been retained.
and widespread lack of impartiality and independence of the courts of the Russian Federation in cases concerning interests of the Russian State. Here, Rosneft and the Russian State were closely interconnected and the awards affected interests that the Russian State expressly considered to be its own.

The court noted that Rosneft failed to present evidence to disprove this conclusion; its argument that Yukos Capital did not supply direct evidence of the partiality and dependence of the individual judges was irrelevant against the background delineated by the materials submitted by Yukos Capital, “in part because partiality and dependence by their very nature take place behind the scenes”.

Having excluded the annulment defense from its examination of the request for enforcement, the court of appeal dealt with the other defenses raised by Rosneft, namely, that (a) enforcement would violate public policy because the loan agreements were part of an illicit tax-evasion scheme within the Yukos Group and (b) Yuganskneftegaz was denied due process in the arbitration.

The court held as to the first argument that even if the tax construction at issue were illegal under Russian tax law, enforcement of the arbitral awards directing Rosneft to repay the moneys borrowed from Yukos Capital in connection with that construction would not violate Dutch public policy. As to the second argument, the court held that it did not appear on the facts of the case that Yuganskneftegaz was in any way unable to present its case before the arbitrators.

Excerpt

[1] “In the present proceedings, Yukos Capital seeks leave to enforce the arbitral awards in the Netherlands pursuant to Art. 1075 Rv, an order that Rosneft bear the costs of the enforcement and an order that Rosneft pay the costs of the attachment mentioned [in the Facts].

[2] “In the attacked decision, the President of the court of first instance [Voorzieningenrechter] denied the relief sought. The Voorzieningenrechter examined

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2. Art. 1075 of the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering – Rv) reads:

"An arbitral award made in a foreign State to which a treaty concerning recognition and enforcement is applicable may be recognised and enforced in the Netherlands. The provisions of articles 985 to 991 inclusive shall apply accordingly to the extent that the treaty does not contain provisions deviating therefrom and provided that the President of the District Court shall be substituted for the District Court and the time limit for appeal from his decision and for recourse to the Supreme Court shall be two months."
the request on the basis of the [1958 New York Convention] and, in short, held that in principle the enforcement court must respect the decision of the Russian civil court to annul the arbitral awards; however, leave to enforce an annulled award may be granted under exceptional circumstances (for instance, violation of generally accepted principles of due process in the proceeding leading to the annulment decision, partiality and dependence of the civil court concerned and totally insufficient reasons for its decisions). The Voorzieningenrechter held that Yukos Capital did not assert such circumstances, or at any rate did not give sufficient reasons therefor.

[3] “Yukos Capital’s grounds for appeal aim at presenting the entirety of the case to this court; hence, they may be examined jointly. The grounds essentially raise the question whether the setting aside/annulment of the arbitral awards by the Russian civil court (does not) hinder recognition and enforcement of those arbitral awards in the Netherlands.

[4] “In answering that question this court starts from the premise that the 1958 New York Convention concerns the recognition and enforcement of arbitral decisions, but does not provide for the international recognition of civil court decisions annulling or setting aside arbitral decisions. [Quotation of Art. V(1)(e) Convention omitted.] [Art. V(1)(e)] does assume that, in the case at hand, the Russian civil court is the competent authority with respect to a request for annulling or setting aside the arbitral awards. However, neither this provision, nor the further provisions of the 1958 New York Convention or any other convention compel the Dutch enforcement court to recognize such decision of the Russian civil court directly. The question whether the decision of the Russian civil court annulling the arbitral awards can be recognized in the Netherlands must be answered pursuant to the rules of general private international law.

[5] “This means that, whatever room the 1958 New York Convention otherwise leaves for granting leave for recognition of an arbitral award that has been annulled by a competent authority in the country where it was rendered, a Dutch court is not compelled to deny leave for recognition of an annulled arbitral award if the foreign decision annulling the arbitral award cannot be recognized in the Netherlands. This applies in particular if the manner in which that decision came to exist does not comply with the principles of due process and for that reason recognition of that decision is at odds with Dutch public policy. If the decisions of the Russian civil court annulling the arbitral awards cannot be recognized in the Netherlands, then when deciding on the request for a leave to enforce the arbitral awards no account is to be taken of the decisions annulling those arbitral awards.
[6] “This court shall therefore first examine under general law [commune recht] whether the decisions of the Russian civil court annulling the arbitral awards of 19 September 2006 can be recognized in the Netherlands, starting from the consideration that a foreign decision, regardless of its nature and scope, is recognized if a number of minimum requirements are complied with, one of them being the foreign decision came into existence [in proceedings complying with] due process. There is no due process when it must be deemed that the foreign decision was rendered by a judicial authority that was not impartial and independent.

[7] “Yukos Capital has argued that the Russian judiciary is partial and dependent and, in particular in decisions on politically sensitive and strategic issues, lets itself be led by the interests of the Russian State and is instructed by the Russian executive. More specifically, Yukos Capital takes the position that the annulment of the arbitral awards is part of the actions of the Russian State since the summer of 2003, aimed at (a) dismantling the Yukos Group, (b) obtaining control over the assets of the Yukos Group and (c) eliminating its political opponents. In Yukos Capital’s opinion, the Russian judiciary is an instrument used by the Russian State to pursue these goals.

[8] “Among Yukos Capital’s [submissions] in support of the above-mentioned statements the following comes to the fore. The Russian journalist Anna Politkovskaya, who was murdered on 7 October 2006, writes in respect of the situation of the Russian judiciary in her 2004 book Putin’s Russia:

‘The fact of the matter is that our courts were never as independent as you might have thought from our Constitution. At the present time, however, the judicial system is cheerfully mutating into a condition of total subservience to the executive. It is reaching unprecedented levels of “supine pozvonochnost”. This word is used in Russia to refer to the phenomenon of a judge delivering a verdict in accordance with what has been dictated to him in the course of a phone call (zvonok) by representatives of the executive branch of the government. Pozvonochnost is an everyday phenomenon in Russia.’

[9] “Mrs. Leutheusser-Schnarrenberg, member of the Parliamentary Assembly of the Council of Europe and former Minister of Justice of the Federal Republic of Germany, writes, inter alia, the following in her report of 29 November 2004 on the circumstances surrounding the arrest and prosecution of the executives of the Yukos Oil Company:
'In view of the numerous procedural shortcomings and other factors pertaining to the political and economic background detailed in the report, the draft resolution concludes that the circumstances of the arrest and prosecution of leading Yukos executives suggest that the interest of the State’s action in these cases goes beyond the mere pursuit of criminal justice, to include such elements as to weaken an outspoken political opponent, to intimidate other wealthy individuals and to regain control of strategic economic assets.

(...)

In my interviews with retired Constitutional Court Vice-President Morshchokva, I learnt that recent legislative reforms have done nothing to improve the independence of the courts, or have even gone in the opposite direction.

(...)

The distribution of cases among judges is left entirely to the discretion of the court president. This state of affairs – to make sure sensitive cases come before “responsible” judges – was confirmed by several official interlocutors.'

[10] “After the publication on 24 January 2005 of an addendum to the above-mentioned report of 29 November 2004, the Parliamentary Assembly of the Council of Europe adopted a resolution on 25 January 2005 stating inter alia:

‘6. The Assembly stresses the importance of the independence of the judiciary, and of the independent status of judges in particular, and regrets that legislative reforms introduced in the Russian Federation in December 2001 and March 2002 have not protected judges better from undue influence from the executive and have made them more vulnerable. Recent studies and highly publicised cases have shown that the courts are still highly susceptible to undue influence.

(...) 13. The circumstances of the sale by auction of Yuganskneftegaz to “Baikal Finance Group” and the swift takeover of the latter by state-owned Rosneft raises additional issues related to the protection of property (ECHR, Additional Protocol, Article 1). This concerns both the circumstances of the auction itself, resulting in a price far below market-value, and the way Yukos was forced to sell off its principal asset, by way of trumped-up tax reassessments leading to a total tax-burden far exceeding that of Yukos’s
competitors, and for 2002 even exceeding Yukos’ total revenue for that year.’

[11] “In the Corruption Perception Index 2006 drawn up by Transparency International, an international non-governmental organization that aims to increase government accountability and limit international and national corruption, Russia holds the 126th place on the list of less corrupt countries. In the Index 2007 Russia ranks 143rd. The Global Corruption Report 2007 of Transparency International states inter alia:

‘Prior to the perestroika process, the judiciary was largely perceived as: “Nothing more than a machine to process and express in Legal form decisions which had been taken within the [Communist] Party.” The independence of the judiciary was one aspect of the changes called for by Mikhail Gorbachev in his groundbreaking speech to the 27th Party Congress in 1986. The reality – a supine, underpaid judiciary, ill-equipped to withstand corruptive practises and the influence of economic or political interests – has proven slow to change, despite a series of reforms by Boris Yeltsin and his successor, President Vladimir Putin.’

[12] “The April 2008 report of the EU-Russia Centre, an international non-governmental organization, contains an article by Rupert D’Cruz, secretary of the British-Russian Law Association, by the title of The Rule of Law and Independence of the Judiciary in Russia, which states:

‘There can be little doubt that in cases where major economic or political interests are at stake the courts of all levels tend to be politically subservient. If anything this trend has grown in recent years. The most pronounced and extreme example is the internationally renowned cases involving Yukos and Khodorkovsky where “total State influence” over the judicial process is widely perceived to have occurred.’

[13] “In its report published in 2007, Freedom House, an American non-governmental organization purporting to investigate and promote democracy, political liberties and human rights, states over Russia:

‘Russia scores very poorly on ratings of judicial independence. The state uses the courts to protect its strategic interests and political goals.

(....)
While processes for resolving commercial disputes have become more reliable, the state still intervenes where it has a strategic interest.

[14] “Numerous articles have been published in the (international) press, in which attention is paid to the lack of independence of the Russian judiciary.

[15] “Courts in several European countries have held that it is likely that the criminal prosecution of officials of Yukos Oil Company in Russia is politically motivated:

(a) By a decision of 18 March 2005, an English judge at The Bow Street Magistrates Court refused the extradition to Russia of two officials of Yukos Oil Company, reasoning, inter alia, that it must be assumed that the prosecution of those officials is politically motivated and that they would not be given a fair trial in Russia.

(b) On comparable grounds the highest administrative court in Lithuania held by a decision of 16 October 2006 that another Yukos official had rightly been awarded refugee status.

(c) By a decision of 13 August 2007, the highest Swiss court denied the Russian Federation’s request for legal assistance in respect of the prosecution of Mr. Khodorkovsky (the former chairman of the board of directors of Yukos Oil Company), on the ground that there are sufficient reasons to suspect that that criminal prosecution is orchestrated by the Russian executive.

(d) By a decision of 19 December 2007, an English judge in the City of Westminster Magistrates’ Court denied a request for extradition of the Russian Federation, reasoning:

‘I conclude that this request is linked to the events surrounding the notorious cases involving NK Yukos and Mikhail Khodorkovsky.

(...)’

There is, in my mind, a strong suspicion that the prosecution is being brought for political and economic reasons. For those reasons I find the defendant would be prejudiced at any trial in the [Russian Federation]. Given the high profile of this case, and on the basis of the defence evidence, I am not confident that a fair trial will be possible. The uncontested expert evidence suggests the judiciary in a case such as this will be pressured to support the prosecution.

(...)’
“In a 3 July 2008 decision of the High Court of Justice, Queen’s Bench Division, Commercial Court in a case on the question whether a dispute between the parties Cherney and Deripaska can be brought before the English courts despite being substantially intertwined with the Russian legal system, it was said in response to the testimony of two expert witnesses on the impartiality of the Russian judiciary:

‘... that it appears to be common ground between the experts that in certain cases, the arbitrazh courts cannot necessarily be expected to perform their task fairly and impartially. Professor Stephan [note of the Amsterdam court of appeal]: the party expert who reported more positively on the independence and impartiality of the arbitrazh courts than the party expert of the other party, Professor Bowring] characterizes that as only applicable in a case whose outcome will affect the direct and material strategic interest of the Russian state.’

In the same decision part of the report of Professor Stephan is presented as follows:

‘Professor Stephan does not dispute that in the Yukos case serious irregularities occurred. The principal criticism concerns the criminal proceedings brought in the courts of general jurisdiction against the leading figures. But the arbitrazh courts also failed to exercise a sufficient stringent review of the tax assessments. There are also grounds for concern as to whether the arbitrazh court overseeing the Yukos bankruptcy was sufficiently proactive in limiting the discretion of the receiver. But the Yukos case, in which the principal target, Mr. Khodorkovsky, was a prominent oligarch, involved the renationalisation of critical energy resources carried out by administrative agencies acting on behalf of the Russian State, that renationalisation being a central policy of the Putin administration.’

“By a decision of 31 October 2007, the Amsterdam court of first instance held the following in respect of a Russian decision of 1 August 2006 which declared insolvency proceedings comparable to bankruptcy applicable to Yukos Oil Company:

‘The above leads to the conclusion that the Russian bankruptcy order appointing Rebgun receiver in the Yukos Oil bankruptcy came into
existence in a manner that is not in accordance with the Dutch principles of procedural due process and thus at odds with Dutch public policy. For that reason, the bankruptcy order cannot be recognized and Rebgun cannot exercise in the Netherlands the receiver’s powers that ensue therefrom under Russian law.’

[18] “This court must decide in light of the facts and circumstances set out above whether the decision of the Russian civil court annulling the arbitral awards can be recognized in the Netherlands, and more in particular whether [that decision] was rendered by an impartial and independent judicial authority. In this respect this court reasons as follows.

[19] “Rosneft and the Russian State are closely interconnected. It is undisputedly established that the Russian State owns a vast majority of Rosneft’s shares and that the majority of Rosneft’s directors are political appointees who combine their position at Rosneft with Russian government positions. Igor Sechin, chairman of the board of directors of Rosneft, at the time was also deputy head of the presidential administration and advisor to President Putin and is currently also vice-premier of the Russian Federation. This court further deems illustrative of the close ties between Rosneft and the Russian State that on 23 December 2004, the day that Rosneft acquired the shares in the Baikal Finance Group … the then Russian President Putin declared at a press conference:

‘In essence, Rosneft – a 100% State company – acquired the well known asset Yuganskneftegaz.

(…)

Today the State, using absolutely legal market mechanisms, is taking care of its own interests.’

[20] “The established facts further show that there is an undeniable connection between the present dispute between Yukos Capital and Rosneft and the events in Russia that led to the dismantling and bankruptcy of Yukos Oil Company and the detention of Khodorkovsky and Aleksanyan. In view of this connectedness, the ties between the Russian State and Rosneft and the substantial interest of this claim, considerable interests, that the Russian State considers to be its own, are at issue in the present case too.

[21] “Rosneft has insufficiently rebutted [the argument] that the Russian judiciary is not impartial and independent in cases concerning (parts of) the (former) Yukos Group or the (former) directors thereof and which concern interests that the Russian State consider to be its own, and that it lets itself be led
by the interests of the Russian State and is instructed by the executive. Contrary to Rosneft’s opinion, Yukos Capital has not merely substantiated its arguments on this point with references to newspaper stories; rather, it properly supported them with the above-mentioned reports and court decisions. Rosneft has not asserted any concrete facts or submitted documents, nor have circumstances otherwise been shown that cast a different light on the influence of the Russian State on the Russian judiciary in the case at issue.

[22] “Against this background, Rosneft’s argument that Yukos Capital has not supplied direct evidence of the partiality and dependence of the individual judges that ruled on Rosneft’s claim to annul the arbitral awards does not carry sufficient weight, in part because partiality and dependence by their very nature take place behind the scenes.

[23] “Based on the above, this court concludes that it is to such extent likely that the Russian civil court decisions annulling the arbitral awards are the outcome of a judicial process that must be deemed partial and dependent, that those decisions cannot be recognized in the Netherlands. This implies that the annulment of the arbitral awards by the Russian court must be ignored when deciding on Yukos Capital’s request for enforcement of those awards.

[24] “The above entails that the grounds for appeal of Yukos Capital succeed to this extent, and that this court must again decide whether enforcement can be granted, taking into account Rosneft’s other defenses.

[25] “Rosneft argues that granting leave for enforcement would be at odds with Art. V(2)(b) of 1958 New York Convention. [Quotation of Art. V(2)(b) Convention omitted.] Rosneft argues that the loan agreements are part of an inadmissible tax construction within the Yukos Group, by which in short Yuganskneftegaz sold the oil it had extracted at low prices to companies belonging to the Yukos Group established in regions with low tax rates, in order to evade taxation by the Russian State on the profits made by those companies when selling the oil at high market prices. The profits thus made were then lent through sister company Yukos Capital to Yuganskneftegaz under the agreement at hand, to finance its business operations.

[26] “This court rejects this argument. Even if this tax construction is illegal under Russian tax law, enforcement in the Netherlands of the arbitral awards compelling Rosneft to repay the moneys borrowed from Yukos Capital in connection with said tax construction is not in conflict with Dutch public policy.

[27] “Rosneft further argues that granting leave for enforcement would be at odds with Art. V(1)(b) of the 1958 New York Convention. [Quotation of Art. V(1)(b) Convention omitted.] Rosneft argues in this connection that Yuganskneftegaz was wrongly denied the opportunity in the arbitration to further
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

substantiate and prove its defense that the loan agreements were fraudulent and therefore invalid.

[28] “This court rejects this defense, because neither has it been argued nor has it appeared that Yuganskneftegaz was in any way restricted in presenting the defense concerned, either in its statement of defense of 5 May 2006 or in its supplementary statement of defense of 20 June 2006. It is worth noting here that, lacking any further commentary, it must be assumed that this defense of Yuganskneftegaz also concerns the overdue interest claimed by Yukos Capital by its introductory application of 27 December 2005 and that there is therefore no good reason why Yuganskneftegaz presented this defense for the first time in the supplementary statement of defense of 20 June 2006, in response to the increase of claim by Yukos Capital in its supplementary application of 9 May 2006. Against this background this court finds that the fact that the arbitrators did not grant Yuganskneftegaz a further stay after 20 June 2006 to substantiate said defense does not mean that it was impossible for Yuganskneftegaz to defend its case in the sense of Art. V(1)(b).

[29] “In first instance Rosneft also argued that the leave sought must be refused pursuant to Art. V(1)(a) of the 1958 New York Convention because the arbitration clause is not valid under Russian law. This court concludes from Rosneft’s assertion in the statement in defense on appeal that the agreements contain a valid arbitration clause, that Rosneft no longer maintains this defense.

[30] “The conclusion is that the attacked decision shall be annulled and that this court, rendering a new decision, shall grant Yukos Capital’s request for a leave to enforce the arbitral awards in the Netherlands.

[31] “Yukos Capital has further requested that on the basis of Art. 706 Rv Rosneft be ordered to pay the costs of the attachment it levied … estimated so far at € 857.52. As this request is based on the law and Rosneft has not contested it, it shall be granted.

[32] “Rosneft, being the unsuccessful party, shall bear the costs of this proceeding.”

(….)
32. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Amsterdam, 18 June 2009, Case No. 411230/KG RK 08-3652

Parties:
Plaintiff: LoJack Equipment Ireland Ltd. (Ireland)
Defendant: A (nationality not indicated)

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Articles:
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Subject matters:
– documents for requesting enforcement supplied (in general)
– translation of award and arbitration agreement (no)
– recognition/enforcement relationship
– due process
– lack of reasons for award
– stay of enforcement proceedings pending (future) annulment action (no)
– security

Commentary Cases:

Facts

By an agreement of 21 April 2006, LoJack Equipment Ireland Ltd. (LoJack) hired A (the consultant) as a consultant. The agreement incorporated by reference the “LoJack Consulting Agreement Standard Terms and Conditions”, which

1. Note General Editor. The President of the District Court is now called the “Voorzieningenrechter” which may be translated literally as “interim measures judge” or “provisional measures judge”. Since it is still customary in the context of international arbitration in the Netherlands to use the term “President of the District Court”, this terminology has been retained.
On 10 January 2007, LoJack terminated the agreement with the consultant. A dispute arose between the parties when the consultant failed to return certain equipment to LoJack as provided for under the agreement. LoJack commenced arbitration at the International Centre for Dispute Resolution (ICDR) in Boston. On 5 December 2007, LoJack’s lawyer sent the consultant and his lawyer at the time, B, a letter communicating the commencement of the arbitration. Attached to the letter were the AAA Rules and a filled-in copy of the Online Filing Demand For Arbitration/Mediation Form, where LoJack described its claim, indicated the amount in dispute and reproduced the arbitration clause in the 2006 agreement.

The ICDR appointed a sole arbitrator after telephone conversations with the parties. By his Third Scheduling Order, dated 16 May 2008, the arbitrator informed the parties that the hearing had been scheduled at 9:00 on 11 June 2008 at the AAA offices in Boston. On 10 June 2008, the consultant informed the arbitrator by fax that he would not attend the hearing; on the following day, before the hearing began, he sent a “Pro Memoria For Involved Parties In Case” by e-mail to the arbitrator, setting out his position in respect of the case. On 19 June 2008, the sole arbitrator rendered an award in LoJack’s favor. LoJack sought enforcement of the award in the Netherlands.

The President of the Amsterdam Court of First Instance, C.S. Schoorl, granted enforcement and denied the consultant’s request to stay enforcement or, alternatively, to direct LoJack to post security. The President first dismissed the consultant’s argument that LoJack failed to supply the necessary documents for requesting enforcement under the 1958 New York Convention. He reasoned that “a reasonable interpretation” leads to conclude that the purpose of Art. IV(1) Convention is “to determine the existence and contents of the arbitration agreement and of the arbitral award”. Here, the consultant did not dispute the existence of the arbitration agreement and award.

The President also dismissed the consultant’s objection that no translation had been supplied, holding that the consultant did not argue that he did not understand the documents, and noting that his own knowledge of the English language allowed him to understand the documents’ contents.

The President further denied the consultant’s argument that LoJack should have asked for both recognition and enforcement of the award, reasoning that this is not a requirement under Art. III Convention.

Also unsuccessful were the consultant’s objections that he had not been duly informed of the arbitration, had not been involved in the arbitrator’s
appointment and had been unable to present his case because the ICDR fixed a date for the arbitration hearing at short notice and without taking into account the dates on which he could not attend. The President noted (1) that the consultant must have been informed of the arbitration because he had admittedly received a copy of LoJack’s Online Filing Demand For Arbitration; (2) that he had to abide by his own statement in the Pro Memoria that he did not wish to challenge the appointed arbitrator, and (3) that the date of the hearing (11 June 2008) was already communicated to the parties in the Third Scheduling Order dated 16 May 2008.

The President finally dismissed the consultant’s objection that the award did not contain reasons explaining why the arbitrator had rejected the consultant’s defenses. He held that under the applicable AAA Commercial Arbitration Rules, arbitrators do not need to give reasons for their decision unless the parties so request or they deem it appropriate. This was not the case here.

The President then considered the consultant’s request that enforcement of the award should be stayed because he planned to file a request for setting the award aside in the United States. The President concluded that it was likely that the time limit for filing an annulment action had expired, as argued by LoJack, and that the consultant had not shown that an annulment action could be successful. An examination of the respective interests of the parties led to the same conclusion: the alleged lack of means of the consultant and his intention to file an opposition against execution of the award did not mean that LoJack’s interest to exercise its rights under the arbitral award should yield.

“In light of the considerations and conclusions above”, the President held that there was no reason to direct LoJack to give security.

Excerpt

1 “The present case deals with the issue whether leave for enforcement of the arbitral award rendered between the parties on 19 June 2008 can be granted in the Netherlands. [The 1958 New York Convention], Tractatenblad 1959/58, to which both the Kingdom of the Netherlands and the United States of America are parties, applies to LoJack’s request.

2 “The most sweeping argument raised by [the consultant] against the request is that LoJack acted in violation of Art. IV of the New York Convention, because – if the President understands correctly – it [allegedly] failed to supply the original arbitration agreement or a duly certified copy thereof and the duly authenticated original arbitral award or a duly certified copy thereof. Further, in
the consultant’s opinion LoJack failed to supply a translation made or certified
by an official or sworn translator. He claims that as a consequence LoJack’s
request is inadmissible or must be denied because these documents are lacking.”
Convention does not provide for sanctions for LoJack’s lack of compliance with
the conditions in Art. IV. For this reason already the consultant’s conclusion that
LoJack’s request is inadmissible or must be denied cannot be shared.
[4] “Nor is there any reason to hold that LoJack’s request is inadmissible or to
deny it on the grounds mentioned above. The opening words of Art. IV(1) of the
New York Convention (‘shall, at the time of the application, supply’) do seem
to be a mandatory provision. However, it follows from a reasonable
interpretation of Art. IV(1) Convention that the purpose of the conditions
mentioned therein is to determine the existence and contents of the arbitration
agreement and of the arbitral award.
[5] “LoJack has supplied to the President a copy of the agreement concluded
between the parties, containing the arbitration clause, and, as LoJack claims and
is not disputed [by the consultant], the original arbitral award signed by the
arbitrator. The consultant only argues in respect of these documents that he is
not aware that LoJack supplied the original of the parties’ agreement in the
proceeding and that he was not aware of the award until he was summoned by
the court of first instance. However, the consultant cannot merely dispute the
documents supplied by LoJack in the proceeding. After all, he has not disputed
that the agreement filed in the proceeding is the agreement he concluded with
LoJack, nor has he given any reason at all why it should be concluded that the
arbitral award submitted was not rendered between him and LoJack, or at least
not with that content. Under these circumstances, the consultant’s objection
must be denied, also taking into account the purpose of Art. IV(1) Convention.
[6] “Equally, the consultant’s objection that no translation of the above-
mentioned documents has been supplied in the proceedings must be dismissed.
It has not been argued nor does it appear that the consultant does not understand
the contents of the documents, and the President masters the English language
enough to fully understand the documents’ contents.
[7] “The consultant further argues that LoJack has not sought the recognition
of the arbitral award together with its enforcement, and that also on this ground
leave cannot be granted. [Quotation of Art. III Convention omitted.] The
consultant’s objection fails in the light of Art. III Convention. It follows from
Art. III that each Contracting State (in this case the Kingdom of the Netherlands)
shall recognize arbitral awards as binding and enforce them, if the conditions laid
down in the Convention are complied with. It is irrelevant that LoJack did not
seek explicitly and primarily the recognition of the arbitral award, since this is not a constitutive condition for recognition pursuant to the said article.

[8] “The consultant argues that he was not duly informed of the arbitration proceeding and of the appointment of the arbitrator, as required by Art. V Convention, and that he was not involved in the appointment of the arbitrator. LoJack stated – and [its statement] was not disputed – that up to March 2008 included, the consultant was represented by B. It has been determined that on 5 December 2007 the then lawyer of LoJack sent to both the consultant and B, inter alia, a copy of the Online Filing Demand For Arbitration. In this form, LoJack set out its claim, the reasons for its claim, the monetary value of its claim and the arbitration clause on which it relied. The consultant admitted that he received the form. Hence, it must be deemed that he could take cognizance of the proceeding commenced against him. As to the consultant’s objection that he was not involved in the appointment of the arbitrator, [the President] finds that the consultant explicitly stated in his Pro Memoria that he did not wish to challenge the appointed arbitrator.2 He can no longer change his mind now. Hence, this objection does not succeed.

[9] “The consultant’s objection that he was not given the opportunity to file an ‘answering statement’ [English original] and a counterclaim must be denied because it is insufficiently substantiated: the consultant has stated no facts and circumstances that necessarily lead to that conclusion.

[10] “The consultant’s objection that the ICDR fixed a date for the hearing without taking into account the dates on which he could not attend OK and on very short notice, thus making it more difficult for him to present his case, also fails. It appears from the arbitrator’s 16 May 2008 [Third Scheduling Order], filed by LoJack in the proceeding, that the consultant was informed then that the hearing would take place at 9:00 on 11 June 2008 in the AAA offices in Boston. It does not appear that the consultant did not receive the Order, and he must therefore be deemed to have been aware of the planned date for the hearing. The consultant cannot raise as an argument against LoJack that he subsequently chose not to participate, either in person or through a representative.

[11] “At the oral hearing, the consultant also argued that the arbitrator does not appear to have dealt at the [arbitration] hearing with his Pro Memoria, which contained his defense; that this also is not apparent in the arbitral award, or that

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2. The President quoted the relevant part of the Pro Memoria in the Facts: “Since this would prejudice the quick conclusion of the case I would not object to the choice [President: of the appointed arbitrator] since C [President: the arbitrator] assured me during the conference call that he is completely neutral. I notice explicitly that it is also my intention not to object since I would like to speed up the case...”

3. The President quoted the relevant provision in the Facts: "(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

12. "The consultant forgets however when raising this objection that, as ascertained by the President on his own initiative, pursuant to Rule 42(b) of the [AAA] Commercial Arbitration Rules' arbitrators do not need to give reasons for their decision unless – in short – the parties so request or they deem it appropriate. These conditions do not appear to exist. Hence, this objection also fails.

13. "The consultant finally claims that it follows from all its arguments that the arbitral award has come into existence in violation of the AAA rules, the New York Convention, Art. 6 of the [European Convention on Human Rights] and the [Dutch] Code of Civil Procedure. Since it follows from all the considerations and conclusions above that none of the objections raised is founded, this last objection must be denied.

14. "It follows from all the considerations and conclusions above that none of the consultant’s objections succeeds, so that LoJack’s request can be granted. As a consequence, the condition on which the consultant has filed his own request [the granting of enforcement] is met and it must be ascertained whether enforcement of the arbitral award should be stayed or else LoJack should be directed to give sufficient security to the consultant.

15. "The consultant gives as a basis for his request to stay enforcement that he plans to file a request in the United States to have the arbitral award annulled. He therefore relies on Art. 1076(7) together with Art. 1066(2) Rv4 for the

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3. The President quoted the relevant provision in the Facts: "(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

4. Art. 1076(7) of the Dutch Code of Civil Procedure [Wetboek van Burgerlijke Rechtsvordering – Rv], reads:

"If an application for the setting aside of an award made in a foreign State is made to a competent authority of the country in which the award is made, the provisions of article 1066(2) to (6) inclusive shall apply accordingly when recognition or enforcement is sought in the Netherlands."

Art. 1066(1)-(2) and (5) Rv reads:

"1. An application for setting aside shall not suspend the enforcement of the award.

2. However, the court which decides on an application for setting aside may, at the request of either party, if it considers the request to be justified, suspend enforcement until a final decision is made on the application for setting aside.

suspension of enforcement and on Art. 1066(5) Rv and Art. VI Convention in respect of security.

[16] “In order to answer the question whether there are grounds to suspend enforcement, the judge must give a provisional opinion as to (the chance of success of) the request for annulment and must weigh the interests of the parties against each other. LoJack argues in this respect that the time limit for filing an annulment action has expired, and that there are no grounds for annulling the award under the law of Massachusetts, which applies to the arbitral award – as claimed by LoJack and undisputed [by the consultant]. On being questioned, counsel for the consultant said at the oral hearing that she did not know for certain whether the arbitral award could be annulled, because she had not yet studied this aspect.

[17] “As things stand now, considering that because of the time that has passed since the arbitral award was rendered it is likely that the time limit for filing an annulment action has expired, and that the consultant has given no reason to conclude that a future annulment action can be successful, there is no reason to stay enforcement of the arbitral award.

[18] “A balancing of the mutual interests of the parties does not lead to a different conclusion. The fact that the consultant allegedly lacks the financial means to pay his debt does not tip the scales. This sole fact cannot deprive LoJack of the opportunity to exercise its rights under the arbitral award. Nor does the fact that the consultant will allegedly commence opposition proceedings [executiegeschil] in case of enforcement of the arbitral award mean that LoJack’s interest in the enforcement of the arbitral award must yield.

[19] “In light of the considerations and conclusions above, there is no reason to direct LoJack to give security, as provided for in Art. 1066(5) Rv and Art. VI Convention.

[20] “In light of the above, all further statements and arguments of the parties need no longer be dealt with. Being the losing party, the consultant shall be ordered to bear the costs of this proceeding.”

(....)

5. Upon granting the request [for suspension], the court may order the petitioner to give security. Upon denying the request, the court may order the other party to give security.”
Starting in 1996, Ocean International Marketing B.V. (Ocean) regularly contacted prospective investors in the United States offering the opportunity to invest in, inter alia, wine. Ocean acted as the agent of Seed International Limited (Seed), previously known as Churchill Portfolio Management Ltd. and later as Churchill Associates Ltd. The defendants are collectively indicated as Seed in the decision. The present claimants – 13 medical doctors and dentists or their spouses, all living in the United States – agreed to the wine investment plan. After making one or more payments to invest in French champagne, the
claimants received an Account Opening Form (AOF). Seed subsequently contacted the investors with an offer to invest in Bordeaux wine; those who accepted also received an AOF. In 2001, the claimants were offered the opportunity to invest in Italian wine; those who accepted received a Wine Program Agreement (WPA) in respect of those investments. Both (the subsequent versions of) the AOF and the WPA provided for the application of the law of the Cayman Islands and contained clauses for arbitration of disputes in the Cayman Islands under the ICC Rules. They also provided that independent of the outcome of the arbitration the individual investor would bear 75 percent (in the AOF) or 50 percent (in the WPA) of the costs of any arbitration proceeding.

Some of the present claimants also entered into contracts to purchase loan notes, obligations or other rights in one or more of four companies of the Seed group: Churchill Ltd., OptiDisc International Ltd., Cupidus.Com (Turks & Caicos) Ltd. and The Wine Corporation Limited. The Subscription Agreement concluded by some claimants for the purchase of shares in The Wine Corporation Limited provided for the application of the laws of the United Kingdom and the jurisdiction of the English High Court.

A dispute arose when the claimants allegedly did not receive interest on their investment and unsuccessfully requested reimbursement of the sums they had paid. On 10 January 2003, the claimants commenced an action in the Netherlands against Seed, seeking reimbursement. Seed raised the objection of lack of jurisdiction because of the arbitration and forum clauses in the contracts.

The Rotterdam Court of First Instance, per Van Zelm van Eldik, held that it lacked jurisdiction over the dispute. The court remarked at the outset that pursuant to the more-favorable-right provision in the 1958 New York Convention, courts can recognize arbitration clauses that do not meet the requirements of the Convention but are deemed valid under the law applicable to them. Further, since arbitration clauses are separable from the main contract, their validity must be examined separately.

The court held that Cayman Islands law, which was the law indicated as applicable in the contracts, applied to the issue of the validity of the arbitration clauses. Under Cayman Islands law, an arbitration agreement must be in writing but need not be contained in a document signed by the parties. Here, the arbitration clauses were laid down in written documents that were sent to the claimants and were therefore available to them. The court further noted that the claimants did not object to arbitration at the time of conclusion of the contracts.
The Rotterdam court then examined the claimants’ argument that the arbitration clauses in the contracts did not cover the present dispute because the claimants based their claims on tort [onrechmatige daad] – that is, Seed’s fraud in persuading them to enter into the contracts – and undue payment [onverschuldigde betaling] rather than on the contracts. The court disagreed, holding that the broad arbitration clauses at hand clearly encompassed a dispute concerning the conclusion of the contracts. The claimants did not allege or prove that the arbitration clauses themselves were the consequence of fraud.

The court also denied the argument that arbitration in the Cayman Islands would be “unreasonable”, noting that Seed was incorporated in the Cayman Islands and the claimants, all US residents, did not prove how and why arbitration in the Cayman Islands would be excessively onerous.

The court then dismissed the claimants’ objection that the arbitration clauses were null and void because they provided that the investor bear in any event 75 percent or 50 percent of the costs of any arbitration. It reasoned that although the Arbitration Law of the Cayman Islands prohibits such agreements, it also provides that clauses containing such provisions shall “have effect as if that provision were not contained therein”. Hence, the validity of the arbitration clauses was not affected.

The court finally held that it also lacked jurisdiction over the dispute under the Subscription Agreement, because of the forum clause therein.

Excerpt

[1] “The Netherlands and the Cayman Islands are parties to the [1958 New York Convention]. Pursuant to Art. II [Convention] the court declares that it has no jurisdiction if a party relies on an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration, unless the court finds that the said agreement is null and void, inoperative or incapable of being performed.

[2] “Equally, pursuant to Art. 1074 Rv the court must declare that it has no

1. Art. 1074 of the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsverordening – Rv) reads:

“(1) A court in the Netherlands seized of a dispute in respect of which an arbitration agreement has been concluded under which arbitration shall take place outside the Netherlands shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a
jurisdiction over a dispute in respect of which an agreement for arbitration outside the Netherlands has been concluded, if [the agreement] is relied on in a timely manner. The validity of the agreement is determined under the law applicable thereto.

[3] “The so-called more-favorable-right provision in Art. VII of the New York Convention implies that, pursuant to Art. 1074 Rv, a Dutch court shall upon request deem effective an arbitration agreement which is not included in a contract signed by the parties or contained in an exchange of letters or telegrams as provided in Art. II Convention.

[4] “The principle of separability applies under both Dutch and Cayman Islands law to the determination of the existence and validity of the arbitration agreement. This means that the validity of the arbitration agreement is ascertained separately, independent of the validity of the main contract in respect of which arbitration has been agreed, even if both are contained in the same document. This principle also applies if the existence and the legal validity of the main contract containing the arbitration clause is disputed and it is claimed that the main contract is null and void ab initio or has been annulled, for instance because of fraud.

[5] “Hence, only the existence and validity of the arbitration agreement must be determined in [this] procedure; [this examination must take place] under the law of the Cayman Islands, as it ensues from the following [considerations].

[6] “The agreements and arbitration clauses at issue here are the following:

(a) Account Opening Form:

‘An agreement between C.P.M. Ltd. [Churchill Portfolio Management Ltd.] (the company) and the party described above (the client) [the individual claimant] whereby it is mutually agreed as follows:

1. The company will open an account subject to the terms and conditions of the members agreement, members agency agreement and the terms of sale, which shall apply until otherwise notified in writing:

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(2) The agreement mentioned in paragraph (1) shall not preclude a party from requesting a court in the Netherlands to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of article 289."
2. This agreement shall come into effect upon the client sending funds to
the company.
3. I hereby confirm that I understand and have read the terms and
conditions.’ [English original]

The individual claimant then signed and dated the document. The accompanying
Agency Agreement (and in shorter form the Members Agreement) contained the
following clauses:

‘Arbitration.
(1) In the event that any dispute whatsoever arises between the Client and
Churchill in relation to or in any way in connection with this Agreement,
the Client and Churchill hereby agree that such dispute shall be referred to
arbitration in the Cayman Islands before one arbitrator to be appointed by
the Client and one arbitrator to be appointed by Churchill. The two
arbitrators appointed as aforesaid shall together co-operate in appointing
a third arbitrator if either or both of them considers it appropriate.
(2) The Arbitrator’s costs will be borne as to 75 percent by the Client and
as to 25 percent by Churchill.
(3) The arbitration shall take place in accordance with the Rules of the
International Chamber of Commerce.
(4) Unless the Client’s arbitrator is appointed within six months of the
dispute arising, the claim shall be deemed to be absolutely waived and
barred and Churchill shall be discharged from all liability.’ [English
original]

and

‘Governing Law.
This Agreement shall be governed by and construed in accordance with the
law of the Cayman Islands.’ [English original]

(b) Account Opening Form: an agreement between Churchill Associates Ltd. and
the individual claimant, which contained, as far as relevant here, essentially the
same text and clauses for Arbitration and Governing Law.
(c) Account Opening Form: an agreement between Seed International Ltd. and the
individual claimant, with the same clauses for Arbitration and Governing Law.
(d) Wine Program Agreement:
'The Client and Seed International hereby agree as follows:

Governing Law; Arbitration.

[a] Law. This Agreement shall be governed by and construed in accordance with the law of the Cayman Islands, without regard to the conflicts of law provisions thereof.

[b] Arbitration. In the event that any dispute whatsoever arises between the Client and Seed International in relation to or in any way in connection with this Agreement, the Client and Seed International hereby agree that such dispute shall be referred to binding arbitration in the Cayman Islands applying Cayman Islands law. Such arbitration shall be before one arbitrator to be appointed by the Client and one arbitrator to be appointed by Seed International and one arbitrator appointed by such two arbitrators, if either or both of them considers it appropriate. The Arbitrator’s costs will be borne equally by the Client and Seed International. The arbitration shall take place in accordance with the Rules of the International Chamber of Commerce.

If the claim to be arbitrated is a claim by the Client, then unless the Client’s arbitrator is appointed within six months of the dispute arising, the claim shall be deemed to be absolutely released, waived and barred and Seed International shall be discharged from all liability.' [English original]

The Wine Program Agreement further provided under [2], inter alia, that

‘this Agreement, when signed by the Client and returned to Seed International shall replace and supersede any prior agreement, arrangement or understanding, whether written or oral, between Seed International and its Affiliates, and the Client with respect to wine or champagne’. [English original]

The two versions of the Wine Program Agreement (‘August 2001’ and ‘November 2001’, respectively) are identical in respect of the provisions above.

c) Form of acceptance and purchase contract, and/or the Loan Note of Churchill Limited mentioned therein (unsecured subordinated loan note 2003) and/or the conditions referred to therein, which contain the same choice-of-law and arbitration clauses reproduced under (a)

‘[in] the event that any dispute whatsoever arises between OptiDisc International Limited, Churchill Limited, Churchill Associates Limited
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

[that is, Seed] and the Seller [the individual claimant] in relation to or in any way in connection with this Form of Acceptance and Purchase Contract’. [English original]

(f) Form of acceptance and purchase contract for Loan notes in Cupidus.Com (Turks & Caicos) Limited, containing the same choice-of-law and arbitration clauses reproduced under (a)

[in] the event that any dispute whatsoever arises between Cupidus.Com (Turks & Caicos) Limited and/or Cupidus.Com Limited and/or Seed International and the Seller [the individual claimant] in relation to or in any way in connection with this Form of Acceptance and Purchase Contract’. [English original]

(g) Subscription Agreement between The Wine Corporation Limited and the claimant who bought B shares in the company (‘The Purchaser’):

‘Applicable Law. This Subscription Agreement shall be governed by and construed in accordance with the laws of the United Kingdom. The Purchaser hereby irrevocably submits to the jurisdiction of the High Court of England and Wales over any action or proceeding arising out of or relating to this Subscription Agreement or any agreement contemplated hereby and the Purchaser hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such Court.’ [English original]

[7] “On the basis of the arguments of the parties and the documents supplied we can assume that all claimants, claimant no. 3 excepted, first made payments in order to invest in the purchase of (rights to) champagne and Bordeaux wines and subsequently made payments to invest in Italian wines. The Account Opening Form in its consecutive versions concerns the former payments, the Wine Program Agreement the latter. Those documents were also sent to the individual claimants.

[8] “It can be assumed that all claimants received one or more versions of the Account Opening Form for them to sign, and a Wine Program Agreement, in respect of their investments in wine. The contractual conditions applicable to the investments were contained in those documents. Subsequently the claimants invested money. Apparently the claimants signed and returned the documents (the file does not contain all the documents signed by all the claimants). Neither
is it argued nor does it appear that any reservation was made in respect of the arbitration clauses.

[9] “Only [claimant no. 12] argues that he never signed the agreements that were sent for him to sign and alleges that the signature on the documents supplied … is a forgery. However, it is undisputed that also the investments of [claimant no. 12] were made in order to obtain rights in champagne or Bordeaux wines as provided in the Account Opening Forms and in Italian wine as provided in the Wine Program Agreement. [Claimant sub 12] does not argue that he objected then to the arbitration clause contained in those documents and made [his objection] known to Seed.

[10] “The contracts for the assignment of rights in wine from Seed through (or the direct purchase of) loan notes in Churchill Ltd. (which in turn held shares in OptiDisc) are signed by [claimant no. 5], [claimant no. 7], [claimant no. 11] and – with the objection above – [claimant no. 12]. The contracts for the assignment of rights in wine from Seed through (or the direct purchase of) loan notes in Cupidus are signed by [claimant no. 4], [claimant no. 5], [claimant no. 6] and [claimant no. 10]. It does not appear that Seed was a party to the contract between The Wine Corporation and [claimant no. 5] and to the forum clause therein.

[11] “On the basis of the considerations above, it can be assumed in the present procedure that all claimants explicitly or tacitly accepted the validity of the above-mentioned arbitration clauses in the consecutive contracts, or at least that Seed (or its predecessors) could reasonably assume on the basis of the claimants’ behavior that the claimants accepted [those clauses].

[12] “The arbitration clauses are laid down in written documents of which the claimants could take cognizance. It was not necessary that these documents be signed by the parties. Art. 2 of the Arbitration Law (2001 Revision) of the Cayman Islands only requires an ‘agreement in writing’, as did the English Arbitration Act 1996 previously in force (Art. 5).

[13] “As a rule, apparently, the (first) Account Opening Form was sent to and signed by the individual claimants only after they had already made a first payment for an investment in wine. This was mostly a small amount (US$ 1,000). In some cases more than one payment was made before signing.

[14] “It does not appear, nor is it likely, that the documents that were subsequently sent [to the claimants for them] to sign were not equally meant to regulate the relationships between the parties in respect of those first investments, and that the claimants did not understand that that was the case.
This also applies to the arbitration agreement therein. No facts indicating the contrary have been alleged. Further, reference can be made to Art. 2 of the Wine Program Agreement (see above at [5] under (d)).

[15] “The dispute concerns the scope of the arbitration clauses. The claimants point out that their claims are based solely on tort [onrechtmatige daad] and undue payment [overschuldigde betaling], not on the contracts.

[16] “The interpretation of the arbitration clauses must also take place according to the law of the Cayman Islands.

[17] “The payments were made pursuant to the contracts concluded by the claimants with Seed or another defendant with the aim of investing in (mostly) wine. The claimants claim that they made those payments as a consequence of deception on the part of the defendants and that the contracts came into existence under the influence of fraud, abuse of circumstances and error. They also claim that the contracts are null and void because they are at odds with the Law on the Supervision of the Stock Market [Wet toezicht effectenverkeer – WTE], public policy and good morals. The illicit behaviour of the defendants consists in this deception, which aimed to persuade the claimants to make those payments to invest in (mostly) wine. The request that the amounts paid be returned on grounds of undue payment is based on the fact that those contracts were the basis for the obligation to pay and that this basis has come to an end because of the nullity and annulment of the contracts.

[18] “Thus, the core of the present dispute is the conclusion of the contracts, to which the claimants were allegedly persuaded by the defendants’ fraud, and the legal validity and consequences of those contracts. This means that this dispute must be deemed ‘any dispute whatsoever ... in relation to or in any way in connection with’ these contracts, as meant in the various arbitration clauses. It is irrelevant that the claimants focus their claims on the illicit behavior of the defendants. The arbitration clauses are so broadly worded that they can also encompass an alleged illicit behavior in respect of the coming into existence of the contracts.

[19] “The same is true in respect of the issue whether the contracts are null and void for violation of the law, public policy or good morals, or are null or can be annulled because of vitiated consent.


[21] “The claimants have alleged no specific facts on the basis of which we should hold that the arbitration clauses themselves came into existence under the influence of vitiated consent (fraud, misrepresentation, duress, undue influence,
error) or are in violation of public policy or good morals…. The argument that
the arbitration clauses were ‘instrumental’ to the overall deceptive conduct of
the defendants and thus played ‘a crucial role’ therein is too generic and
insufficiently concretized and cannot lead to a finding that the arbitration clauses
are invalid. This is also true for the claimants’s argument that events that took
place after the conclusion of the arbitration clauses prevent [those clauses’]
application.

[22] “The claimants have also advanced other arguments on the basis of which
the arbitration clauses themselves should be deemed invalid.

[23] “First, an arbitration in the Cayman Islands allegedly constitutes an
unacceptable barrier. The court rejects this argument. Seed – which is the
defendant in this procedure – is established in the Cayman Islands, the contracts
at issue were concluded with Seed (or Seed is involved as third party) and
provide that the law of the Cayman Islands applies. The arbitration clauses
contain a balanced procedure for the appointment of arbitrators and the
arbitration must take place according to the rules of the ICC. Thus it cannot be
said that arbitration in the Cayman Islands is a road that the claimants – residents
of the United States – cannot in fact follow and cannot be forced to follow. There
is no proof in support of the argument that the place of arbitration is onerous.

[24] “Second, the arbitration clauses contain a rule as to costs providing that –
independent of the outcome of the arbitration – 75 percent (AOF) or half
(WPA) of the costs of the arbitration shall be borne by the individual claimant.
In light of Art. 14(2) of the Arbitration Law (2001 Revision) [of the Cayman
Islands] this provision shall likely not be applied (by the arbitrators). However,
as it also appears from this article, this does not affect the validity of the
arbitration agreement at all:

‘Any provision in an arbitration agreement to the effect that the parties or
any party thereto shall, in any event, pay their or his own costs of the
reference or award or any part thereof shall be void, and this Law, shall,
in the case of an arbitration agreement containing any such provision, have
effect as if that provision were not contained therein…. ’ [English original]

[25] “Third, a time limit of six months after the dispute is arisen is provided,
only in respect of the individual claimant. It is not completely clear to what
extent this provision makes the relevant arbitration clause invalid. Seed … states
however that (if necessary) it will waive this time limit in respect of the
claimants. In an arbitration the claimants will be able to hold Seed to its promise.

[26] “Further, there is no support for the argument that application of the
arbitration clauses is unacceptable according to standards of reasonableness and equity [*billijkheid*].

[27] “The conclusion must be that the claimants are bound by the arbitration clauses in respect of Seed, so that the court must find that it lacks jurisdiction in the proceeding against Seed. It is irrelevant that the claim against Seed shall not [as a consequence] be decided by the same court as the claims against the other defendants.

[28] “The court also finds that it lacks jurisdiction to the extent that the claimants’s claims against Seed concern investments in The Wine Corporation (Art. 23 of Council Regulation No. 44/2001). 2. The principle of separability also applies to a forum clause. Also in respect of the clause at issue no facts or circumstances have been argued or appear that prevent the application of that clause (according to English law).”

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“1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.”
3. Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba [Common Court of Justice of the Netherlands Antilles and Aruba], 10 March 2009, no. EJ 529A/06; H-101/08

Parties: Plaintiff: Imanagement Services Ltd. (British Virgin Islands)
Defendant: Çukurova Holding A.S. (Turkey)

Published in: Available online at <www.zoeken.rechtspraak.nl> (LJN: BH9584)

Articles: V(1)(c)

Subject matter: – award set aside

Commentary Cases: ¶ 516

Facts

On 14 June 2006, an arbitral tribunal of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) awarded the claim of Imanagement Services Ltd. (Imanagement) against Çukurova Holding A.S. (Çukurova) in the amount of US$ 81,000,000.

Çukurova sought annulment of the award in Russia. On 6 September 2007, the Moscow City Commercial [Arbitrazh] Court annulled the award for lack of a valid agreement for ICAC arbitration. On 24 December 2007, the Moscow District Federal Commercial Court reversed the annulment decision. The appellate decision was in turn reversed by the Supreme Commercial Court of the Russian Federation on 16 September 2008.
Imanagement sought enforcement of the ICAC award. The Court of First Instance of the Netherlands Antilles denied enforcement.

On appeal, the Common Court of Justice of the Netherlands Antilles and Aruba affirmed the lower court’s decision, holding that Çukurova timely – that is, before the oral discussion – supplied proof that the ICAC award was set aside by the Russian courts.

Excerpt

(....)

[1] “The grounds for appeal refer Imanagements request for leave for enforcement under Art. 985 Rv1 (exequatur) of the ... arbitral award of the [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC)] ... of 14 June 2006 to this Court in its entirety; they can be discussed jointly.

[2] “As correctly held by the court of first instance ... and not disputed by the parties in appeal, the request for exequatur must meet the requirements of the [1958 New York Convention]. [Quotation of Art. II(1)-(2) and Art. V(1)(c) and (e) Convention omitted.]

[3] “Çukurova timely supplied, before the oral discussion in appeal, in which Imanagement did not participate, a copy of the ‘resolution’ ... of the Supreme Commercial [Arbitrazh] Court of the Russian Federation ... of 16 September 2008, which reversed the ‘resolution’ ... of the Moscow District Federal Commercial Court ... of 24 December 2007 and left undisturbed the ‘ruling’ of the Moscow City Commercial Court ... of 6 September 2007.

[4] “In its resolution of 24 December 2007, the Moscow District Federal Commercial Court, in short, reversed on appeal the ruling of the Moscow City Commercial Court of 6 September 2007, in which the latter court annulled the arbitral award of the ICAC arbitral tribunal dated 14 June 2006, which awarded Imanagements claim against Çukurova in the amount of US$ 81,000,000. In last instance, the Supreme Commercial Court of the Russian Federation left the ruling of the Moscow City Commercial Court of 6 September 2007 undisturbed; as a consequence, it also left undisturbed that ruling’s annulment of the arbitral award of 14 June 2006, which is the object of this proceeding. The Supreme

1. Art. 985 of the Code of Civil Procedure [Wetboek van Burgerlijke Rechtsverordening – Rv] of the Netherlands Antilles sets out the procedure to be followed for the enforcement of foreign decisions.
Commercial Court of the Russian Federation came to this decision because it deemed that the parties did not agree to refer their dispute to the ICAC arbitral tribunal.

[5] “Taking into account the above-mentioned Art. V(1)(c), as well as Art. II(1)-(2), quoted ad abundantiam, together with Art. V(1)(c) Convention, it ensues from the above that the request for exequatur of the arbitral award of 14 June 2006 must be denied.

[6] “This Court comes thus to the same conclusion as the court of first instance, though on different grounds; [the court of first instance’s] decision therefore must be affirmed.”

(....)
RUSSIAN FEDERATION

Ratification: 24 August 1960
1st Reservation

23. Federal Arbitrazh Court, Central District, 2 September 2003, Case No. A 08-7941/02-18
Presidium of the Supreme Arbitrazh Court of the Russian Federation, 30 March 2004, Case No. 15359/03

Parties:

Appellant/Petitioner: OAO Stoilensky GOK (Russian Federation)
Appellee/Respondents: (1) Mabetex Project Engineering S.A. (Switzerland);
(2) Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria)

Appellant/Petitioner: Interconstruction Project Management S.A. (Switzerland)
Appellee/Respondent: OAO Stoilensky GOK (Russian Federation)

Published in: Both decisions available online at <www.consultant.ru> (subscription required)

Articles: I(1)

Subject matters:

– 1958 New York Convention does not apply to setting aside of award
– European Convention of 1961 (Arts. I(1), IX(1))
– Russian courts may set aside award rendered abroad under Russian substantive law

1. The General Editor wishes to thank Mr. Roman Zhykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.
RUSSIAN FEDERATION NO. 23

– setting aside of award by court of country under the law of which the award was made
– time limit to apply to set aside award

Commentary Cases: ¶ 104 + ¶ 704

Facts

On 12 November 1992, OAO Stoilensky GOK (Stoilensky) and the Austrian company Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Mabetex Austria) concluded a contract containing an arbitration clause.

A dispute arose between the parties. Mabetex Austria and Mabetex Project Engineering S.A. (Mabetex), a Swiss company, commenced arbitration against Stoilensky. Ad hoc arbitration proceedings were held in Stockholm, Sweden. On 22 February 2002, the arbitral tribunal rendered an award in favor of the Mabetex companies.

Stoilensky sought annulment of the Swedish award before the Arbitrazh (Commercial) Court for the Belgorod District in the Russian Federation. On 23 May 2003, the court granted the application and annulled the award. Mabetex appealed. (On 26 June 2003, Mabetex changed its name to Interconstruction Project Management S.A. (Interconstruction).)

By the first decision reported below, the Federal Arbitrazh Court for the Central District affirmed the lower court’s decision annulling the Swedish award. The court agreed with the Belgorod court that the Swedish award could be challenged in the Russian courts, pursuant to the combined effect of Art. IX of the 1961 European Convention – which provides that an award may be set aside by the courts of the State under the law of which the award was rendered – and a provision in the Arbitrazh Court Procedure Code of the Russian Federation (the Arbitrazh Code) – which provides that in cases stipulated in an international agreement of the Russian Federation (such as the European Convention, a foreign arbitral award may be challenged in the Russian courts provided that Russian substantive law was applied to the settlement of the dispute.

As the arbitrators had applied Russian substantive law, the Arbitrazh courts had jurisdiction. The Federal Arbitrazh Court agreed with the lower court that the application of Swedish procedural law to the arbitration did not deprive Stoilensky of its right to challenge the foreign award in the Russian Federation.

The court then held that Stoilensky had filed its annulment application timely. The time limit for filing such application under the Arbitrazh Code is within three
months of receiving communication of the award. As the Arbitrazh Code had not yet come into force when Stoilensky received communication of the award, the time limit in the present case began to run on 1 September 2002, when the Code came into force. Stoilensky sought annulment of the award on 6 November 2002, that is, a little over two months from that date.

The court affirmed the lower court’s decision to annul the award and agreed with the reasons for that decision. It reasoned that arbitration agreements must be in writing and, as a consequence, amendments to and the cession of rights under those agreements must also be in writing. Here, Stoilenky had not agreed to Mabetex Austria’s cession of its contractual rights to Mabetex, which was not a signatory of the contract and the arbitration clause therein; on the contrary, Stoilensky had consistently objected to Mabetex’s participation in the arbitration. The arbitral award was therefore rendered “in favor of a party which is not a party to the arbitration clause” and thus “in a dispute which is not covered by the arbitration clause” and should be set aside.

The court finally held that the award should also be annulled because it appeared from the file of the case that Stoilensky had not been granted the opportunity to present its case. This is the first decision reported below.

By the second decision reported below, the Supreme Arbitrazh Court of the Russian Federation reversed the appellate decision. Both decisions below had applied the European Convention because the parties to the arbitration agreement were domiciled in two Contracting States, Austria and Russia. However, noted the Supreme Court, the lower courts failed to take into account that Art. IX of the European Convention does not concern the case where an award may be set aside in a non-Contracting State, such as Sweden. Swedish law allows parties to seek the setting aside of any (international) arbitral award rendered in Sweden. Hence, annulment should have been sought in Sweden.

The Belgorod court of first instance (but not the appellate court) had referred in its decision to the 1958 New York Convention. The Supreme Court held that that reference was incorrect, as the New York Convention does not apply to the setting aside of awards.

Excerpt

Federal Arbitrazh Court, Central District, 2 September 2003

[1] “The Federal Arbitrazh Court for the Central District, having considered in public judicial proceedings the cassation appeal of Mabetex Project Engineering
S.A. [Mabetex] from the ruling of the Arbitrazh Court of the Belgorod District dated 23 May 2003 in case No. A08-7941/02-18, has determined [the following].

[2] “OAO Stoilensky GOK [Stoilensky] filed with the Arbitrazh Court of the Belgorod District an application to set aside the foreign arbitral award dated 22 February 2002, which was rendered in Stockholm, Sweden, in the amount of US$ 5,070,059 and EUR 48,000 against Stoilensky in the action commenced by Mabetex (as of 26 June 2003, the company changed its name to Interconstruction Project Management S.A.) and Mabetex Project Engineering Industrieanlagenplanungs und Errichtungs GmbH (Austria) [Mabetex Austria]. The petition was sustained in the ruling of the Arbitrazh Court of the Belgorod District dated 23 May 2003.

[3] “In this cassation appeal, Mabetex requests annulment of the ruling of the Arbitrazh Court of the Belgorod District dated 23 May 2003 and dismissal of [Stoilenskys’ annulment] application, on the ground that the court applied a law that was not applicable (i.e., Art. 230(5) of the Arbitrazh Code the Arbitrazh Court Procedure Code of the Russian Federation [the Arbitrazh Code], and Art. IX of the [1961 European Convention]), that its conclusions were incorrect and that it incorrectly applied provisions of substantive and procedural law (specifically, Art. 230(3) of the Arbitrazh Code). A Mabetex representative confirmed the arguments made in the cassation appeal in respect of the grounds for appeal and stated that on 26 June 2003 Mabetex’s name was changed to Interconstruction Project Management S.A. [Interconstruction]. Representatives of Stoilensky requested that the ruling of the Arbitrazh Court of the Belgorod District dated 23 May 2003 be left unchanged.

[4] “Having examined the case materials, heard explanations from the parties’ representatives and evaluated the arguments of the appeal, the appellate court does not find any grounds for granting the appeal.


[6] “When annulling the arbitral award, the Arbitrazh court correctly applied Art. 230(5) of the Arbitrazh Code and Art. IX of the European Convention. By virtue of Art. 230(5) of the Arbitrazh Code, in those cases stipulated in an international agreement of the Russian Federation, a foreign arbitral award may be challenged if provisions of Russian law were applied when making the award.

[7] “Arbitration proceedings were initiated here based on Contract No. 810/00186862/1-001/V145 dated 12 November 1992, which was executed by Stoilensky and Mabetex Austria. At the moment of executing the contract, the
European Convention had entered into force and applied to both the Russian Federation and Austria. Hence, pursuant to its Art. I, the European Convention applies to the arbitration proceedings arising out of the contract at hand. The place of the arbitration is irrelevant, since the European Convention does not contain provisions which would limit or exclude its application in cases where the place of arbitration is in a non-signatory state.

[8] “Art. IX of the European Convention provides for the possibility of and the grounds for setting aside an award; such setting aside may be carried out by a court of the state under the laws of which the award was made. Therefore, the provision of … the [European Convention] grants jurisdiction over this category of claims to the Arbitrazh courts of the Russian Federation, on the condition that Russian law is applied when rendering the foreign arbitral award.

[9] “Russian law was applied when rendering the arbitral award dated 22 February 2002 (No. 8.4 of the award dated 22 February 2002). The Arbitrazh Court of the Belgorod District validly concluded that the arbitrators’ reference to the Swedish Arbitration Act of 1999 as the statute governing the arbitration procedure did not deprive Stoilensky of the right to appeal to an Arbitrazh court of the Russian Federation to set aside the foreign arbitral award. The norms of the Swedish Arbitration Act of 1999 are applied to all arbitration proceedings in Sweden…. Similar provisions are contained in the legislation of other nations and in the Law of the Russian Federation on International Commercial Arbitration. Hence, when rendering an arbitral award some mandatory norms of the national legislation at the place of arbitration always apply. Application of such mandatory norms … does not exclude the application of Art. 230(5) of the Arbitrazh Code and Art. IX of the European Convention. Applying the norms of Russian substantive law in the award therefore leads to the application of these provisions.

[10] “The jurisdiction of the Arbitrazh courts of the Russian Federation over claims to set aside foreign arbitral awards was introduced by Art. 230(5) of the Arbitrazh Code, which entered into force on 1 September 2002. Further, Art. 230(3) of the Arbitrazh Code provides that an application to set aside an arbitral award, including an award [rendered] in international commercial arbitration, may be filed within three months from the date on which the party receives the award. Neither the Arbitrazh Code nor the Introductory Act to the Arbitrazh Code defines how to calculate the time limit to challenge awards received by a party before the Arbitrazh Code was enacted. Before 1 September 2002 there was no procedural possibility to challenge a foreign arbitral award, and consequently no time limit for challenging a foreign arbitral award was provided; [thus], according to Art. 9 of the Introductory Act to the Arbitrazh Code, that time limit should be
calculated from the moment the corresponding provisions of the Arbitrazh Code were enacted, i.e., from 1 September 2002. Stoilensky sought annulment of the arbitral award on 6 November 2002, i.e., before expiry of the three-month time limit provided for in Art. 230.3 of the Arbitrazh Code.

[11] “According to Art. 233(2)(3) of the Arbitrazh Code, the evaluation of the award’s accordance with the arbitration clause falls under the scope of the jurisdiction of an Arbitrazh court of the Russian Federation.

[12] “It appears from the case materials that Contract No. 810/00186862/1-001/V145, which contains an arbitration clause, was executed by Stoilensky and Mabetex Austria. The arbitral award dated 22 February 2002 was rendered in favor of Mabetex.

[13] “An arbitration clause is a written agreement of the parties (Art. 7(2) of the Law of the Russian Federation on International Commercial Arbitration). Therefore, amendments and additions to the arbitration clause, as well as the approval of the cession of rights and obligations under the clause to a third party, must also be in writing. Furthermore, clause 18.8 of the contract provides for the obligation to obtain the other party’s written approval to transfer the rights and obligations under the contract.

[14] “The case materials confirm that Stoilensky did not give its approval in writing to the transfer of the rights under the arbitration clause to Mabetex and contested the legality of Mabetex’s participation in the arbitration hearing during all of its stages. The fact that the arbitral award was rendered in favor of a party that is not a party to the arbitration clause, i.e., in a dispute that is not covered by the arbitration clause in the agreement or does not meet that clause’s conditions, is unconditionally a ground for setting the award aside pursuant to Art. IX(1)(c) of the European Convention.

[15] “In addition, the ruling [of the Arbitrazh Court of the Belgorod District] dated 23 May 2003 mentions a violation of the fundamental principles of Russian law as being one of the grounds for setting aside an arbitral award; specifically,

2. Art. 7(2) of the Law of the Russian Federation on International Commercial Arbitration reads:

“(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”
the principle of equality of the parties. In this cassation appeal, Mabetex states that a violation of the fundamental principles of Russian legislation when rendering an arbitral award is not, on its own account, a basis for the jurisdiction of an Arbitrazh court of the Russian Federation over disputes for the annulment of foreign arbitral awards.

[16] “The list of grounds for setting aside an arbitral award in Art. IX of the European Convention is exhaustive; violation of the fundamental principles of the law is not mentioned in Art. IX of the European Convention. However, violations in the arbitral proceedings and in the rendition of the arbitral award dated 22 February 2002, which were established by the court and were the basis for its conclusion that the award was not in accordance with the fundamental principles of the law (Art. 233(3)), are independent grounds for setting aside the award which are explicitly provided for in Art. IX of the European Convention. Specifically, the ruling dated 23 May 2003 found that there was a violation of the principle of equality of the parties to the proceeding, and the court referred to facts that are grounds for setting aside an arbitral award pursuant to Art. IX(1)(b) of the European Convention – since they were established by the court based on the case materials and on the finding that a party was not granted the opportunity to present its case.

(.....)

[17] “Based on Arts. 284, 286, 287(1)(1), 289 and 290 of the Arbitrazh Code, the court decides to leave the ruling of the Arbitrazh Court of the Belgorod District in Case No. A08-7941/02-18 dated 23 May 2003 unchanged, and not to grant the cassation appeal. This decree enters into legal force from the day it is rendered and is not subject to appeal.”

Presidium of the Supreme Arbitrazh Court of the Russian Federation,
30 March 2004

[18] “Stoilensky filed an application with the Arbitrazh Court of the Belgorod District seeking annulment of the arbitral award dated 22 February 2002, which was rendered in ad hoc arbitration in Stockholm, Sweden, in the amount of US$ 5,070,059 and EUR 48,000 against Stoilensky in the action commenced by Mabetex (as of 26 March 2003, the company changed its name to Interconstruction Project Management S.A.) and Mabetex Austria. The appeal was sustained in the ruling of the Arbitrazh Court of the Belgorod District dated 23 May 2003. In a ruling dated 2 September 2003, the Federal Arbitrazh Court for the Central District left the award intact.
[19] “When considering the application to annul the foreign arbitral award, the [lower] courts applied Art. 230(5) of the Arbitrazh Code, which provides that, in cases stipulated in an international agreement of the Russian Federation … a foreign arbitral award may be challenged when Russian law was applied when making the award.

[20] “The court of first instance applied the [1961 European Convention] and the [1958 New York Convention] as [the] international agreements under which foreign arbitral awards may be set aside, while the appellate court only considered the first of these documents. When setting aside the foreign arbitral award, the courts assumed that the award had been rendered on the basis of Russian substantive law.

[21] “In its application to the Supreme Arbitrazh Court to reconsider the rulings [of the lower instances] in the exercise of its supervisory powers, Interconstruction requests that those rulings be quashed because of the incorrect application by the lower courts of provisions of substantive and procedural law.

[22] “Having reviewed the validity of the arguments set forth in the application, the statement in reply to the application, and the presentations of the parties, the Presidium holds that the contested rulings must be reversed and the case closed on the following grounds.

[23] “Pursuant to its Art. I(1), the European Convention applies to (a) arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different contracting states, and (b) to arbitral procedures and awards based on agreements referred to under (a) above.

[24] “It appears from the case materials that the ad hoc award dated 22 February 2002 … was made in Stockholm, Sweden under the Swedish Arbitration Act (SFS (1) 1999:116) in a dispute between Mabetex Austria and Stoilensky, the parties to the arbitration agreement, as well as Mabetex (as of 26 June 2003, the company changed its name to Interconstruction), to which [Mabetex Austria] assigned rights under the main contract, and that the foreign ad hoc arbitral tribunal ordered the payment of certain sums.

[25] “Considering that the parties to the arbitration agreement are domiciled in Austria and Russia – both contracting states of the European Convention – the Arbitrazh courts came to the conclusion that the provisions of the European Convention applied to the ad hoc award rendered in Stockholm, Sweden. However, the courts failed to take into account the following.

[26] “According to paragraph 1 of Art. IX ‘Setting aside of the arbitral award’, the setting aside in a contracting state of an arbitral award covered by the
Convention shall only constitute a ground for the refusal of recognition or enforcement of this award in another contracting state of the Convention where the setting aside of the arbitral award took place in the state in which, or under the law of which, the award was made, and only for one of the reasons listed in the Convention.

[27] “Art. IX of the European Convention does not touch upon issues connected with the possibility of, grounds for and manner of annulment of arbitral awards by states that are not contracting states of the Convention. Such issues are regulated by the domestic legislation of the relevant states and by international agreements. The ad hoc award ... was rendered in Stockholm, Sweden, according to Swedish procedural laws. Sweden is not a contracting state of the European Convention. The Swedish Arbitration Act of 1999 (SFS (1) 1999:116) allows the setting aside of arbitral awards within three months from the date the party receives the award’s definitive text; [the Act] applies to arbitral proceedings taking place in Sweden, [even] despite the presence of an international element in the dispute (Arts. 33, 34 and 36).

[28] “Considering that the ad hoc award ... was rendered in the territory and under the laws of Sweden, which provides for the possibility to set aside awards of arbitration tribunals made in Sweden, the ad hoc award in the present case was subject to challenge in Sweden.

[29] “The court of first instance’s reference to the provisions of the [1958 New York Convention] is incorrect, as this Convention does not govern issues of setting aside foreign arbitral awards, but only provides for grounds to refuse recognition and enforcement of foreign arbitral awards, on which an interested entity may rely to protect its interests against [an enforcement] request.

[30] “Under such circumstances, the case concerning Stoi lensky’s application to set aside the ad hoc award ... rendered in Stockholm, Sweden, is to be closed pursuant to Art. 150(1)(1) of the Arbitrazh Code.

[31] “The challenged judicial acts hinder the formation of a uniform practice of Arbitrazh courts in defining and applying the provisions of the law, which is the basis for their being quashed, according to Art. 304(1) of the Arbitrazh Code.

[32] “Based on the above and on Art. 303, Art. 305(1)(4) and Art. 306 of the Arbitrazh Code, the Presidium hereby decides to annul the ruling of the Arbitrazh Court of the Belgorod District (court of first instance) dated 23 May 2003 in Case No. A08-7941/02-18 and the decree of the Federal Arbitrazh Court for the Central District dated 2 September 2003 in the same case, and to close this judicial proceeding.”

Parties: Appellant/Petitioner: Collective Fishing Farm Krasnoye Znamya (Russian Federation)  
Appellee/Respondent: White Arctic Marine Resources Ltd. (Norway)

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Articles: I(1); VII(1)

Subject matters: – 1958 New York Convention does not apply to setting aside of award  
– European Convention of 1961 (Art. IX(1))  
– Russian courts may set aside award rendered abroad under Russian substantive law

Commentary Cases: ¶ 104 + ¶ 704

Facts

On 8 December 2006, an arbitral tribunal in Oslo, Norway, rendered an award in favor of White Arctic Marine Resources Ltd. (White Arctic) in a dispute with the Collective Fishing Farm Krasnoye Znamya (the Collective Farm).

The Collective Farm sought annulment of the Norwegian award before the Arbitrazh (Commercial) Court for the Arkhangelsk District. On 16 May 2007, the court denied the annulment application, finding that the case was not properly before the Russian courts. The court reasoned that both the 1961 European Convention and the 1958 New York Convention provide that an award may be set aside by the courts of the State under the law of which the award was rendered. It further noted that the Arbitrazh Court Procedure Code of the

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1. The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.
Russian Federation (the Arbitrazh Code) provides that, in cases stipulated in an international agreement of the Russian Federation (such as the European Convention and the New York Convention), a foreign arbitral award may be challenged in the Russian courts provided that Russian substantive law was applied to the settlement of the dispute. The court held however that in the present case Russian law was not applied to the dispute and the Russian courts therefore lacked jurisdiction. The court also noted that Norway is not a party to the European Convention.

The Federal Arbitrazh Court affirmed the lower court’s decision. It first agreed with that court’s conclusion that the European Convention and the New York Convention are international agreements of the Russian Federation which provide that an award may be set aside in the State under the law of which it was rendered, thus triggering the application of the provision in the Arbitrazh Code giving Russian courts the authority to annul foreign awards. The combined effect of these provisions is that two conditions are necessary for the Russian courts to have jurisdiction to annul a foreign arbitral award: (1) the award must have been made in a Contracting State of the European Convention and (2) Russian substantive law must have been applied.

Here, the lower court correctly found that Russian law had not been applied in the arbitration, so that at least the second of the two conditions above was not met. As both conditions must necessarily be met at the same time, it was irrelevant whether Norway indeed was not a party to the European Convention and whether its status had only been determined on the basis of White Arctic’s declarations and had not been ascertained independently.

The court finally noted that the lower court’s reference to the 1958 New York Convention was incorrect, as the New York Convention does not apply to the setting aside of awards.

Excerpt

[1] “The Collective Fishing Farm Krasnoye Znamya (the Collective Farm) applied to the Arbitrazh [Commercial] Court for the Arkhangelsk District to set aside an arbitral award made on 8 December 2006 by a tribunal with seat in Oslo (Norway) … in respect of a claim of White Arctic Marine Resources Ltd. (White Arctic) against the Collective Farm; [the award directed] the Collective Farm to pay [certain sums to] White Arctic. The case was closed by the [lower court’s] ruling dated 16 May 2007.”
[2] "By the present appeal, the Collective Farm asks [the court] to annul the award and refer the case back [to the lower instance] for a new judicial examination in order to re-consider the Collective Farm’s application; it alleges violation of procedural and substantive law provisions and non-conformity of the [lower] court’s conclusions to the actual circumstances.

[3] "The Collective Farm indicates as a ground for its appeal that when the arbitral tribunal … made its award, it examined the claimant’s argument that the members in a partnership hold joint liability pursuant to Russian legislation; hence, it applied the norms of Russian legislation …; this in turn gives the Collective Farm the right to challenge … the arbitral award [in the Russian courts] under Art. 230(5) of the Arbitrazh Court Procedure Code of the Russian Federation [(the Arbitrazh Code)]…. In addition, the Collective Farm argues that the [lower] court’s conclusion that Norway is not a contracting state of the [1961 European Convention] was based exclusively on White Arctic’s submissions.

[4] "There was no statement in reply to the appeal. The parties were duly informed of the place and time of the proceedings, yet they did not send representatives to the judicial session, so that the appeal was heard in their absence. The legality of the challenged decision was examined according to the cassation procedure.

[5] "According to the case materials, the arbitral award was rendered in the city of Oslo, Norway, in a dispute between the Collective Farm and White Arctic … in whose favor the arbitral tribunal [directed the Collective Farm to pay certain sums]. The Collective Farm disagreed with this award and filed an application to annul the award with a competent Arbitrazh court, based on Art. 230 of the Arbitrazh Code.

[6] "The court of first instance closed the case pursuant to Art. 150(1)(1) of the Arbitrazh Code, finding that the conditions in Art. 230(5) of the Arbitrazh Code, which allows the challenging of a foreign arbitral award in the Russian Federation, were not met. The court of first instance came to this conclusion having established that Norway is not a contracting state of the European Convention and that the arbitral award dated 8 December 2006, which was rendered in Oslo, did not contain references to specific provisions of Russian legislation.

[7] "The cassation court deems that the challenged decision [of the lower instance] was made in accordance with the law and the facts of the case; it does not find any ground for reversing it.

[8] "According to Art. 230(5) of the Arbitrazh Code, a foreign arbitral award may be challenged [in the Russian courts] when norms of Russian legislation were applied in the award.…. 
"The court of first instance correctly considered that the European Convention and the [1958 New York Convention] are international agreements of the Russian Federation. According to para. 1 of Art. IX ‘Setting Aside of the Arbitral Award’ of the European Convention, the setting aside of an arbitral award covered by the Convention shall only constitute a ground for the refusal of recognition or enforcement of this award in another contracting state of the Convention where the setting aside of the arbitral award took place in the state in which, or under the law of which, the award was made, and only for one of the reasons listed in the Convention.

"Art. IX of the European Convention does not touch upon issues connected with the possibility of, grounds for and manner of annulment of arbitral awards by states that are not contracting states to the Convention. Such issues are regulated by the domestic legislation of the relevant states and by international agreements.

"As a consequence of the above-mentioned provisions, the following two conditions are necessary for considering an application to challenge a foreign arbitral award in an Arbitrazh court of the Russian Federation: (1) the contested award was made in a contracting state of the European Convention… and (2) provisions of Russian law were applied when rendering the contested foreign award.

"Having established that, when making the contested award, the arbitral tribunal did not apply provisions of Russian legislation to the merits of the dispute, the court of first instance justifiably assumed that there were no grounds under Art. 230(5) of the Arbitrazh Code, which allows for the challenging of a foreign arbitral award in the Russian Federation.

"[The Collective Farm’s] argument that Norway is a contracting state of the European Convention may not be considered by this court since, as already indicated above, both conditions must necessarily exist at the same time for the court to consider an application to challenge a foreign arbitral award.

"The Collective Farm’s argument that the provisions of Russian law were applied when rendering the award is not borne out by the case materials: when resolving the dispute, the arbitral tribunal examined [White Arctic’s] arguments as to the possible application of Russian laws; however, this does not mean that Russian law was applied when rendering the contested arbitral award.

"The Collective Farm’s reference to the provisions of the [1958 New York Convention] is incorrect, as this Convention does not govern issues of setting aside foreign arbitral awards, but only provides for grounds to refuse recognition and enforcement of foreign arbitral awards, on which an interested entity may rely to protect its interests against [an enforcement] request.
[16] “Based on Arts. 286, 287, 289 and 290 of the Arbitrazh Code, the Federal Arbitrazh Court for the North-Western District decides to leave undisturbed the ruling of the Arbitrazh Court of the Arkhangelsk District dated 16 May 2007 in case No. A05-4274/2007 and to dismiss the cassation appeal of the Collective Fishing Farm Krasnoye Znamya.”

Parties:  
Plaintiff/Respondent: Not indicated
Defendant/Appellant: Not indicated

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Articles:  
II(3)

Subject matter:  
– conditions for granting a stay in favour of arbitration

Commentary Cases:  
¶ 217

Facts

On 20 May 2003, the present defendant/appellant (the appellants) time-chartered the vessel DUDEN to Anchor Navigation Ltd (Anchor Navigation). On 9 March 2004, Anchor Navigation time-chartered the vessel to Parkroad Corporation (Parkroad) which, in turn, sub-chartered it to other parties, among which Grand Loyal Ltd (Grand Loyal), for various periods. On 9 September 2004, Grand Loyal further sub-chartered the DUDEN to Goodearth Maritime Ltd (Goodearth). Both the 9 March 2004 and the 9 September 2004 charterparty contained a clause for arbitration of disputes in London.

On 10 September 2004, Goodearth fixed the vessel for Jakhau Salt Company Pvt Ltd for a voyage from India to China with a cargo of Indian solar salt. On 27 September 2004, a Bill of Lading was issued for the cargo to the present plaintiff/respondent (the B/L holders). The reverse side of the Bill of Lading provided for the incorporation of “[a]ll terms and conditions, liberties and exceptions of the [Charter Party], dated as overleaf, including the Law and
Arbitration Clause”. However, there was no identification of the relevant charterparty on the front page of the Bill of Lading.

On 3 November 2004, during discharging operations at the Chinese port of arrival, the cargo was found to be damaged and contaminated in part, allegedly because of the rust of the vessel’s bulkheads and holds. On 14 June 2005, the B/L holders sent a letter to the appellants claiming compensation and seeking clarification in respect of the charterparty referred to in the Bill of Lading.

On 7 July 2005, the B/L holders filed a writ of summons in the High Court of Singapore against the vessel, claiming damages and costs from the appellants. The writ, which was valid for 12 months, was extended a first time for a further 12 months. On 15 February 2007, the DUDEN called in Singapore, but service of the writ was not effected because the ship-watch service provider that had been engaged to maintain local watch on the vessel was not informed of the call. The writ was renewed a second time to 7 July 2008. On 12 November 2007, the DUDEN called in Singapore again. Service of the writ was effected and the vessel was arrested. On 15 November 2007, it was released upon the appellants’ provision of security for the claim that had been filed against them in the Singapore High Court by the B/L holders.

In the meantime, on 13 December 2006, the appellants informed the B/L holders that the charterparty referred to in the Bill of Lading was the charterparty dated 9 March 2004 between Anchor Navigation and Parkroad. The appellants noted that the charterparty contained a London arbitration clause and argued that since no notice of arbitration had been received from the B/L holders within one year from completion of discharge of the cargo, as provided for in the Hague-Visby Rules, the B/L holders’ claim was time-barred. The appellants sent the B/L holders a copy of the 9 March 2004 charterparty on 18 December 2006. On 9 January 2008, however, the appellants’ solicitor deposed in an affidavit in the Singapore court proceedings that the relevant charterparty was in fact the 9 September 2004 charterparty between Goodearth and Grand Loyal, which also contained a London arbitration clause.

On 10 January 2008, the appellants sought a stay of the Singapore court proceedings in favour of arbitration in London, on the basis of the arbitration clause that had been allegedly incorporated by reference into the Bill of Lading. The Assistant Registrar ordered a stay on condition that, inter alia, the appellants

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1. The appellants also applied to set aside the second renewal of the writ, on the ground that the vessel had called in Singapore during the currency of the first renewal and that service of the writ should have been effected at that time. The Assistant Registrar granted the application, but this decision was reversed on appeal.

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waive the defence of time bar under the Hague-Visby Rules in the arbitration proceedings in London. On 28 July 2008, the appellants filed an appeal against this decision.

The High Court, per Andrew Ang J, dismissed the appeal, holding that the court has an “unfettered discretion” under Singapore law to impose terms and conditions upon a stay of proceedings in favour of arbitration. It added that this discretionary power must be exercised judiciously, the main guiding principle being that the court, though in principle slow to interfere in the arbitration process, should not be reluctant to impose conditions “where the justice of the case calls for it”. Here, the court found that justice demanded that a stay be granted on the condition that the appellants waive the defence of time bar in the arbitration proceedings to be commenced in London. The court reasoned that it would be wrong for the B/L holders to be subject to the defence of time bar under the Hague-Visby Rules, “in light of the uncertainty and confusion surrounding the identity of the charterparty referred to in the Bill of Lading”.

Excerpt

[1] “This was an appeal against the decision of the assistant registrar (AR) in Admiralty in Rem No. 112 of 2005 granting a stay of proceedings in favour of arbitration in England. Specifically, the appeal was brought against one of the conditions imposed by the AR for the stay of court proceedings, viz, the condition that the appellants/defendants waive the defence of time bar in the arbitration proceedings. At the end of the hearing of the appeal, I dismissed the appeal with costs fixed at $2,500 and disbursements.

(...) [2] “The relevant statutory provision which empowers the court to impose conditions when granting a stay of proceedings in favour of arbitration is Sect. 6(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed). This provision states that when an application is made by a party in accordance with Sect. 6(1) the court must order a stay of court proceedings unless the arbitration agreement is ‘null and void, inoperative or incapable of being performed’ but may impose ‘such terms or conditions as it may think fit’. Such empowerment of the court stands in contrast to Sect. 9 of the Arbitration Act 1996 (UK) (the English equivalent of Sect. 6 of the International Arbitration Act) where, if the criteria for a stay of court proceedings in favour of arbitration are made out, the court is obliged to stay proceedings for arbitration without condition (David Joseph QC, Jurisdiction and Arbitration Agreements and their Enforcement (Sweet & Maxwell,
It is similar to Australian legislation, where Sect. 7(2) of the Arbitration (Foreign Awards and Agreements) Act 1974 provides that the court may impose ‘such conditions (if any) as it thinks fit’ when ordering a stay of proceedings in favour of arbitration.

[3] “The discretion of the court to impose terms and conditions upon a stay of court proceedings in favour of arbitration is an unfettered discretion. This was the view of Lai Siu Chiu J in Splosna Plovba International Shipping and Chartering d.o.o. v. Adria Orient Line Pte Ltd [1998] SGHC 289. She held (at [23]):

‘My orders as well as the original orders of the deputy registrar were made in accordance with Sect. 6(2) of the [International Arbitration Act], that a stay could be ordered on such terms and conditions as the court may think fit. I find no provisions in the Act and certainly I was informed of none by counsel for the defendants, that fettered the discretion of a court in imposing terms for granting a stay. Counsel did not cite any authorities for the defendants’ argument that Sect. 6(3) overrides Sect. 6(2) of the Act. A plain reading of Sect. 6(3) does not support his interpretation.’ (Emphasis added)

[4] “With respect, Lai J’s opinion appears to me to be in accord with the intention of the legislature. The power to impose terms and conditions on a stay of court proceedings was present in the original version of the International Arbitration Act (ie, Act 23 of 1994). This power was retained in the subsequent significant overhaul of arbitration legislation (the result of which is the present version of the International Arbitration Act). The overhaul was initiated in 1997, when the Review of Arbitration Act Committee (the Committee) was formed by the Attorney-General to review arbitration legislation in Singapore. By 2001, the Committee completed their final report, together with a draft Arbitration Bill (for domestic arbitration) and a draft International Arbitration (Amendment) Bill. In the final report, the Committee noted that the Arbitration Bill would give the court ‘the additional power to order stay on terms as it thinks fit’ and stated that this was adopted from the International Arbitration Act (ie, Act 23 of 1994). No mention of any fettering of the court’s discretion in this respect, vis-à-vis both the proposed Arbitration Bill and International Arbitration (Amendment) Bill, was mentioned by the Committee (or in the subsequent parliamentary debates).

[5] “That having been said, discretionary power must, of course, be exercised judiciously. The corollary to a wide discretionary power is the great caution with which it should be exercised. Unfortunately, there is little case law (both local and from Australia) on the court’s exercise of its discretion with regard to the imposing of conditions on a stay of court proceedings in favour of arbitration.
[6] “The main guiding principle in my view is that courts generally should be slow to interfere in the arbitration process. In recent years, courts have moved from strong uncertainty as to the arbitration process resulting in extensive judicial interference or the non-enforcement of arbitration agreements to a position in favour of arbitration, i.e. deferring to party autonomy and avoiding intervention where possible (Julian DM Lew QC et al, Comparative International Commercial Arbitration (Kluwer Law International, 2003) p. 356).

[7] “Nevertheless, in a case such as this, the court should not be reluctant to intervene by exercising its statutory power to impose conditions where the justice of the case calls for it. As Lai Kew Chai J, in The XANADU [1998] 1 SLR 767, observed (at [6]), the court is ‘entitled to impose terms and conditions as appear reasonable or required by the ties of justice’. But even then, a condition imposed as to the waiver of a defence of time bar can only be justified in ‘very special circumstances as it takes away a substantive right of one of the parties’ (see the commentary on The XANADU in Halsbury’s Laws of Singapore – Arbitration, Building and Construction, vol. 2 (LexisNexis, 2003 Reissue) at para. 20.044).

[8] “In The XANADU, the defendants applied for a stay of the plaintiffs’ action on the basis that the contracts of carriage upon which the plaintiffs’ claim was brought provided for the claim to be dealt with by way of arbitration in London. The stay was granted by the AR on the condition that, inter alia, the defendants waive the defence of time-bar in the arbitration proceedings. The defendants appealed against this condition. Lai J dismissed the appeal and, in doing so, held (at [6]):

‘I was not persuaded that the learned assistant registrar had exercised her discretion erroneously in any way. Although she had to order a stay, she was entitled to impose terms and conditions as appear reasonable or required by the ties of justice. For the following reasons, I would go further and state that I would have imposed the same condition in the circumstances of this case. First, there was, at the least, sufficient ambiguity which was reasonably entertained by the plaintiffs on the question whether the relevant bill of lading had identified the arbitration clause which was invoked. It was therefore reasonable for the plaintiffs to have commenced these admiralty proceedings. Secondly, the defendants waited until after early September 1996, after the expiry of the time-bar, before they filed their application on 20 September 1996 to stay these proceedings. It was noteworthy that the statement of claim was filed on 13 August 1996. Thirdly, if the condition was not imposed, the plaintiffs
would suffer undue and disproportionate hardship, seeing that their claim is in excess of US$ 222,518.'

[9] “In my opinion, the respondents [the B/L holders] in the present case could not be faulted for failing to institute arbitration proceedings. The Bill of Lading did not contain any arbitration agreement and the only reference to an arbitration agreement was in the reverse side which provided, inter alia, for the incorporation of ‘[a]ll terms and conditions, liberties and exceptions of the [Charter Party], dated as overleaf, including the Law and Arbitration Clause’. However, there was no identification of the relevant charterparty on the front page of the Bill of Lading. The respondents were only informed of the identity of the relevant charterparty after the expiry of time for instituting proceedings.

[10] “The claim for compensation was first made by the respondents on 14 June 2005, when their Hong Kong solicitors sent a letter of demand to the appellants. Sixteen days later, on 30 June 2005, the appellants referred the claim to their Protection & Indemnity Club, the American Club (the American Club), to deal with the matter. About a month later, on or about 21 July 2005, the American Club responded to the claim by advising the respondents that they were reviewing the claim documents and seeking further clarification from their experts and correspondents. The claim was investigated by the American Club from 21 July 2005 to sometime before 20 November 2006. During this period of time, neither the appellants nor the American Club made reference to the incorporation of charterparty terms regarding arbitration.

[11] “It was only on 13 December 2006 that the appellants informed the respondents that the Bill of Lading incorporated the terms of the charterparty dated 9 March 2004 between Anchor Navigation and Parkroad … which contained a London arbitration clause and that, as no notice of arbitration had been received from the respondents within one year from completion of discharge of the Cargo, the respondents’ claim was time barred. The appellants’ English solicitors subsequently deposed in an affidavit dated 9 January 2008 that the Bill of Lading incorporated the charterparty dated 9 September 2004 between Goodearth and Grand Loyal … which also contained a London arbitration clause, rather than the charterparty dated 9 March 2004. The respondents’ Hong Kong solicitors deposed in an affidavit that the respondents were never privy to the terms of the charterparty dated 9 March 2004 or the charterparty dated 9 September 2004 or, indeed, any other charterparty. The respondents were only provided with a copy of a charterparty, viz, the charterparty dated 9 March 2004, on 18 December 2006. This was the first time that the respondents had seen an arbitration clause in the course of the pursuit of
the claim. As for the charterparty dated 9 September 2004, the respondents had never seen it prior to the service of the appellants’ English solicitor’s affidavit dated 9 January 2008.

[12] “The incorporation of the charterparty dated 9 September 2004 takes a rather confused and indirect route. The appellants, in their submissions to the AR, contended that the Bill of Lading was clearly intended to be used with a charterparty and this was the fixture note between Goodearth and the respondents (... the Fixture Note). The Fixture Note itself referred to a charterparty dated 9 September 2004 between Goodearth and Anchor Navigation. The appellants admitted to the AR that there was no such charterparty between Goodearth and Anchor Navigation but produced a letter from the solicitors of Goodearth stating that the charterparty referred to in the Fixture Note was the charterparty between Goodearth and Grand Loyal ... and not Anchor Navigation. The AR accepted the appellants’ explanation that there was a mistake made in the Fixture Note and that it had intended to refer to the charterparty between Goodearth and Grand Loyal. She concluded that there was no charterparty between Goodearth and Anchor Navigation dated 9 September 2004, and therefore the parties must have been referring to the charterparty between Goodearth and Grand Loyal.

[13] “In my view, it would be wrong for the respondents to be subject to the defence of time bar in light of the uncertainty and confusion surrounding the identity of the charterparty referred to in the Bill of Lading. It would be unreasonable to expect the respondents to comply with an arbitration agreement found in a charterparty, the identity of which the appellants themselves were not certain of. In The XANADU, the presence of ambiguity vis-à-vis the arbitration agreement was one of the reasons expressed by Lai J as to why he would have imposed the condition of a waiver of the defence of time bar on the defendants (see [at [8]] above). I would go further and say that it is a compelling reason when the ambiguity is egregious, as it was in the present case.

[14] “Based on the foregoing, I felt that the justice of this case demanded the imposition of the condition that the appellants waive the defence of time bar in the English arbitration proceedings. Counsel for the appellants submitted that there was room for the respondents to seek an extension of time for the commencement of arbitration via the arbitral process and Sect. 12 of the Arbitration Act 1996 (UK). However, in my view, justice had to be done (or ensured) in substance with the imposition of the condition that the appellants waive the defence of time bar. In this respect, I stand guided by Lord Mansfield CJ in Alderson v. Temple, 98 ER 165, where his Lordship stated (at 167):
‘[T]he most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial justice.’


‘Arguments of every kind have been deployed over the years to persuade courts that the interests of justice lie in the issues being determined elsewhere, although in very many cases the true position is that the defendant’s real interest is to ensure (if at all possible) that the issues will in practice never be determined at all.’

[16] “The present case appears to be of that ilk; the appellants in the present case do not appear to have any bona fide intention to have the respondents’ claim arbitrated. They appear all too clearly to be trying all ways and means to avoid an adjudication of the matter, as demonstrated by the fact that they mounted an unmeritorious application to the Court of Appeal for leave to appeal against the decision of Choo J upholding the renewal of the Writ. The appeal was bound to fail as there was clearly no prima facie case of error, question of general principle decided for the first time, or question of public importance – those being the situations where leave to appeal would be granted (see Lee Kuan Yew v. Tang Liang Hong [1997] 3 SLR 489 at [16]). In the event, it did fail.

[17] “In the result, I dismissed the appeal with costs fixed at $2,500 plus disbursements.”

Parties: 
Plaintiff: P.T. Tri-M.G. Intra Asia Airlines (Indonesia)  
Defendant: Norse Air Charter Limited (Mauritius)

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Subject matters: 
– stay of court proceedings and referral to arbitration  
– conflicting forum selection clause and arbitration clause  
– conditions for granting a stay in favor of arbitration

Commentary Cases: 
[1]-[50] = ¶ 220; [51]-[62] = ¶ 219; [63]-[64] = ¶ 217

Facts

By an Aircraft Lease Agreement of 17 January 2007 (the Agreement), P. T. Tri-M. G. Intra Asia Airlines (Tri-M.G.) leased a Boeing aircraft to Norse Air Charter Limited (Norse) from 1 February 2007 to 31 January 2008. The High Court quoted two apparently contradictory clauses of the Agreement:

“Clause 15 ARBITRATION
All disputes under this Agreement shall be submitted for resolution by arbitration pursuant to the Rules of conciliation and Arbitration of the International Chamber of Commerce in effect as of the date any dispute arose.

Clause 22 GOVERNING LAW AND JURISDICTION
22.1 This Agreement shall be governed and construed in accordance with the laws of The Republic of Singapore.  
22.2 Each of the parties to this Agreement agrees for the exclusive benefit of the others (sic) that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any
A dispute arose between the parties and Norse terminated the Agreement as of 25 July 2007. On 18 August 2008, Tri-M.G. commenced an action against Norse in the Singapore High Court, seeking US$ 324,485.42 allegedly due and owing under the Agreement and a further US$ 420,000 for Norse’s early termination of the Agreement. Norse filed an application to stay court proceedings in favor of arbitration.

The High Court, per Darius Chan, Assistant Registrar, granted the application, finding that upon a proper construction of the Agreement clause 15 contained a valid arbitration agreement while clause 22.2 referred to the supervisory jurisdiction of the Singapore courts over the arbitration. The dispute between the parties should therefore be settled in arbitration.

The court acknowledged that a literal reading of clause 22.2 did not commend itself prima facie to such a construction, but reasoned that “the degree of infelicity in the language” of that clause did not warrant a different conclusion. Also, such a construction would best give effect to the intentions of the parties, as expressed in their correspondence prior to the court proceedings. The court noted Tri-M.G.’s “categorical stand” in that correspondence that the dispute would be referred to arbitration.

The High Court then held that, contrary to Tri-M.G.’s assertion, there was a dispute between the parties as Norse had made no admission of both liability and quantum in relation to Tri-M.G.’s claims and had on the contrary disputed its liability. The court finally held that the justice of this case did not warrant the imposition of any condition on the stay, namely, that Norse furnish security for costs as required by Tr-M.G.

Excerpt

[1] “The defendant in this application seeks a stay of proceedings pursuant to Sect. 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (IAA). What distinguishes this from a typical stay application is that the contract between parties contains, ex facie, an arbitration clause as well as a jurisdiction clause. This presents an important practice point especially in international commercial contracts where such clauses feature significantly and impact considerably on how risks are managed by the parties.”
1. THE PARTIES’ CASE

1. Norse’s Case

[2] “Counsel for Norse, Ms. Shanna Ghose, unsurprisingly submitted that the dispute in the present case ought to be referred to arbitration. In her written submissions, she raised four arguments in support. First, she cited Robert Merkin, Arbitration Law (LLP, Service Issue No. 50. 1 September 2008) (Merkin) at [5.13]-[5.14] for the proposition that when there is an inconsistency in a contract in relation to the dispute resolution mechanism, as a matter of policy, the courts will give priority to the obligation to arbitrate.

[3] “Ms. Ghose’s second argument rested on Paul Smith Ltd v. H & S International Holding Inc [1991] 2 Lloyd’s Rep 127 (Paul Smith) where the contract between the parties had two similarly distinct dispute resolution clauses. The learned Steyn J construed the contract and held that the jurisdiction clause was to be interpreted as a reference to the law governing the arbitration, i.e., the curial law or the lex arbitri. Read in that light, the jurisdiction clause was not an impediment to him granting a stay of proceedings in favour of arbitration. This approach in Paul Smith was cited by the learned Moore-Bick J in Shell International Petroleum Co Ltd v. Coral Oil Co Ltd [1999] 1 Lloyd’s Rep 72 (Shell).

[4] “Ms. Ghose submitted that a similar construction ought to be applied to clauses 15 and 22.2 of the Agreement. She argued that such a construction would be consistent with parties’ intention, which in her submission, was that all disputes would be referred to arbitration. She pointed out that when parties were trying to resolve the dispute, Tri-M.G. itself had made repeated requests to amend the arbitration agreement from an International Chamber of Commerce (ICC) arbitration to one conducted under the auspices of the Singapore International Arbitration Centre (SIAC) by a single arbitrator in Singapore. These requests are evidenced in the correspondence between parties exhibited in the affidavit of Mohd Yunos Bin Mohd Ishak (Yunos), Executive Chairman of Tri-M.G. [footnote omitted].

[5] “The third argument advanced by Ms. Ghose foreshadowed Tri-M.G.’s case. She contended that clauses 15 and 22.2 of the Agreement should not be construed as giving the parties an option to elect between arbitration and litigation. This was in response to the principle espoused in David St John Sutton, Judith Gill and Matthew Gearing, Russell on Arbitration (23rd ed., Sweet & Maxwell, 2007) (Russell) at [2-018], which states that where a dispute resolution

provision contains an arbitration agreement but also provides one party with an
option to litigate, that provision will be upheld provided it is clear and
unequivocal. Russell cites *Law Debenture Trust Corp Plc v. Elektrim Finance BV* [2005]
EWHC 1412 (*Law Debenture*) in support. Locally, the learned Goh Joon Seng J
in ‘*The Dai YUN Shan*’ [1992] 2 SLR 508 had recognized that an arbitration
agreement could give either party a choice between arbitration and litigation.
Ms. Ghose sought to distinguish those two cases by confining them to the specific
language of their dispute resolution provisions.

6.  “The final argument of Ms. Ghose was based on the canon of construction
whereby when there are two inconsistent clauses in a contract, the later clause
is to be rejected as repugnant and the earlier clause prevails. However, if the
court can read the later clause as qualifying rather than destroying the effect of
the earlier clause, then the two are to be read together and effect given to both:
see Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2007) at
[9.08]. Ms. Ghose observed that this canon of construction had been cited locally
in argument in *Al Stainless Industries Pte Ltd v. Wei Sin Construction Pte Ltd* [2001]
SGHC 243. She urged the court to excise clause 22.2 of the Agreement pursuant
to this canon.”

2.  *Tri-M.G.’s Case*

7.  “The written submissions of counsel for Tri-M.G., Mr. Ooi Oon Tat,
sought to persuade the court that on a proper construction of the Agreement,
clauses 15 and 22.2 gave parties an option to proceed with either arbitration or
litigation. He distinguished *Paul Smith* (supra at [3]) on two grounds. First, he
emphasized that the wording of the jurisdiction clause in *Paul Smith* is different
from clause 22.2 of the Agreement and that the phraseology employed in clause
22.2 would be inconsistent with a finding that that clause referred to the
Singapore courts having mere supervisory jurisdiction over the arbitration. I
propose to scrutinize the case law later in this judgment. At this juncture it
would be appropriate to record the court’s appreciation to Mr. Ooi’s candour
in raising the *Paul Smith*-line of authorities which was prima facie adverse to his
case and which was not cited by Ms. Ghose during the hearing.

8.  “The second ground on which Mr. Ooi attempted to distinguish *Paul Smith*
(supra) was by submitting that it was decided before the enactment of the
Arbitration Act 1996 (UK) when the judicial climate in England was more
interventionist. He went on to argue that interpreting a submission to the
Singapore court’s jurisdiction as merely allowing the courts supervisory
jurisdiction over the arbitration is contrary to the doctrine of party autonomy.
That doctrine recognizes that parties are at liberty to choose for themselves the procedures and legal rules applicable to their contractual relationship: see Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (4th ed., Sweet & Maxwell, 2004) at [2-34].

[9] “The written submissions on this point were regrettably difficult to follow but it appears Mr. Ooi’s argument essentially was that the adoption of the construction in Paul Smith (supra at [[3]]) would impose a curial law upon the parties that deprives parties of their liberty of that choice. My response is that it is axiomatic that the entire exercise of construction is precisely to ascertain what the parties had agreed to in the first place. If the court finds, upon a proper construction exercise, that parties had indeed made a choice of seat of arbitration or curial law in their Agreement, that exercise serves to give effect to, and not derogate from, the doctrine of party autonomy.

[10] “The next contention of Mr. Ooi was that Norse had committed a repudiatory breach of the arbitration agreement which resulted in Tri-M.G.’s termination of the same. To elaborate on the factual matrix mentioned (supra at [[4]]), Yunos deposed in his affidavit that before this suit was initiated, parties had a meeting through the same set of solicitors in an attempt to resolve the matter amicably. After that meeting, Mr. Ooi wrote a letter on behalf of Tri-M.G. seeking the formal consent of Norse to a variation of clause 15 of the Agreement, whereby it was proposed that instead of arbitration under the ICC, the arbitration was to be held in Singapore before a single named arbitrator under the SIAC or such rules as may be agreed between the parties (the proposed variation). The proposed arbitrator was to be the same arbitrator who had been appointed to hear a dispute in Singapore under the SIAC rules between Executive Jet (Charters) Pte Ltd (EJA) and Norse Leasing Limited (NLL). NLL was a company under Norse’s group of Pte Ltd (EJA) and Norse Leasing Limited (NLL). NLL was a company under Norse’s group of companies. Yunos, on the other hand, was a shareholder and non-executive director of EJA.

[11] “In that letter, Mr. Ooi imposed a deadline of seven days from the date of the letter on Norse to provide a written acceptance of the proposed variation. Ms. Ghose’s firm replied that they were taking instructions from Norse but it appears that there was no subsequent reply forthcoming from Norse or its solicitors.

[12] “Mr. Ooi submitted that time was made of the essence when he imposed the deadline of seven days and the failure of Norse to respond constitutes a repudiatory breach which entitles Tri-M.G. to terminate the arbitration agreement. Mr. Ooi anchored his submission on the principle that where time was not originally of the essence of the contract, but one party has been guilty of
undue delay, the other party may give notice requiring the contract to be performed within a reasonable time: see Chitty on Contracts (29th ed., Sweet & Maxwell, 2004) at [21-014]. He further submits that once proper notice making time of the essence is served, breach of that notice allows the innocent party to terminate the contract.

[13] “I have no hesitation in rejecting this argument in limine for being misconceived in law. The only effect of the lack of response by Norse was the lapsing of the offer of the proposed variation. Any undue delay on the part of Norse was in its response to the proposed variation and not in its performance of its obligations under the arbitration agreement. Accordingly, any delay would not affect the arbitration agreement.

[14] “Further, as Ms. Ghose pointed out during the hearing, Tri-M.G. cannot unilaterally vary the arbitration agreement such that it is now a condition that Norse had to respond to the proposed variation by the deadline imposed. I accept Mr. Ooi’s general proposition that a party may, under certain circumstances, commit a repudiatory breach of an arbitration agreement thereby permitting the innocent party to bring the arbitration agreement to an end: see David Joseph QC, Jurisdiction and Arbitration Agreements and Their Enforcement (Sweet & Maxwell, 2005) (Joseph QC) at [4.23]; John Downing v. Al Tameer Establishment and anor [2002] EWCA Civ 721 at [23].”

[15] “However, the specific argument advanced by Mr. Ooi in relation to the present facts is, with respect, misplaced. Chitty (supra at [[12]]) states at [21-014]:

‘Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time. … Notice making time of the essence of the contract can be given in relation to any term of the contract: entitlement to give notice is not confined to essential terms of the contract. … Once notice has been given, both parties are bound by it so that, if the party giving the notice is not ready to perform on the expiry of the notice, the other party may be entitled to terminate. (Emphasis added)

Chitty at [21-017] elucidates on the last sentence of the extract above:

‘Where, however, notice is given by one party purporting to make “time of the essence” in respect of a breach of a non-essential term of the contract, the consequences are altogether different. Such a notice does not serve to make time of the essence so far as the obligations in the original contract are concerned, because one party cannot unilaterally vary the terms of a contract by turning what was previously a non-essential term of the contract into an essential term: the notice “has in law no contractual import”…. Given that the notice cannot have the effect of turning the non-essential term of the contract into a condition, the party giving the notice can only terminate where the failure of the other party to comply with the terms of the notice goes to the root of the contract so as to deprive that party of a substantial part of the benefit to which he was entitled under the terms of the contract. Failure to comply with the terms of the notice can therefore only be used as evidence of a repudiatory breach; it is not a repudiatory breach per se.’

[16] “For Mr. Ooi’s argument to succeed, it must first be a term of the arbitration agreement that Norse was obligated to respond to the proposed variation by the imposed deadline. On the basis of the evidence before me, I cannot see how Norse had agreed to such an obligation. Even assuming arguendo that there is such an obligation, it does not mean that Norse’s failure to comply with the terms of the notice is a repudiatory breach of the arbitration agreement per se. At no time was Tri-M.G. deprived of the substantial part of the benefit of the arbitration agreement, viz for the dispute to be referred to arbitration. This is in fact well recognized by Tri-M.G. itself. After Norse had failed to reply to Tri-M.G. by the imposed deadline, Tri-M.G. sent a letter through Mr. Ooi dated 12 May 2008 [footnote omitted]. Mr. Ooi wrote that if Norse failed to reply by that same day, Tri-M.G. ‘would have made the request to arbitration under the ICC this evening’. That closing remark speaks volumes.

[17] “The final argument raised by Mr. Ooi was in response to the canon of construction advanced by Ms. Ghose (see supra at [[6]]). Mr. Ooi cited Gerard McMeel, The Construction of Contracts (2007, Oxford University Press) (McMeel) at [4.18]-[4.21] which states that the traditional rule that where two clauses are repugnant the former prevailed and the latter rejected is thought to be ‘a mere rule of thumb and to be used only as a last resort’. McMeel submits that ‘such a rule no longer represents good English law’ and explains that: ‘The modern principle is that the court will treat as repugnant a clause which is inconsistent with the main purpose of the contract, or with the intentions of the parties
objectively ascertained from the whole of the contract in its relevant contextual setting.”

[18] “On this topic of canons of construction, I queried counsel during the hearing which party bore the responsibility for drafting the Agreement, having in mind the applicability of the contra proferentem rule. Unfortunately both counsel had no instructions and therefore I could place no reliance on that rule.”

II. WHETHER THERE IS A VALID ARBITRATION AGREEMENT

1. Case Law

[19] “Having crystallized the parties’ submissions, it is clear that I have to construe the Agreement, an exercise which both counsel did not disagree that I should undertake. Since there appears to have been no reported local authority on this point, I propose to evaluate case law from other jurisdictions to consider their applicability to the instant case. I commence with the cases cited by counsel.

[20] “Paul Smith (supra at [3]) concerned a licensing agreement whereby the plaintiff granted the defendant a licence to manufacture, promote, distribute and sell in North, Central and South America sports clothing designed by the plaintiff. The arbitration clause in that agreement was clause 13 entitled ‘Settlement of Disputes’. It read as follows:

‘If any dispute or difference shall arise between the parties concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so, the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those rules.’

There was ex facie an exclusive jurisdiction clause in that agreement which was clause 14 entitled ‘Language and Law’. It provided as follows:

‘This Agreement is written in the English language and shall be interpreted according to English law. The courts of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit.’

(Emphasis added)
“Steyn J recognized that even though the phrase ‘over it’ in the clause above was, strictly speaking, referring to the agreement between the parties, that clause should be construed as referring to the curial law instead. That was because, in his view, treating the arbitration clause to be pro non scripto (ie, as if it were not written) was unattractive in the context of an international commercial contract. He rejected an interpretation that would entail reading the phrase ‘subject to clause 13’ into the latter clause because of ‘the linguistic manipulation required and the unbusinesslike spectre of some disputes going to court and some to arbitration’. It is also pertinent to note that in this case the Court of Arbitration of the ICC had confirmed London as the place of arbitration.

Mr. Ooi urged the court not to adopt the construction employed in Paul Smith (supra at [[3]]) because it would be incompatible with the clear language of clause 22.2 of the Agreement. He argued that the language used in clause 22.2 of the Agreement was of a wider and more definite nature than the relatively sparsely worded jurisdiction clause in Paul Smith.

“Paul Smith (supra at [[3]]) was cited subsequently in Shell (supra at [[3]]). Shell involved, inter alia, a services agreement that was entered into by the plaintiff to provide assistance to the defendant to enable the defendant to blend and produce lubricating oils for sale in Lebanon and the Middle East. The services agreement contained ex facie a jurisdiction clause entitled ‘Applicable law’ in the following terms:

‘This Agreement, its interpretation and the relationship of the parties hereto shall be governed and construed in accordance with English law and any dispute under this provision shall be referred to the jurisdiction of the English Courts.’

The next clause was the arbitration clause entitled ‘Arbitration’ which provided as follows:

‘Any dispute which may arise either in contract or at law of or in connection with this Agreement shall be finally and exclusively settled by arbitration by three arbitrators in London, England in accordance with the Rules of the London Court of International Arbitration at the date hereof.’

Moore-Bick J held that the two clauses above could be reconciled by requiring any dispute on the proper law of the contract to be referred to the English court and that all other disputes would be referred to arbitration. Whilst the language of the two clauses in Shell could be distinguished from the instant
case, what is most germane is the observation by Moore-Bick J that in his judgment the parties did intend substantive disputes to be referred to arbitration. Merkin (supra at [2]) at [5.13] opined that the court ‘felt that the existence of an arbitration clause was strongly indicative of the parties’ intentions and that the construction adopted made sense of each of the provisions’.

[25] “I now turn to analyze other relevant cases that were not raised by counsel. In The NERANO [1994] 2 Lloyd’s Rep 50, a bill of lading contained words sufficient to incorporate an arbitration clause in the underlying voyage charterparty that read as follows: ‘That should any dispute arise between the Owners and Charterers the matter in dispute shall be determined in London, England, according to the Arbitration Acts, 1975 to 1979 and any amendments or modifications thereto and English law to govern.’ However, the bill of lading also contained a clause that stated that ‘English law and jurisdiction applies’. In deciding whether the arbitration clause had been successfully incorporated in the bill of lading, the learned Clarke J held (at 55) that the two clauses were reconcilable and the reference to English jurisdiction was not inconsistent with a submission to arbitration; it simply meant that the English court was to retain supervisory jurisdiction over the arbitration since under the arbitration clause, the arbitration was to take place in England. This reasoning was approved on appeal by the learned Saville LJ in The NERANO [1996] 1 Lloyd’s Rep 1 at 43 with whom the learned Aldous LJ and Glidewell LJ concurred.

[26] “A more recent case is Axa Re v. Ace Global Markets Limited [2006] EWHC 216 (Comm) (Axa Re), where there was an arbitration clause in a reinsurance contract which provided as follows:

‘15 ARBITRATION
15.1 The parties agree that prior recourse to courts of law any dispute between them concerning the provisions of this contract shall first be the subject of arbitration....
15.9 The seat of the arbitration shall be in London and the arbitration tribunal shall apply the laws of England as the proper law of this contract unless indicated in section L to the schedule....’

There was also ex facie a jurisdiction clause which read as follows: ‘This Contract shall be subject to English Law and Jurisdiction.’

[27] “The learned Gloster J applied Paul Smith (supra at [3]) and held (at [34]) that the reference to English jurisdiction fixed the supervisory court of the

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arbitration. In arriving at her holding, Gloster J had to deal with *Indian Oil Corporation v. Vanol Inc* [1991] 2 Lloyd’s Rep 634 (*Indian Oil*) which was raised in argument. In that case which involved a sale of kerosene oil CIF Yanbu, there was an incorporated arbitration clause in standard terms which read as follows:

(a) The contract shall be governed by the laws of India.
(b) In the event of any dispute arising between the two parties relating to the various terms and conditions set forth in the contract the two parties undertake to resolve the differences by mutual consultation. In the event of their inability to resolve the dispute, the parties herein undertake to refer such disputes to an arbitrator: the arbitration shall take place in India.’

However, parties had also agreed to a clause as follows:

‘Law: the validity construction and performance of the agreement shall be governed by English law and all disputes arising thereunder shall be submitted to the jurisdiction of the English Courts.’

[28] “The learned Webster J in *Indian Oil* held that the terms of the written document, which contained the specifically agreed clause as to English law, took precedence over the arbitration clause, which had been incorporated merely by reference to the plaintiff’s general terms and conditions for import of products. Webster J concluded that when there were two incompatible clauses, the specifically agreed clause was to be preferred over the incorporated standard clause. There was a subsequent appeal which did not affect this particular holding: see *Indian Oil Corporation v. Vanol Inc* [1992] 2 Lloyd’s Rep 563.

[29] “Gloster J in *Axa Re* (supra at [26]) distinguished *Indian Oil* (supra at [27]) on two grounds (at [37]): (i) that case involved an arbitration clause that was incorporated as part of the standard terms and a jurisdiction clause that was specifically agreed to; and (ii) in his view the two clauses in *Indian Oil* were ‘clearly mutually inconsistent’. Merkin (supra at [2]) at footnote 7 to [5.13] is of the view that in light of ‘*Axa Re* and the earlier decisions … it might be thought that *Indian Oil* is now of little if any weight’.

a software licence agreement with a jurisdiction clause nominating the English courts as well as an arbitration clause. In addition, parties entered into a maintenance agreement that had a jurisdiction clause nominating the English courts, an entire agreement provision, but no arbitration clause. When disputes arose, one party sought to initiate arbitration proceedings in London but the other party sought an injunction before Garland J opposing the arbitration. Garland J granted the injunction by holding that the arbitration clause in the licence agreement was ineffective. He acknowledged that it was a difficult decision but was motivated by the particular circumstances of that case and the relationship of the parties, where there may well be disputes which overlapped between the two contracts and disputes which may be discrete. He was of the view that it was preferable to construe both contracts consistently to provide one dispute resolution mechanism for disputes arising out of both contracts and since the maintenance agreement had an entire agreement provision, it was not open to him to write the arbitration clause into the maintenance agreement.

[31] “MH Alshaya (supra at [30]) has come under criticism by two learned authors, Merkin (supra at [2]) at [5.14] and Joseph QC (supra at [14]) at [4.74]. Both of them proffer the same solution to this case. They suggest that Garland J ought to have held that on a proper construction of the licence agreement, substantive disputes had to be referred to arbitration with the English courts having supervisory jurisdiction over the arbitration. Disputes under the maintenance agreement however would be referred to the English courts. In so far as the disputes under the maintenance agreement overlapped with those under the licence agreement, the English court would have been entitled, pursuant to its inherent jurisdiction, to stay those proceedings and accept the conclusion of the arbitral tribunal on those issues by way of issue estoppel.

[32] “To my mind, Indian Oil (supra at [27]) and MH Alshaya (supra at [30]) are unhelpful to the instant case because those decisions essentially turned on their unique factual matrices. Indian Oil concerned an incorporated term for arbitration by reference to the general terms and conditions of one party on the one hand and an express jurisdiction clause on the other. MH Alshaya involved two contracts where the paramount concern of the judge was the consistency of results for disputes arising under the two closely connected contracts. Those special features are absent from the instant case. In any event, whilst it is unnecessary for me to render any conclusive views, I have set out how the correctness of both decisions has been questioned by learned writers: see supra [[29]] and [[31]].

[33] “Returning to the trilogy of Paul Smith (supra at [3]), Shell (supra at [3]) and Axa Re (supra at [26]), all three cases were cited and applied in McConnell
Dowell Constructors (Aust) Pty Ltd v. National Grid Gas plc [2006] EWHC 2551 (TCC) (McConnell) by the learned Jackson J. McConnell involved a contract for the construction of a gas pipeline in Lancashire, England by the Australian plaintiff. That contract contained ex facie a jurisdiction clause which provided as follows:

‘5. The Contract shall be governed by and construed in accordance with English Law and in the event of any dispute relating thereto the parties hereby submit to the jurisdiction of the Courts of England.’

The contract also included detailed provisions on how disputes are first to be referred to the project manager, then to adjudication if still unresolved and finally to arbitration if parties are dissatisfied with the decision of the adjudicator. The relevant portions of the arbitration agreement read:

‘1. .... The Adjudicator is to be agreed between the parties....
9. Disputes and determination: The person who will choose a new adjudicator if the Parties cannot agree a choice is the President for the time being of the Institution of Civil Engineers. The tribunal is arbitration.
10. Optional statements: The arbitration procedure is the Institution of Civil Engineers Arbitration Procedure (England and Wales) 1997....’

[34] “Jackson J was of the view (at [58]) that the reconciliation of the dispute resolution provisions according to the approach in Paul Smith (supra at[[3]]) made good commercial sense and was in accordance with the expressed intention of the parties.
[35] “The final English authority to be considered which involves a variation of the present factual scenario is the very recent decision of the learned Christopher Clarke J in Ace Capital Ltd v. CMS Energy Corporation [2008] EWHC 1843 (Comm) (Ace Capital).4 That case concerned an insurance policy between the insured Michigan corporation and its underwriters. The policy contained an arbitration clause specifying arbitration at the London Court of International Arbitration in London for the resolution of all disputes. It also contained a clause entitled ‘Service of Suit Clause’ by which the underwriters agreed to submit to the jurisdiction of any court of competent jurisdiction in the United States in the event the underwriters failed to pay any monetary claims of the insured. The insured had commenced proceedings in the United States and the underwriters sought an injunction before Christopher Clarke J to restrain those proceedings.

It was not open to the judge to hold that the United States courts had supervisory jurisdiction over the arbitration since London had been expressly designated as the seat of the arbitration.

[36] “Counsel for the insured in that case pressed for a construction whereby monetary claims may be tried in the United States at the option of the insured, but if there is a non-monetary claim (e.g., a claim for a declaration of liability or non-liability where there is as yet no monetary claim) then it must be arbitrated. Christopher Clarke J rejected such an argument and held, upon a construction of the policy, that the arbitration clause ought to be accorded primacy and the ‘Service of Suit Clause’ was only concerned with ensuring that the underwriters were amenable to United States jurisdiction in proceedings to enforce any arbitration award. Such a holding also has, as the judge observed, the support of strong judicial opinion in the United States.

[37] “Whilst Christopher Clarke J canvassed four factors in reaching his decision, the bulwark of his holding was the House of Lords’ decision in *Premium Nafta Products Ltd v. Fili Shipping Co Ltd* [2007] 4 All ER 951. The House of Lords in that case held that the courts would be slow to attribute to reasonable parties an intention that there should be in any foreseeable eventuality two sets of proceedings, viz arbitration and litigation: see also Yeo Tiong Min, ‘The Effective Reach of Choice of Law Agreements’ [2008] 20 SAClJ 723 at [40]-[41]. In the instant case, Mr. Ooi has rightly not pressed for an interpretation that may lead to a situation where some disputes would go to arbitration and some to litigation. Nevertheless one would do well to bear this in mind when approaching this exercise of construction.

[38] “In his review of authorities on both sides of the Atlantic, Christopher Clarke J also referred to the trilogy of *Paul Smith* (supra at [3]), *Shell* (supra at [3]) and *Axa Re* (supra at [26]). What is pertinent for our purposes is that he understood those cases to demonstrate the principle that the contract must be read as a whole and every effort should be made to give effect to all clauses in a contract: see [70]. He also acknowledged that in reaching the ultimate construction of the policy, infelicity in language may invariably have to be endured, especially when the consequence of not doing so would be to regard the arbitration clause, in so far as it relates to monetary claims by the insured as being, at the insured’s option, pro non scripto. Further, the judge emphasized the language of the arbitration clause as being a mandatory ‘all disputes’ arbitration clause: see [95]-[96].

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[39] “Moving from the United Kingdom to the Orient, there is an analogous Hong Kong authority in Arta Properties Limited v. Li Fu Yat Tso and ors [1998] HKCU 721. The learned Findlay J was faced with an arbitration clause which read:

‘In case any dispute or difference should arise between the parties hereto touching or relating to the said development or any other matter or thing arising under this deed/contract the same shall be referred to a “single arbitrator” in accordance with the provisions of the Arbitration Ordinance in Hong Kong or any statutory modification or re-enactment of it for the time being in force.’

However the next clause read:

‘This deed shall be governed by and construed in all respects under the laws of Hong Kong and each party shall submit to the jurisdiction of the Hong Kong courts in case there are any disputes.’

Findlay J held, without citing any of the English cases canvassed thus far, that the reference to the jurisdiction of the Hong Kong courts referred to the supervisory jurisdiction of the courts over the arbitration and accordingly ordered a stay of proceedings and referred the matter to arbitration. He opined thus:

‘The parties have entered into this agreement seriously. It’s a formal agreement. It’s not a home-made agreement written by the parties on a piece of restaurant napkin. They’ve obviously had advice and it’s been drawn up and sealed in a formal way. One must assume that the parties expected what they agreed in this agreement to be effective and to be workable. The court should not strive to frustrate the parties’ wish to implement every clause of this agreement if it is reasonably and sensibly possible to construe the two clauses so that they can sit together.’

[40] “These views above find resonance in the judgment of the learned Lord Goff in Yien Yieh Commercial Bank Ltd v. Kwai Chung Cold Storage Co Ltd [1989] 2 HKLR 639 (PC) at 645: see also Lewison (supra at [[6]]) at [9.13] and McMeel (supra at [[17]]) at [4.11]-[4.13]. Lord Goff suggested that (at 645):

‘But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to
be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction.'

I saw pragmatic commercial sense in the judicial acumen of Findlay J and Lord Goff and respectfully adopt their advice for this exercise of construction.

[41] “Taking into account the international flavour of international commercial contracts such as the Agreement in the instant case, it may be apposite to focus our comparative lenses on jurisprudence beyond the Commonwealth before I proffer my views. In this regard I can do no better than set out verbatim the observations of Emmanuel Gaillard and John Savage in Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, 1999) at [390]:

‘[W]hen faced with an apparent contradiction between an arbitration clause and a clause providing for the jurisdiction of courts, the French courts have systematically attempted to ensure that the former prevails over the latter. As the Paris Tribunal of First Instance held in 1979

“an ambiguous arbitration clause should be interpreted by considering that if parties had not wished to submit their disputes to arbitration, they would simply have refrained from mentioning the possibility of doing so; … by including an arbitration clause in their contract, they demonstrated that it would be necessary to submit any disputes arising from their contract to [the arbitral tribunal to which they referred]”.

In 1991, the Paris Court of Appeal reached a similar conclusion in a case arising from contracts containing a clause attributing jurisdiction “in the event of a dispute” to “the Paris courts” and a clause conferring “jurisdiction on arbitrators in the event of a dispute concerning the interpretation or performance of the present contracts”. The Court held that the first of these clauses “can only be interpreted as an attribution of territorial jurisdiction, subordinate to the arbitration agreement, to cover the eventuality that the arbitral tribunal is unable to rule”. In a decision of 26 November 1997, in a case concerning a French domestic arbitration, the Cour de cassation upheld a decision of a Court of Appeals which, when faced with a contract containing both an arbitration clause and a clause providing for the jurisdiction of the courts, had held that the latter clause played only a subsidiary role and had therefore declined jurisdiction in favour of the arbitral tribunal. Courts in other jurisdictions often display
the same tendency to salvage the arbitration clause whenever possible. In a case where the parties had incorporated, in two successive articles of their contract, an ICC arbitration clause and a clause providing for the exclusive jurisdiction of the English courts, the High Court saved the arbitration clause by ruling that the reference to English courts applied only to incidents arising during the conduct of the arbitration. A similar approach has been adopted by United States courts.

2. The Court’s Views

[42] “Whilst the comments of the Paris Tribunal of First Instance reproduced in the extract above may apply fully in a domestic context, its force is somewhat reduced in an international commercial contract because the same reasoning can apply to jurisdiction clauses that designate a neutral forum, e.g., in the instant case parties are incorporated in Mauritius and Indonesia respectively but specifically selected Singapore in clause 22.2 of the Agreement. Nonetheless, the extract above neatly encapsulates how different courts around the world, whilst diverse in legal cultures, have approached this very issue with a very similar technique of construction to best give effect to parties’ intentions.

[43] “Upon a careful consideration on the suitability and applicability of the case law reviewed thus far, I am inclined to apply the technique of construction in Paul Smith (supra at [[3]]) locally and find that clauses 15 and 22.2 can be reconciled by reading clause 22.2 as a submission to the Singapore court’s supervisory jurisdiction over the arbitration. I acknowledge that a literal reading of the language used in clause 22.2 of the Agreement may not, at first blush, commend itself to such a construction, but the same could be said for Paul Smith, McConnell (supra at [[33]]), Arta Properties (supra at [[39]]) and Ace Capital (supra at [[35]]). I do not think that the degree of infelicity in the language of clause 22.2 warrants a different conclusion. If the language used in the Agreement had been perfect, this issue would not have arisen in the first place.

[44] “Ultimately I am persuaded by the views of the learned judges in the cases reviewed that such a construction would best give effect to the expressed intentions of the parties in the context of an international commercial contract. The Agreement was a formal contract presumably concluded at arms’ length under advice. Bearing in mind how courts should generally approach issues of inconsistencies (see supra at [[40]]), I do not think that clauses 15 and 22.2 are so irreconcilable such as to deprive either clause of its effect in the overall scheme of the Agreement. More importantly, I am not persuaded by Mr. Ooi that the Agreement gave either party an option between arbitration and litigation. The
language of clause 15 is in the form of an unqualified mandatory ‘all disputes’ arbitration agreement which is inimical to the construction advanced by Mr. Ooi. None of the cases reviewed above have taken that approach. A review of the relevant case law that have found such an option came about only from clear and unequivocal language used by the parties.

[45] “Although Mr. Ooi did not cite any cases that had conferred an option to arbitrate on either or one party in support of his contention, it may be in good order for me to raise the key authorities in this area to illustrate my point. In The DAI YUN SHAN (supra at [[5]]), the relevant clause read:

‘Jurisdiction: All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or by arbitration in, the People’s Republic of Singapore.’ (Emphasis added)

In William Co v. Chu Kong Agency Co Ltd & Anor [1993] 2 HKC 377, the relevant clause read:

‘All disputes arising out of or in connection with this bill of lading shall, in accordance with Chinese law, be resolved in the courts of the People’s Republic of China or be arbitrated in the People’s Republic of China.’ (Emphasis added)

In The MESSINIAKI BERGEN [1983] 1 Lloyd’s Rep 424, the relevant clause read:

‘40 (a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree … provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950…’

In The STENA PACIFICA [1990] 2 Lloyd’s Rep 234, the relevant clause read:

‘…. (b) Any dispute arising under the charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.
(c) Notwithstanding the foregoing, but without prejudice to any party’s right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have
any such dispute referred to the arbitration of a single arbitrator in London….’

In the *Law Debenture* (supra at [[5]]), the relevant clauses provided as follows (at [3]):

‘29.2 Any dispute arising out of or in connection with these present … may be submitted by any party to arbitration for final settlement under … (the UNCITRAL Arbitration Rules), which rules are deemed to be incorporated by reference into this Clause 29.2….

29.4 The place of any such arbitration shall be London, and the language of the arbitration shall be English. The decision and award of the arbitrators shall be final and binding and shall be enforceable in any court of competent jurisdiction….

29.7 Notwithstanding Clause 29.2, for the exclusive benefit of the Trustee and each of the Bondholders, [EFBV] and [ESA] hereby agree that the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have nonexclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents … and that accordingly any suit, action or proceedings (together referred to as “Proceedings”) arising out of or in connection with any of the above may be brought in such courts….’ (Emphasis added)

[46] “By way of observation, that the Agreement had provided such an option was not raised or discussed by either party at any stage prior to the filing of the suit. In the exchange of letters between 27 November 2007 and 12 May 2008 [footnote omitted], Tri-M.G.’s categorical stand repeated in their correspondence was that the dispute would be referred to arbitration. In fact Tri-M.G.’s letter of 12 May 2008 stated that if it did not receive any confirmation to the proposed variation, it would be proceeding with ICC arbitration: see supra at [16]). No slightest mention was made that it had the option of commencing proceedings in the Singapore courts. These facts made the construction advanced by Tri-M.G. appear like an afterthought and did not help its case.

[47] “The concluding point to make in relation to this issue is that I am acutely aware that in *The NERANO* (supra at [[25]]) and *Ax Re* (supra at [26])), the seat or the place of the arbitration was expressly designated to be England in the arbitration agreement, and in *Paul Smith* (supra at [[3]]) by the Court of Arbitration of the ICC. This is not so in the instant case. However I do not think that that distinction ought to prevent me from applying the same construction
adopted by those English cases. Such an approach would not have been possible if parties had, in their arbitration agreement, expressly stipulated a third country as the seat or place of arbitration. But that had not been done and upon a proper construction of clause 22.2 of the Agreement, parties have, in effect, stipulated Singapore to be the seat of arbitration by submitting to the Singapore court’s supervisory jurisdiction over the arbitration. This is not incongruous with the rest of the Agreement since parties have expressly chosen Singapore law as the proper law of the contract (in clause 22.1 of the Agreement); the arbitral tribunal is not placed in an unenviable situation of having to manage various systems of laws. For the avoidance of doubt, the stipulation of Singapore as the seat of arbitration does not pre-determine the ultimate venue of the arbitral hearings: see P.T. Garuda Indonesia v. Bingen Air [2002] 1 SLR 393 at [23]-[24]."

3. A Possible Alternative Construction

[48] "A possible alternative construction of the Agreement is to interpret clause 22.2 of the Agreement as a jurisdiction clause that applies to disputes arising out of all other governing documents except the Agreement itself. In other words, disputes under the Agreement would be referred to arbitration under clause 15 but disputes arising under any other governing documents from that relationship would be referred to litigation under the Singapore courts pursuant to clause 22.2. To recapitulate, clause 22.2 reads:

‘22.2 Each of the parties to this Agreement agrees for the exclusive benefit of the others (sic) that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any Governing Document (respectively “Proceedings” and “Disputes”) and, for such purposes irrevocably submits to the jurisdiction of such courts.’

(Emphasis added)

[49] "This is a possible construction because clause 22.2, in contrast with the rest of the clauses in the Agreement, is the only clause in the Agreement that uses the specific phrase ‘any Governing Document’ when it could easily have read ‘disputes which may arise out of … this Agreement’ instead. That there may well be a distinction between the two phrases is further bolstered by how the drafter had in that same clause used the starting phrase ‘Each of the parties to this Agreement …’ but went on to use the phrase ‘any Governing Document’ later in the same clause. This nuanced but critical distinction in language suggests that
the ambit of clause 22.2 may well be different from that of clause 15. This construction would admittedly have been more consistent with the language used in clause 22.2 and eliminates the apparent inconsistency between the two clauses.

[50] “However this alternative construction is not without difficulties. I can well envisage complications that may arise if those governing documents captured under clause 22.2 contained their own dispute resolution mechanism. Further, the court is chary of a construction that may lead to a bifurcation of disputes between litigation and arbitration: see supra at [[37]]. Be that as it may, both counsel did not attach any significance on the phrase ‘Governing Document’ and did not suggest any other possible documents which may be captured under that phrase. In the absence of arguments, it would not lie for me to pursue this alternative construction, elegant though it may be.”

III. WHETHER THERE IS A DISPUTE

[51] “The second issue in this application is whether there exists a dispute between the parties. Arguments by counsel can be simply put. Mr. Ooi contended that Norse had failed to make a positive assertion that it was disputing the claim. Mr. Ooi further invited me to peruse certain exhibits in Yunos’ affidavit which, according to Mr. Ooi, showed that Norse had in fact admitted the claim.

[52] “Ms. Ghose argued that Norse had made a positive assertion of a dispute at [13]-[14] of the affidavit filed by Dave Avnit, the CEO of Norse, on 25 November 2008 and that the law did not require Norse to further adduce evidence of the dispute. She submits that even if the law did require so, it can be seen from certain exhibits of Yunos’ affidavit dated 5 December 2008 that Norse had disputed the claim. The rest of the exhibits in Yunos’ affidavit that Mr. Ooi sought to adduce in relation to this issue, was in her submission, generally protected by ‘without prejudice’ privilege and she had set out during the hearing which portions of those exhibits ought not to be adduced.

[53] “In this connection, I am guided by the law set out concisely in Tjong Very Sumito and ors v. Antig Investments Pte Ltd [2008] SGHC 202 by the learned Choo Han Teck J, who had cited the earlier decision of the learned Woo Bih Li J in Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd [2005] 4 SLR 646 (Dalian).

[54] “It is irrefragable from both authorities above that the court is not to consider whether there is in fact a dispute or whether there is a genuine dispute. This means that the quality of the defence is not a matter for the courts: see
Robert Merkin and Louis Flannery, *Arbitration Act 1996* (Informa Law, 2008) at 40 (Merkin and Flannery). Mr. Ooi has rightly not invited me to assess the merits of the defence but asserts that Norse had made certain binding admissions.

[55] “In a scenario involving admissions by the defendant, I found valuable guidance from an extract of *Getwick Engineers Ltd v. Pilecon Engineering Ltd* (2002) 1020 HKCU 1 (*Getwick*) which was cited by Woo J in *Dalian* (supra at [[53]]) at [41]. The learned Ma J in *Getwick* stated the approach a court should take (at [23]):

‘(3) The existence or non-existence of a dispute or difference as envisaged under the relevant arbitration agreement between the parties is crucial to the granting of a stay. For this purpose, a dispute will exist unless there has been a clear and unequivocal admission not only of liability but also quantum: see *Louis Dreyfus v. Bonarich International (Group) Limited* [1997] 3 HKC 597; *Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam BV* [1996] 1 HKC 363, at 375A-B. In the absence of admissions as to both these aspects, a mere denial of liability or of the quantum claimed, even in circumstances where no defence exists, will be sufficient to found a dispute for the purposes of Sect. 6 of the Ordinance (and Art. 8 UNCITRAL Model Law). Thus, finding out whether a dispute (as defined in this way) exists, is the only exercise that the court carries out in a stay application (apart of course from construing the arbitration agreement to discover its full ambit): it does not involve itself in evaluating the merits of the claim.’

[56] “That there must be an admission as to both liability and quantum before a dispute ceases to be a dispute has also been recognized in *Glencore Grain Ltd v. Agros Trading Co* [1999] 2 Lloyd’s Rep 410: see Merkin and Flannery (supra at [[54]]) at 41. Joseph QC (supra at [[14]]) summarizes it pithily (at [11.16]): ‘unless a claim has been admitted in full, a dispute will exist’.

[57] “Was there a clear and unequivocal admission of both liability and quantum in this case? In Yunos’ affidavit dated 5 November 2008 at [25]-[27], he set out and exhibited the e-mail correspondence he was relying on as evidence that there had been clear and unequivocal admissions of both liability and quantum. Despite Norse’s claim of ‘without prejudice’ privilege over most of those correspondence, I am justified in examining the particular e-mails relied upon to see if there had been an admission of liability. That is because ‘without prejudice’ privilege only serves to protect admissions of interest made in the course of settlement negotiations so as to promote out-of-court settlement of disputes. That is to be distinguished from admissions of liability where the privilege does

[58] “The relevant correspondence, in chronological order, are: (a) an e-mail from Mike Benfield of Norse to Suja of Tri-M.G. dated 9 July 2007; (b) an e-mail from Dave Avnit to Yunos dated 7 August 2007; (c) an e-mail from Dave Avnit to Yunos dated 24 August 2007; (d) an e-mail signed off by Yunos sent from Suja’s e-mail address addressed to Dave Avnit dated 25 August 2007; (e) an e-mail from Dave Avnit to Yunos dated 27 August 2007; and (f) an e-mail from Suja to Dave Avnit dated 3 September 2007 [footnotes omitted].

[59] “Before I study those e-mails, it is beneficial to recapitulate the two distinct claims made by Tri-M.G. in this suit. First, Tri-M.G. is claiming US$ 420,000 for Norse’s purported repudiation of the lease. The second claim is for US$ 324,485.42 due and owing from Norse arising from ACMI (aircraft, crew, maintenance and insurance) charges, crew air tickets, loss of pallets, insurance coverage and crew salary that had accrued prior to the purported repudiation.

[60] “In so far as the US$ 420,000 claim for purported repudiation is concerned, I am wholly satisfied that far from admitting liability for this claim, Norse had vehemently denied such liability. This is manifest from Dave Avnit’s e-mail of 7 August 2007 where he had set out two reasons why Norse should not be liable in this regard. Since Ms. Ghose unsurprisingly did not object to those two reasons being adduced in evidence, I am at liberty to state that one of the reasons given was that there had been an event of force majeure. Accordingly, there was no admission of liability in relation to this claim.

[61] “I move on to the second claim. It is sufficient for me to dispose of the second claim on the amounts due and owing under the Agreement by holding that there is a dispute as to the quantum. Since privilege has been claimed, I do not propose to set out the contents of the e-mails. I find that the contents of Dave Avnit’s e-mail of 7 August 2007 (excluding the two reasons referred to above), Dave Avnit’s e-mail of 24 August 2007, Yunos’ entire e-mail of 25 August 2007, Dave Avnit’s e-mail of 27 August 2007 and Suja’s e-mail of 3 September 2007 contain negotiations on quantum which would be protected by ‘without prejudice’ privilege. Such privilege attaches to negotiations to settle genuine disputes over quantum even if there had been an admission as to liability: see Sin Lian Heng (supra at [[57]]), at [48]-[58]). I am satisfied that those e-mails were exchanged in the context of negotiations on settlement and that to allow the adduction of such evidence would patently undermine the policy of encouraging out-of-court settlements. It is therefore not open to me to find that there had been an admission as to quantum. For the avoidance of doubt, none of the
correspondence I have referred to in the preceding part of this judgment (at [5]-[50] supra) was objected to by Ms. Ghose on the ground of privilege.

[62] “In the absence of an admission of both liability and quantum in relation to both claims, a mere denial of liability will suffice to constitute a dispute: see supra at [[55]] and Dalian (supra at [[53]]) at [75]. In the instant case, I am satisfied that Norse had made such an assertion at [14] of Dave Avnit’s affidavit dated 25 November 2008. It follows that a dispute exists and the consequence is that a stay ought to be granted.”

IV. WHETHER CONDITIONS SHOULD BE IMPOSED ON THE STAY

[63] “The final matter to consider in this application is Mr. Ooi’s submission that if I should grant a stay, that the stay be granted on the condition that Norse furnish security for costs. Mr. Ooi argued that Norse had delayed rightful payment due and owing to Tri-M.G. by claiming a set-off with the sums owing under a contract between two other unrelated companies, EJA and NLL (see supra at [[10]]). Such conduct, according to Mr. Ooi, amounted to mala fides.

[64] “I am fully cognizant of the guidance set out by the learned Andrew Ang J in The DUDEN [2008] 4 SLR 984 at [14] highlighting that the discretion to impose conditions on a stay of court proceedings must be exercised judiciously. After careful reflection on where the justice of this case lies, I express some sympathy for Tri-M.G.’s position in so far as a letter of demand had been sent to Norse as early as 13 November 2007 [footnote omitted]. However I am ultimately not persuaded to exercise my discretion in imposing any conditions on the stay because even on Tri-M.G.’s own construction of the Agreement, Tri-M.G. could well have instituted arbitration proceedings on its own initiative after the dispute arose if it was of the view that Norse was no longer negotiating in good faith; this Tri-M.G. fully recognized when Mr. Ooi wrote in his letter dated 12 May 2008 that ‘unless your confirmation is received now, we would have made the request to arbitration under the ICC this evening’: see supra at [[16]].”
V. CONCLUSION

[65] “In the final analysis, I find that upon a proper construction of the Agreement, clause 15 of the Agreement contains a valid arbitration agreement and clause 22.2 of the Agreement refers to the supervisory jurisdiction of the Singapore courts over the arbitration. There has been no admission of both liability and quantum in relation to both claims brought by Tri-M.G. and Norse had made a positive assertion of a dispute. These proceedings must therefore be stayed in favour of arbitration pursuant to Sect. 6 of the IAA. I am further of the view that the justice of this case does not warrant the imposition of any condition on the stay.

[66] “I hereby allow Norse’s application. I remain grateful to counsel for their submissions and invite them to address me on costs.”
8. High Court, 3 April 2009, Suit No. 960/2008

Parties:  
Plaintiff: Car & Cars Pte Ltd (Singapore)  
Defendant: Volkswagen AG (Germany) and another

Published in:  
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– stay of court proceedings is mandatory under Singapore International Arbitration Act  
– choice for international arbitration by adopting Singapore International Arbitration Centre (SIAC) Rules

Commentary Cases:  ¶ 215 + ¶ 217 + ¶ 227

Facts

In May 1999, Car & Cars Pte Ltd (the plaintiff) entered into an agreement with Volkswagen AG (the first defendant) to become the sole importer and distributor of Volkswagen (VW) products, including passenger cars, in Singapore (the Importer Agreement). On 2 November 2004, the plaintiff and the first defendant concluded a Memorandum of Understanding (MOU) providing that Volkswagen Group Singapore Pte Ltd (the second defendant), a Singapore company, would take over the role of importer of VW passenger cars from the plaintiff, while the plaintiff would continue as importer of other VW products and exclusive dealer of VW passenger cars in Singapore. The MOU was superseded on 9 December 2004 by a Dealership Agreement having the same content, concluded between the plaintiff and the second defendant.

The parties mutually agreed to terminate their relationship. To this end, they concluded four settlement agreements between 31 January 2007 and 1 February 2007: (a) a Termination of Importer Agreement between the plaintiff and the first defendant; (b) a Termination of Dealership Agreement between the plaintiff and the second defendant; (c) a Sale of Assets and VW Parts Agreement,
between the plaintiff, the plaintiff’s parent company, Group Exklusiv Pte Ltd (GEPL), and the second defendant; (d) an Assignment of Lease of certain units in the premises of the plaintiff, between GEPL and the second defendant.

The Termination of Importer Agreement provided for the application of German law and referred disputes to the exclusive jurisdiction of the German courts. The Termination of Dealership Agreement provided for the application of Singapore law and arbitration of disputes at the Singapore International Arbitration Centre (SIAC) under the SIAC Rules “for the time being in force”.

As part of the settlement, the first defendant was to pay the plaintiff S$ 1.2 million under the Termination of Importer Agreement, and the second defendant was to pay the plaintiff S$ 800,000 under the Termination of Dealership Agreement. Both payments were to be made to Volkswagen Financial Services Singapore Pte Ltd (VFS) to set off a sum of S$ 3 million owed by the plaintiff to VFS. On 2 February 2007, the first defendant and the second defendant had not yet made the payments and the plaintiff itself paid S$ 3 million to VFS. On 6 February 2007, the second defendant paid the sum it owed, S$ 800,000. The first defendant only paid the sum it owed, S$ 1.2 million, on 20 March 2007. By that time, however, the plaintiff had elected to treat the first defendant’s failure to pay as repudiatory conduct and did not cash the check. It then commenced court proceedings in the Singapore High Court against both defendants, claiming that the first defendant’s repudiation of the “global settlement” reached by the four settlement agreements revived all pre-existing rights and obligations. As a consequence, the plaintiff could claim loss and damages arising from the breach of the Importer Agreement and the Dealership Agreement.

The present decision concerns the second defendant’s application to stay the proceedings against it on the basis of the arbitration clause in the Termination of Dealership Agreement. The first defendant was not yet represented before the court as the plaintiff had been granted leave to serve the writ on the first defendant in Germany only approximately two weeks before the hearing.

The High Court, per Saqib Alam AR, granted the second defendant’s application and stayed court proceedings. The court noted that the parties disagreed as to whether the arbitration clause in the Termination of Dealership Agreement triggered the application of the domestic arbitration legislation of Singapore, the Arbitration Act (AA), or of its International Arbitration Act (IAA). The plaintiff maintained that the AA applied and that the court should exercise its discretion thereunder to deny a stay, because of the risk of (possible contrasting decisions in) a multiplicity of proceedings, that is, arbitration against the second defendant and court proceedings against the first defendant. The second defendant argued in turn that the IAA applied and that under the IAA a
stay is mandatory as long as the arbitration agreement is not null and void, inoperative or incapable of being performed, which was undisputed between the parties.

The court first considered whether, assuming the AA applied, it should exercise its discretion not to grant a stay. It noted that it is “generally recognized that multiplicity of proceedings is an important, but not a decisive ground for refusing a stay of proceedings” and concluded on the basis of Commonwealth jurisprudence that a stay must not be granted if: (a) the issues for determination in court and arbitration are closely related so that the resolution of one will materially affect the other, and the evidence in both proceedings is similar; (b) the multiplicity is induced by the plaintiff; (c) the court proceedings have progressed beyond a preliminary stage and (d) it is in the interests of justice that a stay should not be granted.

The court held that none of these factors applied here. As to (a), the issues in the two proceedings were not the same and were based on different evidence:

(i) before the court, the issue would be whether the first defendant’s failure to pay timeously was a repudiation of the Termination of Importer Agreement, and whether this repudiation restored the rights of the plaintiff against the first defendant;
(ii) before the arbitral tribunal the issue would be whether the alleged repudiation of the settlement by the first defendant restored the rights of the plaintiff against the second defendant under the Dealership Agreement.

As to (b), the plaintiff framed its claim “in a way that creates an illusion that there will be a multiplicity of proceedings, while in fact there are two separate issues arising from two different agreements”. As to (c), the court proceedings before the High Court were not in an advanced stage and, as to (d), the court was of the opinion that there would instead be an injustice if, “based on these facts”, the plaintiff were released from its obligation under the arbitration agreement.

As a consequence, even assuming that the AA applied the court would not exercise its discretion not to order a stay.

The High Court then held, however, that a stay was mandatory in any case because the IAA, rather than the AA, applied. It reasoned that under Singapore law parties can choose whether the AA or the IAA govern their arbitration agreement and added that in case law a reference to the SIAC Rules 2007 is deemed to indicate a choice for international arbitration. Here, the plaintiff claimed that the reference in the arbitration clause in the Termination of Dealership Agreement to “the SIAC Rules” was a reference to the SIAC Domestic...
Arbitration Rules, which existed alongside the (international) SIAC Rules 1997 at the time of the conclusion of the Agreement.

The court noted that the arbitration clause referred to the SIAC Rules “for the time being in force” and took this to mean the rules in force at the time of commencement of arbitration, that is, the SIAC Rules 2007, which repealed the SIAC Domestic Arbitration Rules and replaced the SIAC Rules 1997.

The court denied the plaintiff’s argument that the arbitration clause contained in the Sale of Assets and VW Parts Agreement, which provided for the application of the AA, could be used to interpret the arbitration clause contained in the Termination of Dealership Agreement because these two agreements were part of a “global settlement”. The court held that under the applicable case law an arbitration clause contained in one contract does not apply to the claims arising from another contract, unless there is a “head” agreement and the other agreements are supplemental to it. This was not the case here.

Excerpt

1. THE ISSUES

[1] “In the present action … the plaintiff alleges that the failure of the first defendant to pay the S$ 1.2 million timeously was a repudiation of the ‘global settlement’ reached between the parties. As a result of this repudiation, the plaintiff alleges that its rights against the defendants before the ‘global settlement’ was reached were restored viz. it could, once again, make claims against the defendants because the terms of the settlement did not matter anymore. On this basis, the plaintiff mounts its claim for, inter alia, loss and damages arising from the breach of the Importer Agreement and in the alternative, loss and damages arising from the breach of an agreement to appoint the plaintiff as exclusive/sole dealer [footnote omitted].

[2] “I should add at this juncture that only the plaintiff referred to the settlement agreements as a ‘global settlement’. The second defendant disagreed with the plaintiff’s choice of nomenclature. The second defendant’s position was that the four agreements did not amount to a ‘global settlement’, and were merely four contracts entered into in order to effect a ‘clean break’ between the parties.

[3] “For the plaintiff to be able to mount its claim against the defendants, the issue to be determined was whether the late payment of the S 1.2m constituted a repudiation of the settlement agreements which restores the plaintiff’s rights.
against the defendants as they were before they entered the settlement agreements.

[4] “In the present summons, the issue I have to determine is whether the alleged repudiation, as it relates to the second defendant only, should be referred to arbitration under the arbitration agreement in the Termination of Dealership Agreement. This was the second defendant’s application; the first defendant was not represented at the hearing. In fact, the plaintiff had only just been granted leave to serve the writ on the first defendant in Germany about two weeks before the hearing.

[5] “Before determining whether the current proceedings should be stayed in favour of arbitration, I shall first examine the dispute resolution clauses in detail. Of the four agreements entered into, only two agreements (namely, the Termination of Importer Agreement and Termination of Dealership Agreement …) are relevant for present purposes. The Sale of Assets and VW Parts Agreement and the Assignment of Lease continue to form the backdrop of the settlement reached between the parties; however as they involved GEPL (who was not a party to the present proceedings), the parties only made passing references to them in their submissions before me.

[6] “Interestingly, the Termination of Importer Agreement and Termination of Dealership Agreement contained different dispute resolution clauses. The plaintiff and the second defendant were not in dispute that the arbitration clause contained in the Termination of Dealership Agreement was not void, inoperative or incapable of being performed.

[7] “However, the plaintiff’s position was that, by the arbitration agreement, the parties had agreed to domestic arbitration and accordingly, the Arbitration

1. “For clarity, I shall reproduce them:

(a) In the Termination of Importer Agreement, the relevant clause is clause 6. Clause 6 reads:

‘This agreement herein shall be governed by and its provision interpreted in accordance with the law of the Federal Republic of Germany. The courts in Wolfsburg shall have exclusive jurisdiction of any disputes arising out of or in connection with the agreement herein.’

(b) In the Termination of Dealership Agreement, the relevant clause is clause 6 (the ‘arbitration agreement’). Clause 6 reads:

‘This agreement herein shall be governed by and its provision interpreted in accordance with the law of Singapore. Any disputes arising out of or in connection with this agreement herein shall be referred to arbitration in the Singapore International Arbitration Centre in accordance with the Rules of the Singapore International Arbitration Centre for the time being in force.’

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Act (Cap 10, 2002 Rev Ed) (the AA) would be the governing regime. The plaintiff argued that, as the parties had agreed to domestic arbitration, a stay of proceedings was not mandatory. Under Sect. 6 of the AA, the court has a discretion whether or not to stay proceedings in favour of arbitration. Under Sect. 6 of the IAA, the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the IAA) the court must stay proceedings in favour of arbitration as long as the arbitration agreement is not null and void, inoperative or incapable of being performed: (see at [10] below where the relevant provisions are reproduced). The plaintiff argued that the court should exercise its discretion in the plaintiff’s favour and should not refer the matter to arbitration because it would lead to a multiplicity of proceedings and possible inconsistent findings as a result. For this reason, the plaintiff argued that the matter should not be referred to arbitration and should be determined by the courts, together with the plaintiff’s claim against the first defendant.

[8] “The second defendant argued that the IAA would apply in this case because the parties had intended that this was going to be an international arbitration when they entered into the arbitration agreement. As the IAA was the governing regime, a stay of the proceedings in favour of arbitration was mandatory under Sect. 6 of the IAA. For this reason, the second defendant argued that all proceedings relating to itself should be stayed in favour of arbitration.

[9] “Based on the position adopted by the parties, it is evident that the plaintiff had a more onerous hurdle to cross to defeat this application. The plaintiff had to establish: first, that the arbitration agreement was governed by the AA; and second, that I should exercise the discretion afforded by the AA and refuse a stay because of multiplicity of proceedings and the possibility of inconsistent findings by the court and arbitration tribunal.”

II. STAY OF PROCEEDINGS IS MANDATORY IN INTERNATIONAL, DISCRETIONARY IN DOMESTIC ARBITRATION

[10] “In Singapore, there are two legal regimes that govern arbitration. International arbitration is governed by the IAA (supra) and domestic arbitration is governed by the AA (supra). The two legal regimes are mainly similar but one of the areas they differ is in the extent of curial intervention the courts can
exercise when faced with an application to stay court proceedings in the face of an arbitration agreement.2

11 “Thus, where the IAA is the governing regime, a stay of proceedings is mandatory where a party to an arbitration agreement institutes court proceedings against another party to the agreement if the matter falls within the scope of the agreement, and the agreement is not null and void, inoperative or incapable of being performed (see Coop International Pte Ltd v. Ebel SA [1998] 3 SLR 670 at [99] and Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd [2005] 4 SLR 646 at [75]). In contrast, under the AA, a stay will be given at the discretion of the court if the court is satisfied that the conditions in Sect. 6(2) of the AA are met.

2. “Sect. 6 of the IAA provides:

'(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall (emphasis mine) make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

(....)"

The corresponding provision in the AA, also Sect. 6, provides:

'Stay of legal proceedings

(1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) may (emphasis mine), if the court is satisfied that –

(a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

(....)"

[12] “In NCC International AB v. Alliance Concrete Singapore Pte Ltd [2008] 2 SLR 565 (NCC International), V K Rajah JA, who delivered the decision of the Court of Appeal, discussed the different levels of curial intervention in international and domestic arbitration. Rajah JA observed that the court would ‘play a relatively more interventionist role in domestic arbitration as compared to international arbitration’ (NCC International at [51]). Rajah JA added later that the greater scope for intervention would be based on the principle that the court must intervene only in limited circumstances where curial intervention will support arbitration.

[13] “In relation to the court’s power to grant a stay under the Arbitration Act, Halsbury’s Laws of Singapore Vol. 2 (LexisNexis, 2003 Reissue) (Halsbury’s Singapore) states at para. 20.031:

‘The power to grant a stay under the Arbitration Act is discretionary. The burden initially lies with the applicant to show the existence of the [conditions laid out in Sect. 6 AA]. This burden is discharged upon the court being satisfied that there is a prima facie case that there is a valid arbitration agreement between the parties which covers the subject matter in dispute before the court. The burden then shifts on to the party who has commenced the action to “show sufficient reason why the matter should not be referred to arbitration”. The application may be made even if the court proceedings were commenced after commencement of the arbitration.’

[14] “At the hearing before me, the plaintiff argued vigorously that a stay should not be granted because of multiplicity of proceedings and the possibility of inconsistent findings by the court and the arbitration tribunal. Counsel for the plaintiff also submitted that there were very few local cases on this issue and cited a string of commonwealth cases that discuss the principle. For this reason, I shall deal with this issue first, even though my determination of the second issue – i.e, the governing regime for the arbitration agreement – proved to be the decisive ground for my decision.”

III. MULTIPLICITY OF PROCEEDINGS

[15] “The plaintiff’s primary argument against granting a stay of proceedings was that there would be multiplicity of proceedings and a possibility that the court and the arbitration tribunal would reach inconsistent findings. The plaintiff
alleged that the plaintiff and the defendants had entered into a ‘global settlement’. The plaintiff’s claim was premised on the fact that the first defendant’s failure to pay the $1.2 million timeously was a repudiation of the ‘global settlement’ and as a result, the plaintiff’s rights against the defendants before it entered into the ‘global settlement’ were restored; meaning, the plaintiff could now initiate claims against the first defendant and second defendant. If this issue went before both the courts and the arbitration tribunal, there was a possibility that the court and the tribunal would reach inconsistent findings. Also, the plaintiff argued that time and expense could be saved if the two proceedings were heard together. For this reason, the plaintiff argued, it was desirable to have the matter heard before a court of law. After all, there was no arbitration agreement between the plaintiff and the first defendant.

[16] “Counsel for the plaintiff submitted that refusing a stay on the ground of multiplicity of proceedings was not unusual. He brought to my attention a passage in Halsbury’s Singapore which stated at para. 20.029:

‘Applications for stay have been resisted on many varied grounds including:
... (10) there are concurrent proceedings relating to the same subject matter and there is a possibility that inconsistent findings may result.’


[18] “It is generally recognized that multiplicity of proceedings is an important, but not a decisive ground for refusing a stay of proceedings. Mustill and Boyd in Commercial Arbitration, 2nd ed., Butterworths, 1999 at 477 (Mustill and Boyd) state:

‘Where a grant of a stay would involve one of all of the parties in the delay and extra expense involved in having the same issues debated in one jurisdiction, this is a strong ground – albeit not a decisive ground – for refusing a stay.’
Mustill and Boyd then list some situations where this principle is applied e.g. where part of the relief claimed is outside the powers of the arbitrator; where proceedings between the same parties, in relation the same or related issues are already in progress in the High Court or in another jurisdiction; and where one of the parties to the arbitration agreement is or will be involved with other parties in High Court proceedings in respect of the same or related issues (see Mustill and Boyd at 478). These principles have been applied by courts across the Commonwealth and I shall discuss them here.

[19] “In Taunton-Collins (supra), the plaintiff employed an architect and contractors to build him a house. The agreement contained an arbitration clause. The plaintiff found the house unsatisfactory and sued the architect who in his defence blamed the contractors. The action was referred to an official referee. The plaintiff then added the contractors as co-defendants to the action. The contractors applied for a stay of proceedings and a stay was refused. On appeal, the Court of Appeal dismissed the appeal and found that it was undesirable that there should be two proceedings before two different tribunals (the official referee and an arbitrator) who might reach inconsistent findings; accordingly there were special reasons for the exercise of the discretion to refuse a stay. Lord Denning MR, affirming The Pine Hill [1958] 2 Lloyd’s Rep. 146 explained his reasoning as follows (at 635-636):

‘The matter is of considerable importance. There are a great number of contracts in the R.I.B.A. form, but there is very little authority on this point. It seems to me most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay. Furthermore, as Mr. Finer pointed out, if this action before the official referee went on by itself – between the building owner and the architect – without the builders being there, there would be many procedural difficulties. For instance, there would be manoeuvres as to who should call the builders, and so forth. All in all, the undesirability of two separate proceedings is such that I should have thought that it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the builders. Everything should be dealt with in one proceeding before the official referee.’
Pearson LJ in Taunton-Collins (at 637) noted:

‘in this case there is a conflict of two well-established and important principles. One is that parties should normally be held to their contractual agreements.... That is one principle. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise.’

On the facts, Pearson LJ agreed with Denning LJ and dismissed the application for stay of proceedings.

[20] “In Bulk Oil (Zug) A.G v. Trans-Asiatic Oil Ltd SA [1973] 1 Lloyd’s Rep 129 (Bulk Oil), the defendants agreed to transport the plaintiff’s oil, under a transportation agreement which provided for arbitration in Geneva. The parties then entered into a charterparty where the plaintiffs chartered a vessel to the defendants, for the purpose of transporting the oil. The charterparty did not contain an arbitration clause; the charterparty provided that disputes were subject to the jurisdiction of the English Courts. The plaintiff alleged that the defendant had repudiated both agreements and commenced proceedings in Geneva and England. The defendants relied on events arising out of the transportation agreement by way of defence as well as by way of counterclaim. The plaintiff then applied to stay the counterclaim in favour of arbitration. Kerr J granted a stay of the counterclaim only, noting that although the most sensible course would be to have all the disputes determined by the same tribunal, he noted that the plaintiffs had themselves created the risk of multiplicity and inconsistent decisions by entering into two contracts with the defendants, with related subject matter but different jurisdiction clauses. The learned Judge was of the view that a stay was still appropriate because the parties had expressly arranged their affairs in this fashion.

[21] “Taunton-Collins and Bulk Oil have been approved by Goff LJ in Berkshire (supra) and by Hirst LJ in Palmers Corrosion Control Ltd v. Tyne Dock Engineering Ltd [1997] APPL.R 11/20 (Palmers Corrosion). In the latter two cases, a stay was refused on the facts. It is pertinent to note, however that both Berkshire and Palmers Corrosion did not involve separate claims against each defendant based on alleged wrongs. The cases concerned claims arising from work done under one contractual relationship and indemnity claims by the defendants against third parties to the proceedings based on sub-contracts.

[22] “In Halsbury’s Laws of Australia, Vol 1(2), Butterworths, 1999 (Halsbury’s Australia), the following passage appears in para. 25-205:
‘The desirability of avoiding such a plurality of proceedings and the possibility of inconsistent findings of fact by different tribunals may be an important factor which bears upon the discretion to order a stay (emphasis mine).’

At footnote 19 of para. 25-205, the learned authors of Halsbury’s Australia state ‘the ultimate question is whether it would be just to hold the parties to the agreement’: see also W Bruce Ltd v. J Strong [1951] 2 KB 447 (W Bruce Ltd)

[23] “In Tasmanian Pulp & Forest Holdings Ltd v. Woodhall Ltd [1971] Tas SR 330 (Tasmanian Pulp), the plaintiff was a mill owner who was dissatisfied with the way his mill was built. The plaintiff sued the engineers, builders, suppliers and machine installers. The builders applied for a stay of proceedings pursuant to an arbitration agreement in the building contract. The judge granted a stay, but on appeal, the judge’s order was revoked. The Supreme Court (Full Court) of Tasmania held that all three defendants had complex factual issues involving lengthy and detailed technical evidence in common between them; the time, energy and costs in deciding these issues once would be heavy enough. At 346, Neasey J (with whom Burbury CJ agreed) held that the issues raised by the plaintiff against the builders were very closely connected with the resolution of issues between the engineers and the builders; meaning, once responsibility was determined as between the engineers and the builders, resolution of the issues between the mill owner and the engineers would be materially affected. For these reasons, the court did not grant a stay.

[24] “In Bond Corporation (supra), a developer (the applicant) was aggrieved over time and costs overruns in a building project and sued his civil engineer (the first respondent) for the conduct of the works and the consulting and supervising engineers (the second respondent) over their design, cost and time estimates. Earlier, the first respondent had referred a claim for shortfall in payment to arbitration pursuant to an arbitration agreement between itself and the applicant. The applicant and the first respondent then entered into discussions on whether to join the second respondent as a party to the arbitration or as a third party in judicial proceedings. These discussions later fell apart and the applicant began court proceedings against them both. The applicant then moved for an order to restrain the first respondent from prosecuting the arbitration. The first respondent applied to have the court proceedings stayed until arbitration was concluded. The Federal Court of Australia followed Tasmanian Pulp and observed that ‘the factual considerations [were] not completely straightforward’ in this case and held that the issues between the applicant and the respondent were closely related, if not common to the issues raised between the applicant and the second respondent; allowing the arbitration and court litigation to proceed side
by side in this case could lead to inconsistent findings of fact. However, in
deciding that the courts would be the appropriate forum to hear the entire claim,
the Court found ‘that this was not a case where the resolution of the arbitration
proceedings would lead to a resolution of issues in this litigation…. There were
issues of law raised in the proceedings in [the present case] which are closely
related to some of the questions that may arise in arbitration and which cannot
be resolved by the arbitrator’ (at 143).

[25] “It appears from Australian jurisprudence that the way the plaintiff frames
its claim is also relevant; the plaintiff cannot frame its claim in a way that
attempts to evade the arbitration agreement. *Morrison v. Inmode Developments Pty
Ltd* 1990 WL 1035578 (*Morrison*) is authority for the proposition that if the
plaintiff frames its claim in a way to avoid arbitration, the parties should not be
made to pursue their claim in court instead. In *Morrison*, the plaintiff sought an
injunction on arbitration proceedings because it argued that the remedy it was
seeking under the Fair Trading Act was only available through procedures
applicable in court, and as such, proceeding with arbitration would result in the
dispute being heard both in arbitration and in the courts. The Supreme Court of
Victoria held: ‘the provisions of the Fair Trading Act should not be used as a
flocculent to launder the Commercial Arbitration Act of potency and to suspend
the arbitration process in a wash of legalism’; Nathan J, delivering the judgment
of the court found that the plaintiff had clothed the dispute within the terms of
the Fair Trading Act to obscure the real nature of the dispute and dismissed the
application for the injunction.

[26] “For the position in Canada, the decisions of *Yukon Energy* (supra) and
*Dawson* (supra) are instructive. In *Dawson*, the parties had commenced arbitration
proceedings, which later fell into difficulties because of disputes over the
admissibility of an expert report and the scheduling of counsel’s time. Months
later, the plaintiff commenced an action in the courts. The British Columbia
Court of Appeal granted a stay of proceedings in favour of arbitration because ‘a
considerable amount of time, effort and money had been expended’ in instituting
arbitration proceedings which were ‘virtually ready for hearing’; Hall JA
delivering the judgment of the court found that ‘it would be unjust to now
require [the defendant] to now suddenly shift from the arbitration process that
has proceeded so far and to undertake new proceedings under the court process’
(see *Dawson* at [18]; the principles are also discussed in *Yukon Energy* at [50]).

[27] “In *Yukon Energy*, the plaintiff, YEC, entered into a Design-Build Agreement
with Chant for a hydroelectric power line which was not completed on time.
YEC commenced a claim against Chant, which Chant sought to refer to
arbitration. The Yukon Territory Supreme Court declined to stay proceedings
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in favour of arbitration citing a ‘significant overlap’ (at [42]) of the issues between YEC and Chant and third-party actions taken out by YEC. In Yukon Energy, there were some ten third-party consultants whom YEC was going to prosecute its third-party claims against (see [50] and [53]) and by the time YEC had commenced proceedings against Chant, YEC had already commenced about five third-party actions with sub-contractors and professionals. Gower J was of the view that if the arbitration were to proceed, YEC would have to deal twice over with all of the facts and law relevant to the issues which was common to the parties. YEC had also indicated that if the stay was refused, it would seek to consolidate the third-party actions with the present action, or alternatively seek an order that they be heard together (at [55]). For these reasons, the court declined to grant a stay in favour of arbitration.

[28] “In Prestige Pools International Ltd v. Yan Oi Tong Ltd & Anor [1985] 2 HKC 116 (Prestige Pools), the Hong Kong High Court refused to grant a stay citing multiplicity of proceedings as a factor. Applying Taunton-Collins and The Jade [1976] 1 All ER 441, Hunter J noted that in this case there was a ‘real risk of a lay arbitrator and a judge reaching different conclusions’ and that ‘all the parties [were] going to be in difficulty if this hearing [was] split into two’ (at 122). Hunter J emphasized that this case was not one where one party to the contract had ‘dragged [another party] into the proceedings with a view to defeating the arbitration clause’ (at 121), and that ‘not only justice but the interests of all parties required one hearing’ (at 122). In Well Hoped Ltd & Anor v. Nippon Yusen Kaisha & Anor [1982] 1 HKC 155 (Well Hoped Ltd), the Hong Kong High Court said that it was generally undesirable to have separate proceedings, but in this case, the issues to be determined were different and did not overlap; the evidence against the first defendant was different than that to be adduced against the second defendant – for this reason, there was no multiplicity of proceedings. Jones J, granting a stay on the facts, also observed that the plaintiff could have easily awaited the result of the proceedings against the first defendant before suing the second defendant: it was not necessary to sue the second defendant at this early stage ([1982] 1 HKC 155 at 159).

[29] “Recently, the Malaysian High Court in Sunway Damansara Sdn Bhd v. Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872 (Sunway Damansara) granted a stay of proceedings in favour of arbitration because the court found that the multiplicity of proceedings was induced by the plaintiff’s own action. The High Court was of the view that the plaintiff could not come to court and object to the second defendant’s exercise of its right to stay proceedings under the arbitration agreement in favour of arbitration by relying on grounds that the plaintiff itself had created. The plaintiff was pursuing claims against two parties
on two separate agreements in one action and therefore, the perceived ‘multiplicity’ was induced by the way the plaintiff initiated its case. In *Sunway Damansara*, Aziah Ali J also found that there was no multiplicity per se because the findings in the claim against the first defendant may not be necessarily applicable in the claim against the second defendant: they were two separate causes of action based on two separate agreements (see [2008] 3 MLJ 872 at [14], [18] and [19]).

[30] “In Singapore, the High Court has stayed proceedings in favour of arbitration despite the risk of multiplicity of proceedings stating ‘that justice would be best served if the three parties proceeded to arbitration to determine their respective claims, defences and counterclaims if any’ (see *Yee Hong Pte Ltd v. Tan Chye Hee Andrew (Ho Bee Development Pte Ltd, Third Party)* [2005] 4 SLR 398 at [43]).

[31] “Having discussed the cases across the Commonwealth, I shall attempt to crystallize the relevant factors taken into consideration when a judge exercises his or her discretion in deciding to stay arbitration proceedings on the ground that there will be multiplicity of proceedings. The factors are not exhaustive and in no way conclusive. Based on Commonwealth jurisprudence, a stay of proceedings in favour of arbitration will not be granted if:

(a) the issues for determination in court and arbitration are closely related, such that the resolution of one issue will materially affect the other; in particular, if the evidence adduced in both proceedings is similar (discussed in *Yukon Energy; Bond Corporation; Taunton-Collins; Tasmanian Pulp; Well Hoped Ltd; Prestige Pools*);
(b) the plaintiff ‘induces’ the multiplicity (discussed in *Bulk Oil; Morrison; Sunway Damansara; Well Hoped Ltd*);
(c) the court proceedings have progressed beyond a preliminary stage (discussed in *Yukon Energy; Dawson*);
(d) it is in the interests of justice that a stay should not be granted (discussed in *Taunton-Collins; Dawson; Prestige Pools; Yee Hong Pte Ltd; W Bruce Ltd*).

[32] “Applying these factors to the present case, I did not see any reason why the plaintiff should not be held to the arbitration agreement. I was not convinced that there would be any risk of inconsistent findings if the plaintiff proceeded against the first defendant in the courts, and against the second defendant in arbitration proceedings.

[33] “In my view, the issues that are to be determined in arbitration between the plaintiff and the second defendant are not similar to the issues for trial in the plaintiff’s case against the first defendant. There is only one alleged repudiation
in the present case: the first defendant’s failure to pay the $ 1.2 million timeously. Before the court, the issue to be determined is whether the first defendant’s failure to pay timeously is a repudiation of the Termination of Importer Agreement, and whether this repudiation restores the rights of the plaintiff against the first defendant. The issue before the arbitration tribunal will be whether the first defendant’s alleged repudiation of the Termination of Importer Agreement (if found by the court) restores the rights of the plaintiff against the second defendant. This is a case of two separate causes of action, based on two separate agreements that provided for two different procedures for dispute resolution.

[34] “The evidence against the first defendant at the trial (essentially, evidence of the first defendant’s repudiatory conduct) is also different from the evidence that is to be adduced against the second defendant at arbitration (presumably, to show the relationship between the first defendant and the second defendant, and that the parties had entered into a ‘global settlement’). For this reason, as there is little overlap between the issues and evidence, I was of the view that there is no prima facie multiplicity of proceedings.

[35] “The issues to be determined only overlap in relation to the plaintiff’s allegation that the parties entered into a ‘global settlement’. Only the arbitration tribunal will rule on this issue. As I have noted above, the arbitration tribunal will not be deciding whether the first defendant’s failure to pay timeously is a repudiation of the Termination of Importer Agreement. The arbitration tribunal will be deciding whether, on the facts, the first defendant’s failure to pay timeously under the Termination of Importer Agreement, restores the plaintiff’s rights against the second defendant. Whichever way the tribunal rules on this, I do not see any risk of inconsistent findings, because the fact remains, the arbitration tribunal will only be deciding the issue in relation to the second defendant only. In no way will the arbitration tribunal’s decision have a bearing on the plaintiff’s rights against the first defendant, or on the first defendant’s culpability, because that matter, which is part of a separate agreement altogether, will be decided by the courts.

[36] “The plaintiff has framed its claim in a way that creates an illusion that there will be a multiplicity of proceedings. By choosing to pursue its case against both the first defendant and the second defendant as one action, using the umbrella of a ‘global settlement’ to tie the claims together, the plaintiff has moulded its claim in such a manner that having them heard in two different forums gives an appearance that there is a multiplicity of proceedings. In fact, there are two separate issues arising from two different agreements. For this reason, the
plaintiff cannot now come to court and point to a potential prejudice on its part if the claims are not heard together.

[37] “I should also add at this juncture that I feel that it may not even be necessary to sue the second defendant at this stage. As the alleged repudiation only relates to the first defendant, the plaintiff could have proceeded against the first defendant first, before commencing proceedings against the second defendant. Here, the plaintiff brought proceedings against the second defendant at a very early stage, even before documents have been served on the first defendant in Germany. Nevertheless, I should also add that as the issues are unrelated, there is no reason why the plaintiff cannot first seek a declaration from the arbitration tribunal, that a repudiation of the Termination of Importer Agreement by the first defendant (if found by the court) will restore the plaintiff’s rights against the second defendant.

[38] “Also, the present court proceedings are not in an advanced stage. In fact, they have barely started. As I have mentioned above, the plaintiff had only just been granted leave to serve the writ on the first defendant in Germany about two weeks before this hearing. As a result, there would not be a significant dissipation of time and costs if the proceedings in relation to the second defendant are referred to arbitration at this juncture. Both the court and the arbitration tribunal will be able to hear the plaintiff’s cases against the first defendant and second defendant respectively from the very beginning. There would also be no prejudice to any party because their preparations up to this stage have been minimal.

[39] “Lastly, I did not see any interests of justice that would lead the courts to refuse a stay of proceedings in favour of arbitration. In fact, I am of the view that it would be an injustice if, based on these facts, the plaintiff was released from its obligation to comply with the valid arbitration agreement it entered itself into with the second defendant.

[40] “For these reasons, I was of the view that there was no reason why a stay of proceedings in favour of arbitration should be refused on the grounds of multiplicity of proceedings and the possibility of inconsistent findings. However, as we will see below, it was my finding on the governing regime behind the arbitration agreement that was the decisive factor in my decision.”

IV. INTERNATIONAL ARBITRATION ACT IS APPLICABLE STATUTE

[41] “The next issue relates to whether the AA or the IAA was the governing regime for the arbitration agreement between the parties. Having established
earlier that the courts, when faced with a valid arbitration agreement have to mandatorily grant a stay when the IAA is the governing regime (as compared to the AA, where there is a discretion), the issue to determine now is which governing regime the plaintiff and the second defendant elected to govern the arbitration agreement.

[42] “Both the plaintiff and the second defendant had their places of business in Singapore. Singapore is also the place where a substantial part of the contractual obligations were to be performed and the place with which the dispute is most closely connected. These factors would point towards domestic arbitration (see the dicta of Lai Kew Chai J in *Jurong Engineering Ltd v. Black & Veatch Singapore Pte Ltd* [2003] SGHC 292 (*Jurong Engineering (High Court)*) at [42] and [43], and when the facts of the case are referred to generally, (*Jurong Engineering*); see also Sect. 5(2) of the IAA).

[43] “Notwithstanding this, under Singapore law, parties to an arbitration agreement can elect between the AA and the IAA to govern their arbitration agreement. In *NCC International*, V K Rajah JA made the following observation (at [52]):

‘Notwithstanding that domestic arbitration does not fall within the ambit of “international” arbitration as defined under the IAA, the parties can expressly opt to have the IAA apply by either agreeing in writing to this effect or adopting institutional rules which expressly stipulate that the IAA shall apply (see *Halsbury’s* ([20] supra) at para. 20.013). One instance of such an institutional rule is Rule 32 of the SIAC Rules 2007 (3rd ed, 2007), which provides that where the seat of arbitration is Singapore, the law of arbitration conducted under the auspices of the Singapore International Arbitration Centre shall be the IAA.’


‘Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.’

[44] “The remarks made by Rajah JA reinforce the proposition that where the SIAC Rules 2007 are adopted, the arbitration in question will be treated as an international arbitration and by the operation of Rule 32 of the SIAC Rules 2007,
the IAA will be the governing regime. Therefore, parties who agree to adopt the SIAC Rules 2007 (without any further qualifications) elect to have their arbitration treated as an international arbitration, with the IAA as the governing regime.


[46] “The second defendant’s argument was simple. The second defendant argued that the words ‘the Rules of the Singapore International Arbitration Centre’ contained in clause 6 of the Termination of Dealership Agreement were a reference to the SIAC Rules 1997 and accordingly, the IAA would be the governing regime. The second defendant contended that if the parties wanted the arbitration to be a domestic arbitration, they would have expressly referred to ‘the Domestic Arbitration Rules of the SIAC’; in which case, the AA would be the governing regime.

[47] “The plaintiff argued that clause 6 was equivocal because the clause merely stated ‘Rules of the SIAC’ and not ‘Arbitration Rules of Singapore International Arbitration Centre’ as it is referred to in the preamble to the SIAC Rules 1997. Counsel for the plaintiff then highlighted Rule 1 of the SIAC Domestic Arbitration Rules which provided:

‘Scope of Application
1.1 These Rules apply to all cases:
(a) where the parties have agreed in writing that their dispute is to be submitted or referred for arbitration under these Rules and where the case is a domestic case; or
(b) where the parties have agreed in writing that their dispute is to be submitted or referred to the Centre for arbitration under rules of the Centre generally and where the case is a domestic case; or
(c) where the parties have agreed in writing that their dispute is to be submitted or referred to the Centre for arbitration without specifying any particular set of rules and where the case is a domestic case.’
“Rule 1.2 of the SIAC Domestic Arbitration Rules states that a case is a domestic case for the purposes of these rules when all parties to the arbitration at the conclusion of the arbitration agreement had their places of business in Singapore and where a substantial part of the obligations of the commercial relationship was to be performed in Singapore or where the subject matter of the dispute is most closely connected with Singapore. The plaintiff reiterated that both the plaintiff and the second defendant were Singaporean companies with their place of business in Singapore and the dispute was also closely connected to Singapore; this would make the arbitration a domestic one under Rule 1 the SIAC Domestic Arbitration Rules which were in force when the parties entered into their arbitration agreement.

Lastly, counsel for the plaintiff also referred to the Sale of Assets and VW Parts Agreement and highlighted that by clause 15 of the Sale of Assets and VW Parts Agreement, the parties had expressly agreed that the AA would apply (see [[59]] below). In his view, as the contracts formed part of a ‘global settlement’, clause 15 of the Sale of Assets and VW Parts Agreement could shed light on the arbitration agreement in the Termination of Dealership Agreement. He submitted that the drafters of the Termination of Dealership Agreement could have had an oversight and failed to expressly state that the AA would apply.

Was it the parties’ intention that the SIAC Rules 1997 would apply, and accordingly, by virtue of Rule 32 of the SIAC Rules 1997 (which is in pari materia with Rule 32 of the SIAC Rules 2007), the IAA would be the governing regime? Or did the circumstances dictate that the arbitration would be a domestic one with the AA as the governing regime? At the time the parties entered into the arbitration agreement, there were two sets of SIAC rules in place, as noted above. Now, at the point of submission to arbitration, only one set of SIAC rules are in place. Having been repealed, did the SIAC Domestic Arbitration Rules matter at all?

The key to these questions lies in the words ‘for the time being in force’. The parties agreed that the dispute ‘shall be referred to arbitration … in accordance with the Rules of the SIAC for the time being in force’. In Jurong Engineering (High Court), Lai Kew Chai J noted at [14]:

‘I took the view that the parties had agreed to submit to an SIAC arbitration, and generally, to the most appropriate institutional rules existing at the time of the submission (emphasis mine), regardless of whether those rules were in existence at the time of the Contract.’
Later (at [16] - [17] ), Lai Kew Chai J re-iterated the English position and added that if the parties had chosen to do so, they could have confined themselves to the rules that existed at the time of the contract:

‘16 The English Court of Appeal in *Perez v. John Mercer & Sons* [1922] 10 LIL Rep 584, which the plaintiffs referred me to, took a similar view. The clause in question, which was similarly general, read: “All disputes to be referred to the Tribunal of Arbitration of the Manchester Chamber of Commerce, to be determined in accordance with the rules of the Tribunal.” Were the rules which existed at the time of the contract or those which existed at the time of submission to arbitration to apply? The court construed the clause to read “according to the rules for the time being of the Tribunal”, as opposed to the rules which already existed at the time of the Contract.

17 If more specific words had been used in the arbitration clause, the defendants could possibly have effectively confined themselves to those rules that already existed at the time of the Contract. But that was not the case here.’

[52] “In *Jurong Engineering*, the parties entered into a contract which stated, inter alia, that “… any arbitration will be conducted in English in Singapore under and in accordance with the rules of arbitration promulgated by the [SIAC]”. At the time of the contract, the SIAC had only one set of rules: the SIAC Rules 1997 (as stated above, the SIAC Domestic Arbitration Rules were introduced later). After differences arose between the parties, the plaintiff commenced arbitration proceedings under the SIAC Domestic Arbitration Rules. The defendant objected, contending that the rules at the time of the contract, the SIAC Rules 1997, should apply instead. If the SIAC Rules 1997 applied, the IAA would be the governing regime. However, if the Domestic Arbitration Rules applied, the AA was the governing regime. At the High Court, Lai Kew Chai J held that the SIAC Domestic Arbitration Rules applied because the nature of the parties and the nature of the dispute meant that the matter was a domestic one, based on the rules that were in force at the time the matter was referred to arbitration viz. the Domestic Arbitration Rules. The defendant appealed to the Court of Appeal.

[53] “On appeal, in *Black and Veatch Singapora Pte Ltd v. Jurong Engineering Ltd* [2004] 4 SLR 19 (*Jurong Engineering (CA)*), Justice Woo Bih Li, delivering the judgment of the Court of Appeal laid out the rationale behind applying the rules which were in place at the time the dispute was submitted for arbitration. Woo J noted that although it was a principle of interpretation that contractual
provisions should be interpreted as at the date when the contract was made, the question still remained whether the arbitration agreement referred to rules of the SIAC in force and applicable as at the date of the contract or rules of the SIAC in force and applicable as at the date when arbitration commenced. WoJ considered the English position as laid out by Brandon J in *Bunge S.A. v. Kruse (No. 2)* [1979] 1 Lloyd’s Rep 279, and held that there was a prima facie inference that if the rules contained mainly procedural provisions, then the rules in force at the time of commencement of arbitration would be the ones that applied to the arbitration. However, if the rules contained mainly substantive provisions, then those in force as at the date the contract was entered into would apply. At [19]-[20] of *Jurong Engineering (CA)*, WoJ wrote:

19 In *Bunge S.A. v. Kruse* [1979] 1 Lloyd’s Rep 279 (affirmed on other grounds in [1980] 2 Lloyd’s Rep 142), a question arose as to whether a provision providing for any dispute to be settled by arbitration in accordance with the rules of an association meant that the rules of the association at the date the contract was entered into applied or the rules in force at the date of commencement of arbitration applied. In the view of Brandon J, at 286, there was a prima facie inference that where the rules contained mainly procedural provisions, then the rules in force at the time of commencement of arbitration would be the ones that applied to the arbitration. However, if the rules contained mainly substantive provisions, then those in force as at the date the contract was entered into would apply.

20 This decision was followed by Robert Goff J in *Peter Cremer v. Granaria BV* [1981] 2 Lloyd’s Rep 583 where Goff J said, at 592-593:

“Indeed, if one looks at it as a matter of common-sense, I do not think it can be expected that arbitrators in any particular case should have to look at the date of the contract, ascertain the relevant procedure for arbitrations which were in force as at the date and then, regardless of the fact that new procedures, which may or may not be fundamental, may have been introduced and applicable and [being] applied at the date when the arbitrators were appointed, go back to and apply the old procedure in force as at the date when the contract was made.”

The Court of Appeal was of the view that even if there were substantive differences between the IAA and the AA, the arbitration clause in *Jurong Engineering* did not refer directly to primary legislation but to rules promulgated
by the SIAC which were clearly procedural in nature, and therefore the rules at
the time the dispute was submitted to arbitration would be applicable (see Jurong
Engineering (CA) at [22]-[23]).
[54] “The facts in Jurong Engineering and the present case are not dissimilar. In
both cases, the SIAC’s rules changed in between the time the parties entered into
the arbitration agreement and the time the matter was submitted to arbitration.
In Jurong Engineering, the SIAC Domestic Arbitration Rules came into force in
between the time the contract was entered into and the matter was submitted for
arbitration. In the present case, the SIAC Domestic Arbitration Rules were
repealed in the period between the arbitration agreement was made and the
matter was submitted to arbitration. Also, within this period, the SIAC Rules
2007 had replaced the SIAC Rules 1997.
[55] “Following Jurong Engineering (CA), the principle to be applied in both cases
is the same: where rules are mainly procedural, the rules in force at the time of
commencement of arbitration will apply. In this case, the arbitration agreement
referred to the SIAC rules for the time being in force. The parties did not
contract to adopt the SIAC rules in force at the time of the contract. As such, the
rules to be applied are the rules in force at the time the matter is referred to
[56] “This does not mean that just because the SIAC Domestic Arbitration Rules
have been repealed, all arbitration agreements where the parties chose to adopt
SIAC rules will be converted into international arbitrations under the new SIAC
Rules 2007 (read with Rule 32). Art. 2 of Schedule 1 of the SIAC Rules 2007 is
a transitional provision which states:

‘Article 2 – Transitional Provision
1. Where parties have by agreement expressly referred to arbitration under the
SIAC Domestic Arbitration Rules (emphasis mine), the agreement shall be
deemed to be a reference to arbitration under these Rules and to this
Schedule.
2. Notwithstanding Rule 32, the law of the arbitration to which this
Schedule applies shall be the Arbitration Act (Chapter 10, 2002 Ed,
Statutes of the Republic of Singapore) or its modification or re-enactment
thereof.’

[57] “This means that, at present, only where the parties have by agreement
expressly referred to arbitration under the SIAC Domestic Arbitration Rules,
Schedule 1 of the SIAC Rules 2007 will apply, and the arbitration will be
governed by the AA. The SIAC Rules 2007 will apply to all other arbitration
agreements which adopt SIAC rules and do not expressly refer to the SIAC Domestic Arbitration Rules 2002. On reading the SIAC Rules 2007, it appears that if a party today wants to incorporate SIAC rules but retain the status of the arbitration as a domestic arbitration, it must expressly refer to arbitration under ‘SIAC Domestic Arbitration Rules’ so as to trigger the operation of Schedule 1, SIAC Rules 2007; alternatively, the parties can expressly adopt the SIAC Rules 2007 and expressly stipulate that the AA shall apply accordingly.

[58] “In the present case, the arbitration agreement does not expressly refer to the SIAC Domestic Arbitration Rules. For this reason, Art. 2 of Schedule 1 of the SIAC Rules 2007 (being the SIAC rules in force at the time the matter is submitted to arbitration) will not apply. The parties also did not expressly state that the AA would apply. Therefore, this arbitration will be governed by the SIAC Rules 2007. Rule 32 of the SIAC Rules 2007 will apply, and the governing regime will be the IAA.

[59] “At this juncture, I should also deal with the argument raised by counsel for the plaintiff that the arbitration clause contained in the Sale of Assets and VW Parts Agreement could shed light on the arbitration clause contained in the Termination of Dealership Agreement because (as the plaintiff put it) the Termination of Dealership Agreement was one agreement out of a ‘global settlement’. The arbitration agreement in the Sale of Assets and VW Parts Agreement read:

‘15 Arbitration

15.1 Any dispute between the parties arising out of or in relation to this Agreement, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in accordance with the Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force which rules are deemed to be incorporated by reference into this Clause. The Arbitration Act in force in Singapore shall apply accordingly (emphasis mine).

15.2 Arbitration shall take place in Singapore before an arbitrator, either mutually agreed upon by the parties or in the event that the Parties cannot agree appointed by the President of the SIAC.

(....)’

[60] “This happens often in the practice of international dispute resolution. More often than not, international transactions involve more than one contract. Sometimes, mechanisms and procedures for dispute resolution are only contained in one contract, and other contracts which are part of the transaction
are silent on the issue. In other situations, different contracts provide for
different means and procedures for dispute resolution – some contracts require
the parties to submit to the jurisdiction of the courts in a certain state and other
contracts require disputes to be referred to arbitration in a separate venue. In
transactions like this, it may be unclear what the parties intended on how to
settle disputes arising out of the whole contractual scheme. So, parties often
resort to importing dispute resolution clauses from one contract into another to
suit their tactical preferences, resulting in further disagreements between them.

[61] “In *Dalian Hualiang Enterprise Group v. Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 (*Dalian*), the first plaintiff, Dalian Hualiang Enterprise (*DHE*) and the
defendant entered into a contract (the *Armonikos Contract*) which contained an
arbitration clause. DHE then assigned it to the second plaintiff (DJOM). DHE
and DJOM filed an action against the defendant for payments due. The defendant
applied for a stay in favour of arbitration. The defendant then raised a set-off
against DHE and DJOM in relation to a contract with a Guangdong company (the
*Hanjin Tacoma Contract*) alleging that the Guangdong company was part of the
group of companies that included the plaintiffs. A stay of proceedings in relation
to the set-off claim was ordered by an Assistant Registrar. On appeal, the issues
before the court were whether the court had the jurisdiction to determine if
there was in fact a dispute between the parties and if the issue of set-off was
within the scope of the arbitration agreement. Justice Woo Bih Li allowed the
appeal and held that as DHE and DJOM were not parties to the *Hanjin Tacoma
Contract* and the disputes under the *Armonikos Contract* were unrelated to the
disputes under the *Hanjin Tacoma Contract*, the setoff issue was not within the
scope of the arbitration agreement contained in the *Armonikos contract* and thus
would not be submitted to arbitration.

[62] “In summary, the High Court in *Dalian* held that the arbitration clause
contained in one contract did not apply to the claims arising from another
contract. Similarly, in this case, the arbitration clause contained in the *Sale of
Assets and VW Parts Agreement*, which expressly provided that the AA would
be the governing regime, cannot apply to claims arising out of the *Termination of
Dealership Agreement*.

[63] “The situation is different when there is one ‘head’ agreement, and the
other agreements are supplemental to it. In such a situation, if supplemental
agreements expressly refer to one head agreement, and the head agreement
contains an arbitration clause, it can be surmised that the parties’ intention was
to refer all disputes arising out of the whole set of contracts to arbitration.

*Fouchard Galliard Goldman on International Commercial Arbitration* (Emmanuel
Galliard and John Savage eds.); Kluwer Law International: 1999 at para. 520 states:

‘The first is where only the heads of agreement, or framework agreement, contains an arbitration clause to which the other related contracts refer. This case presents no difficulty. The parties’ intention is clear: they sought to refer all disputes arising out of the whole set of contracts to arbitration, before a single arbitration tribunal in accordance with the heads of the agreement.’

[64] “In the present case, there was no head agreement that the other supplemental contracts referred to. Even if the plaintiff was of the impression that it was entering into a ‘global settlement’, it chose to do so in separate contracts with separate and distinct procedures for dispute resolution provided for in the contracts. If the agreements were supplemental to one head agreement which contained a dispute resolution clause that applied generally to all the supplemental agreements, I would not have hesitated to apply the dispute resolution clause from the head agreement to all the supplemental agreements (provided the supplemental agreements did not contain their own dispute resolution clauses). For a discussion on this issue, see Tjong Very Sumito and Others v. Antig Investments Pte Ltd [2008] SGHC 202.

[65] “For this reason, as the two dispute resolution clauses were contained in different contracts, I was hesitant to import the dispute resolution clause contained in the Sale of Assets and VW Parts Agreement into the Termination of Dealership Agreement. I was also hesitant to use it to shed light on what the parties could have intended in the Termination of Dealership Agreement. I felt that it was possible that the parties could have intended for a separate regime for dispute resolution in the Termination of Dealership Agreement which was why the lawyers who drafted it did not expressly refer to the AA as the governing regime. After all, the Sale of Assets and VW Parts Agreement had GEPL as a party too, so it was possible that the parties agreed to a dispute resolution clause of a different nature altogether.

[66] “In the world of commercial arbitration, multiplicity of proceedings and uncertainty over the governing regime of the arbitration can easily arise out of the web of contracts in an international transaction that transcends geographical boundaries and an array of dispute resolution procedures. Arbitration clauses contained in various contracts could provide for arbitration under different seats, laws, languages, or institutional rules.
“In the present case, the parties could have avoided any multiplicity of proceedings and uncertainty over the governing regime by putting the four settlement agreements under one head agreement with one clear dispute resolution clause as I have discussed above. In that way, all disputes arising out of the settlement agreements can be resolved according to the dispute resolution clause contained in the head agreement. Parties who want to avoid multiplicity of proceedings can also provide for multi-partite arbitration under one governing regime if the relationship between the parties allows for it. Further, the dispute resolution clause could also contain a provision that requires consolidation of arbitration proceedings under one tribunal and one governing regime for disputes that contain related issues or parties. I should also add at this juncture, that all this may be easy to propose in theory, but in practice, drafting such clauses will be highly technical and tricky. It may also lead to further litigation between the parties on the applicability of the clauses to the disputes that arise. Nevertheless, the inclusion of such clauses may, in most cases, avoid the inconvenience and uncertainty of having two proceedings side by side.”

V. CONCLUSION

“In light of my finding that the IAA is the governing regime for the arbitration agreement, I am bound to stay the proceedings in favour of arbitration in relation to all claims involving the second defendant under Sect. 6 of the IAA. I should also add, for the reasons I have given above, that even if the court had the discretion to refuse a stay, I saw no reason to refuse a stay on the grounds that a multiplicity of proceedings would result. Either way, I am of the view that a stay of proceedings in favour of arbitration should be granted.

“For these reasons, I allow the second defendant’s application for a stay. I remain grateful to the counsel on both sides for their submissions before me. I shall hear the parties on costs.”
SWITZERLAND

Ratification: 1 June 1965
No Reservations

40. Tribunal Fédéral [Federal Supreme Court], First Civil Chamber, 9 December 2008, 4A_403/2008/ech

Parties:
Appellant: Compagnie X SA (nationality not indicated)
Appellee: Federation Y

Published in:
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Articles:
V(1)(e)

Subject matters:
– award “not (yet) binding”
– suspension of enforcement in country of origin (France)
– grounds for refusal of enforcement are exhaustive and strict

Commentary Cases:

Facts

This case arises out of a complex dispute involving loan agreements. On 31 July 2002, Compagnie X SA (Company X) and Federation Y (the Federation) entered into a Protocol of Agreement under which the Federation agreed to pay Company X US$ 800,000,000 in repayment of certain loans. The Protocol was subject to a certain condition for its validity. It also contained a clause for ICC arbitration of disputes in Paris. The Federation did not pay under the Protocol of Agreement. Company X sought a payment order from the Debt Enforcement Office (Office des poursuites) in Geneva on the basis of the Protocol. On 27 February 2003, the Office notified an order for the payment of CHF 1,185,600,000 – the equivalent of US$ 800,000,000 – to the Federation. The
Federation opposed the order and, on 30 July 2003, commenced ICC arbitration in Paris in respect of this dispute.

On 5 June 2007, an ICC arbitral tribunal issued a majority award holding that the debt which was the object of the Swiss payment order did not exist, because the condition for the Protocol’s validity was not complied with when the award was rendered. On 25 June 2007, the Federation obtained an order of execution (the exequatur) in respect of the award from a French court. The exequatur was notified to Company X on 13 July 2007. The notification expressly mentioned that the exequatur could be appealed before the Paris Court of Appeal within a time limit of three months from the date of its notification.

On 17 October 2007, the arbitral tribunal issued an addendum correcting and interpreting the award in respect of certain material errors, at the request of Company X. No exequatur was issued in respect of the addendum.

On 8 January 2008, the Federation filed a request for enforcement of the ICC award in Switzerland; it did not mention the addendum. On 13 March 2008, the Geneva Court of First Instance granted enforcement. On 7 August 2008, the Geneva Court of Appeal affirmed the enforcement decision.

The Federal Supreme Court affirmed the lower court’s decision, denying Company X’s defenses under Art. V(1)(e) of the 1958 New York Convention.

First, Company X argued that the award was not yet binding between the parties because an action for setting aside (recours en annulation) could still be filed against it. The addendum was an integral part of the award and consequently the time limit of three months for filing an action for setting aside would start running only from the notification of the exequatur of the addendum of 17 October 2007. No such notification had been made.

The Court reasoned that foreign awards are binding when ordinary means of recourse are not (or no longer) available; extra-ordinary means of recourse, such as a recours en annulation, do not affect the binding character of an award.

Second, Company X argued that the award had been suspended in France because French law provides that an action for setting aside has an automatic, ex lege suspensive effect on the execution of the award.

The Supreme Court noted that while it did hold in the past that the suspensive effect by law of an appeal against the award to the courts in France was a ground for refusing enforcement under the Convention, it subsequently embraced the opposite opinion and held that suspension must be expressly granted by a competent court in order to be a ground for refusal of enforcement under the Convention. The Court noted that this latter opinion, which has been welcomed by commentators, is in accordance with the New York Convention which refers to awards “suspended by a competent authority”; it also agrees with the
restrictive interpretation to be given of the grounds for refusal of enforcement under the Convention.

Excerpt

(...)  

1. “BINDING”

[1] “By its first ground for appeal, the appellant [Company X] claims that the arbitral award, which was rendered in France in international arbitration, can be appealed only by an action for setting aside [recours en annulation] as provided for in Art. 1504(1) NCCP. Since the ‘Addendum’ of 17 October 2007 is part of the award of 5 June 2007, the action for setting aside must be addressed against the award and its ‘Addendum’ as a whole. Company X deduces from this that the time limit for filing an action for setting aside the award of 5 June 2007 can start running only after a new enforcement order has been issued for the award and its addendum together as a whole. By failing to understand this, the court of appeal allegedly violated Art. V(1)(e) of the [1958] New York Convention.

[2] “It results from the facts [of the case] that the awards at issue, whose recognition is sought in Switzerland, were rendered by an arbitral tribunal with seat in Paris. Hence, the [Swiss] PILA does not apply to this enforcement dispute (see Art. 176(1) PILA); rather, the New York Convention applies, as provided for by Art. 194 PILA.”

1. Art. 1504(1) of the New French Code of Civil Procedure (NCCP) reads:

“The action for setting aside is available against arbitral awards rendered in France in international arbitration, on the grounds of Art. 1502.”

2. Art. 176(1) of the Swiss Private International Law Act (PILA) reads:

“The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is situated in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.”

3. Art. 194 PILA reads:

“The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.”

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[3] “Art. V(1) Convention lists the grounds for opposition to enforcement, which are examined only if they are invoked and proved by the party opposing the recognition of the arbitral award in the State where enforcement is sought (ATF 110 Ib 191 under 2c p. 195; 108 Ib under 3 p. 88; decision of 8 December 2003 in case 4P.173/2003, under 3.1).”


[5] “The appellant relies only on the ground for opposition under Art. V(1)(e) Convention. [Quotation of Art. V(1)(e) Convention omitted.] We must therefore ascertain whether the arbitral award of 5 June 2007 and the ‘Addendum’ of 17 October are not binding within the meaning of the New York Convention, as argued by the appellant.


[7] “In order to be deemed ‘binding’, a foreign award need not be executory in the state of origin, since the New York Convention wished to avoid ‘double exequatur’ (ATF 108 Ib 85 under 4e; decision 5P.292/2005 of 3 January 2006, already cited above, under 3.2; Patocchi/Jermini, op. cit., note 114 to Art. 194 PILA; Kurt Siehr, Commentaire zurichois, 2nd ed., 2004, note 26 to Art. 194 PILA).

[8] “The fact alone that an action for setting aside is possible or has been filed in the state of origin against the award whose recognition is sought in another state does not affect that award’s ‘binding’ character (Poudret/Besson, op. cit., Chapter 920, p. 897; Philippe Fouchard et al., Traité de l’arbitrage commercial international, Paris 1996, Chapter 1684, p. 992).
[9] “In the present case, the appellant argues that an arbitral award rendered in France in international arbitration can only be the object of an action for setting aside under Art. 1504(1) NCCP. If we apply the principles mentioned above, the possibility of filing such a recourse does not suffice to make the award non-binding in the sense of the New York Convention. We must add that the appellant has not proved that the action for setting aside under French law is an ordinary means of recourse. Hence, the appellant has failed to establish that the award of 5 June 2007 and its ‘Addendum’ have not become ‘binding’ under Art. V(1)(e) Convention. The appeal must be denied.”

II. “SUSPENDED”

[10] “In support of its second ground for appeal, the appellant argues that the court of appeal again violated Art. V(1)(e) of the New York Convention by holding that the suspensive effect of an appeal against an arbitral award can be a ground for opposition under this provision of the Convention only if the suspension follows from a decision of a judicial authority. The appellant claims that on the contrary the suspensive effect in Art. 1506 NCCP6 suffices to prevent enforcement of the arbitral award and that the position of the court of appeal, which was based on doctrinal opinions, is not in accordance with Swiss court jurisprudence. Company X refers on this point to ATF 110 Ib 191 under 2c p. 195 and to a decision rendered in 1987 by the Geneva court of appeal that was in line with that precedent.

[11] “Company X does not argue, correctly, that the awards whose enforcement is sought in Switzerland were annulled by a French court, nor has it ever claimed that it filed an action against those awards in France. It only argues that the awards have been suspended in the state of the seat [of the arbitral tribunal] (that is, in France) because of the suspensive effect of Art. 1506 NCCP, which provides that the time limit for filing the action for setting aside under Art. 1504(1) NCCP suspends the execution of the arbitral award, and that an action filed within that time limit is equally suspensive.

6. Art. 1506 NCCP reads:

“The time limit for the procedures of Arts. 1501, 1502 and 1504 suspends the execution of the arbitral award. Institution of one of these procedures within the time limit has the same suspensive effect.”

814 Yearbook Comm. Arb’n XXXIV (2009)
[12] “In ATF 110 Ib 191 under 2c, cited by the appellant, this Federal Supreme Court held without any reference to doctrinal opinions that the ex lege suspensive effect of the cassation appeal to the Supreme Court under French law as in force at that time was a ground for opposition under Art. V(1)(e) of the New York Convention.

[13] “In its decision 5P:371/1999 of 21 March 2000 under 2b, published in ASA 20/2002 p. 266 et seq., particularly p. 268, this Court affirmed that the Art. V(1)(e) ground relied on to deny enforcement of an English arbitral award was not applicable in casu because the judges of the London Court of Appeal had not formally suspended the award. The federal judges supported this change of opinion by a reference to Albert Jan van den Berg, ‘The New York Convention: Summary of Court Decisions’, in ASA Special Series no. 9, p. 90 and Paulsson, op. cit., p. 112; both authors refer to a decision of the Swedish Supreme Court of 13 August 1979 on the enforcement in Sweden of an arbitral award rendered in France, where it could be the object of an action for setting aside (case Götaerken Arendal AB v. General National Maritime Transport Company, published in Revue de l’arbitrage, Paris 1980, p. 555 et seq.).

[14] “On 8 December 2003, this Federal Supreme Court rendered decision 4P:173/2003; at 3.1, middle part, it stated that enforcement of a foreign arbitral award must be refused ‘where suspensive effect has been granted to a request for setting aside the award by a competent authority’. This sentence is followed by a reference to Patocchi/Jermini, Commentaire bâlois, 1st ed., 1996, note 117 to Art. 194 PILA.

[15] “In its decision 5P:292/2005 of 3 January 2006, mentioned ... above, this Federal Supreme Court confirmed implicitly the two decisions mentioned above, which were not published in the Official Collection [Recueil officiel]. It wrote that there is a ground for opposition to enforcement under Art. V(1)(e) Convention if the effects of the award ‘have been suspended by the competent authority ... pending an annulment action’. This decision refers, next to the above-mentioned opinion of Patocchi/Jermini, to the opinions of Siehr, op. cit., note 26 to Art. 194 PILA and Andreas Bucher / Andrea Bonomi, Droit international privé, 2nd ed., 2004, note 1330.

[16] “This new view of this Federal Supreme Court – that suspension of the award in the state of origin is a ground for opposition in the sense of Art. V(1)(e) Convention only if the suspension was granted by court decision, not if it simply ensues by law from the action filed against the award – has been welcomed by commentators (Gabrielle Kaufmann-Kohler/Antonio Rigozzi, Arbitrage


2000 must be confirmed. First of all, it is in accordance with the text of the New
York Convention which, in respect of the ground for refusal at issue, refers to
an award ‘suspended by a competent authority of the country in which, or under
the law of which, that award was made’. A suspension by operation of the law
clearly exceeds the context of this provision.

[18] “Further, the grounds for refusal under Art. V Convention must be
interpreted restrictively in order to favour the enforcement of arbitral awards
(Poudret/Besson, op. cit., Chapter 902, p. 881; van den Berg, The New York

[19] “Finally, it would seem sensitive, from the point of view of legal theory, to
hinder [the application of] an international Convention, whose purpose it is to
facilitate the recognition of foreign arbitral awards, by relying merely on a
procedural rule of the state of the seat [of the arbitration], which suspends
execution of the award in that state while the award may be subject to extra-
ordinary means of recourse.

[20] “Based on the above, we hold that the suspensive effect of an action for
setting aside under Art. 1506 NCCP is not a defense allowing the appellant to
prevent enforcement of the award of 5 June 2007 and the ‘Addendum’ of 17
October 2007 in Switzerland. This ground for appeal is unfounded.

[21] “This conclusion exempts this Federal Supreme Court from examining the
appellant’s ground for appeal concerning the means of recourse available under
French law when an arbitral award rendered in France and governed by the ICC
Rules is accompanied by a corrective or interpretative addendum.

[22] “In the light of the above, this appeal must be denied. The appellant, being
the losing party, shall bear the costs of the proceedings (Art. 66(1) [Federal Law
on the Federal Supreme Court – Loi sur le Tribunal fédéral (LTF), 17 June 2005]
and pay an indemnity to the appellee for its expenses (Art. 68(1)-(2) LTF).”

Parties: Claimant: Glencore International A.S. (nationality not indicated)
Defendant: Metropolitan Municipality of Bursa (Turkey)

Published in: No information available at time of publication

Articles: V(1)(e) (by implication)

Subject matters: – applicable law to arbitration determines annulment forum
– setting aside of award only by court of country under the law of which the award was made

Commentary Cases: ¶ 516

Facts

On 2 September and 3 December 1992, the Metropolitan Municipality of Bursa (Bursa), a city in northwestern Turkey, and Glencore International A.S. (Glencore) entered into two contracts for the purchase of fuel coal; a supplementary contract was concluded on 15 November 1994. All contracts contained arbitration clauses.

1. The General Editor wishes to thank Dr. Hakan Karan, attorney and Head of the Maritime Law Department, Law Faculty, Ankara University, and Ms. Burcu Yüksel, Ph.D. student, for their invaluable assistance in translating this decision from the Turkish original.
A dispute arose between the parties and Bursa commenced arbitration against Glencore as provided for in the contracts. The arbitration proceeding was held in Germany. On 19 November 1997, the arbitral tribunal rendered an award in favor of Glencore. Bursa appealed to the Turkish Supreme Court against the award through an application to the Bursa First Commercial Court of First Instance.

The Supreme Court dismissed the application, holding that it can only hear appeals against “Turkish” awards. The Court noted that the nationality of an award is determined solely on the basis of the “procedural law principle”, that is, an award is an award of the country under whose procedural law it is rendered. If the parties expressed no specific intention as to the applicable procedural law in the arbitration agreement or otherwise, and their intention cannot be ascertained by interpreting other contractual provisions, then it shall be deemed that they left the decision of the applicable procedural law to the arbitrators.

This was the case here. Since it appeared from the minutes of the hearings that the arbitrators had decided to apply and had in fact applied German procedural law, the award was a German, rather than a Turkish, award and could not be appealed in Turkey.

Excerpt

[1] “Upon the appeal filed by the claimant, with a request for a hearing, and by the defendant, with no such request, against the arbitral award rendered on 19 November 1997 in the proceedings between Glencore International A.S. and the Metropolitan Municipality of Bursa, the award was sent to this Chamber by the Bursa First Commercial Court of First Instance; the parties were notified of the hearing. The hearing commenced on the set date in the presence of defendant’s attorneys; after hearing the oral explanations of the attorneys present [at the hearing], the hearing was adjourned for issuing a decision. Thereupon, having ascertained that the petition was submitted timely, the file was examined and [the following] was held.

[2] “Upon the appeal timely [filed] by the attorney for the defendant, the Metropolitan Municipality of Bursa, by submitting an appeal petition to the Bursa First Commercial Court of First Instance against the arbitral award rendered in the City of Cologne in Germany by an arbitral tribunal with respect to the claimant’s claim arising from the contractual relationship between the parties, the appeal petition and the file attached thereto were examined, and a decision was rendered. The defendant timely appealed, by submitting a petition to the
Bursa First Commercial Court of First Instance, against the arbitral award rendered by an arbitral tribunal consisting of three arbitrators, one of them Turkish, in the City of Cologne in Germany, concerning the dispute arising from the performance of the contracts for the purchase of fuel coal dated 2 September 1992 and 3 December 1992, and the supplementary contract dated 15 November 1994, on the basis of the arbitration clauses in the contracts, at the conclusion of proceedings commenced by the claimant, which had been notified to the parties.

[3] “Whether the arbitral award could be appealed must be examined and assessed by the Supreme Court of Cassation as a preliminary question.

[4] “First of all, it must be pointed out that an appeal against an arbitral award shall be heard by the Supreme Court of Cassation only on the condition that the award is a ‘Turkish Arbitral Award’. In other words, foreign arbitral awards cannot be the object of an appeal to the Supreme Court of Cassation. The nationality of the arbitral award shall therefore be determined beforehand.

[5] “In doctrine and in the practice of the Supreme Court of Cassation, the nationality and domicile of the parties to an arbitration agreement, the place of arbitration (the place where the arbitration proceedings took place and the arbitral award was rendered), the nationalities of the arbitrators and the substantive law applied by the arbitrators to the settlement of dispute shall not be adopted as criteria for the determination of the nationality of the arbitral award.

[6] “In doctrine and in the continuous practice of the Supreme Court of Cassation, the relevant principle in respect of the nationality of arbitral awards is the ‘procedural law principle’. According to this principle, an arbitral award is deemed an arbitral award of the country under whose procedural law it is rendered. Thus, it must be ascertained which country’s procedural law rules were applied in rendering the arbitral award.

[7] “In determining the country whose procedural law rules were applied by the arbitrators, it is first examined whether the parties agreed on this point in the arbitration agreement or somewhere else. In the absence of such agreement, the parties’ intention as to the procedural law applicable to the arbitration shall be ascertained on the basis of the interpretation of other provisions in the arbitration agreement. If this method fails to lead to a conclusion, it shall be deemed that the parties have left the decision of the choice of the applicable arbitration procedure to the arbitrators. In such case, which country’s procedural law is to be applied
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in the settlement of the dispute shall be determined by the arbitrators. This assumption is also in line with Art. 525 of the Code of Civil Procedure.2

[8] “In light of this rule and explanations, it appears that in the present case the arbitral award was rendered by an arbitral tribunal consisting of three arbitrators, one of them Turkish and the two others foreigners, in the City of Cologne in Germany, on the dispute arising from contracts, one party to which was Turkish and the other a foreigner, at the conclusion of a proceeding commenced by the foreign party; that the parties were notified of the award; that the defendant timely appealed against the award by submitting a petition to a Turkish court, and that, on appeal, the appeal petition and the attached documents were sent to the Supreme Court of Cassation.

[9] “It is also noted that the parties did not agree on the procedural law to be applied by the arbitrators in the arbitration clauses in the contracts or in a separate document. Nor is it possible to reach a conclusion in respect of this matter by interpreting other clauses. Under these circumstances, as stated above, it shall be deemed that the parties left this determination to the choice of the arbitrators.

[10] “It clearly appears from the certified translation of the minutes of the meeting that took place on 2 April 1997 that the arbitral tribunal agreed on the application of the rules of German procedural law, and that the proceeding was conducted in accordance with this decision of the tribunal. Therefore, there is no doubt that the appealed award has the nature of a foreign arbitral award. It is also clear that foreign arbitral awards cannot be examined by the Supreme Court of Cassation.

[11] “On the other hand, the appealed arbitral award was not submitted to a Turkish court by the arbitrators as provided for in Art. 532 of the Code of Civil Procedure.3 The submission of the appeal petition to the court cannot be deemed

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2. Art. 525 of the Turkish Code of Civil Procedure reads:

"Unless agreed otherwise, the arbitrators determine the form of the procedure and fix the time limits. When the time limits have expired, the arbitrators decide only on the basis of the documents which have been submitted to them."

3. Art. 532 of the Turkish Code of Civil Procedure reads:

"The arbitral award is to be filed at the Secretariat of the competent court, which shall keep it in its archives and shall issue copies of it to the parties who so request. A written notification of this filing and of the decision is given to the parties by the Court, which may require an acknowledgment of receipt. The award is only deemed to exist between the parties..."
sufficient to fulfill this procedural requirement related directly to the arbitral award. Thus, the defendant’s appeal shall be dismissed.

[12] “Based on the above grounds, the dismissal of the defendant’s appeal is unanimously held on the date of 7 July 1998.”

Parties:

Claimant: Sarilar Uluslararası Nak. Ihr. Ltd. Sti.
(nationality not indicated)

Defendant: Batinak Shipping Trading Co. Ltd.
(nationality not indicated)

Published in:

No information available at time of publication

Articles:

II(2)

Subject matters:

– incorporation of arbitration clause by general reference to standard conditions
– standard contract (GENCON charterparty)

Commentary Cases:

¶ 209

Facts

On 16 January 2003, Sarilar Uluslararası Nak. Ihr. Ltd. Sti. (Sarilar) entered into a voyage charterparty with Batinak Shipping Trading Co. Ltd. (Batinak) for the carriage of two cranes located in Dubai to Turkey by sea on a certain vessel. The charterparty contained a clause reading “Other terms are as like in GENCON 76 Charter Party”. The GENCON 76 Charter Party contains a clause referring disputes to arbitration in London.

A dispute arose between the parties when Batinak failed to make the vessel ready at the port and the cranes were transported to Turkey on two separate vessels by another company after a long wait in Dubai. Sarilar commenced an action in the First Commercial Court of First Instance in Izmir, seeking compensation for costs and damages. Batinak raised the objection of lack of

1. The General Editor wishes to thank Dr. Hakan Karan, attorney and Head of the Maritime Law Department, Law Faculty, Ankara University, and Ms. Burcu Yüksel, attorney and Ph.D. student, for their invaluable assistance in translating this decision from the Turkish original.
jurisdiction based on the arbitration clause in the charterparty. Sarilar countered that there was no valid arbitration agreement between the parties because Sarilar did not sign the GENCON form containing the arbitration clause.

By the first decision, on 19 November 2004, the First Commercial Court of First Instance in Izmir granted Batinak’s objection, holding that the parties concluded a valid arbitration agreement and should therefore refer their dispute to arbitration.

By the second decision, on 19 January 2006, the Turkish Supreme Court affirmed the lower court’s decision. The Court noted the “clear” arbitration clause contained in the GENCON 76 Charter Party and held that an arbitration agreement had been validly concluded between the parties by reference thereto, in accordance with Art. II(2) of the 1958 New York Convention.

Excerpt

First Commercial Court of First Instance, 19 November 2004

[1] “At the end of the open trial in the action commenced against the defendant by the claimant’s attorney, which was heard by this Court, we hold [the following].

[2] “The claimant’s attorney argued that his client concluded a contract dated 16 January 2003 for the carriage of two cranes from Dubai to Turkey; that the defendant failed to make the ship ready at the port; that the cranes had to wait there; that they were then transported by another company. Reserving all further rights, and taking into account the amount of freight, as well as the extra port and warehousing expenses and loss of profit, he claimed US$ 30,000 for the claimant’s loss from the defendant, as well as interest at the annual rate of 12% from the date of payment; reserving all further rights, he also claimed] 10,000 Turkish Lira for warehousing expenses, with rediscount interest from the date of payment, and, in addition, 1,000 Turkish Lira, being the loss of profit, together with rediscount interest due from 28 February 2003.

[3] “In his petition, the defendant’s attorney sought dismissal of the case, arguing that the contract dated 16 January 2003 was concluded between the parties as a type of voyage charterparty; that at the end of the second page of the contract there was a clause stating that ‘Other terms are as in the GENCON 76 Charter Party’, and that clause 19 of the GENCON Charter Party refers disputes between the parties to settlement by arbitration in London; that, on this basis, this court cannot hear this case; that his client cannot be sued directly because it
acted as an agent; that his client offered to the claimant another ship of the same quality, even cheaper, but the claimant did not accept the offer; that the claimant had the cranes carried by two ships; that the contracts contained exaggerated amounts and were therefore simulated contracts.

[4] “In his reply statement, the claimant’s attorney claimed that the case should be heard by this court, arguing that although the objection had been raised as an objection to competence, it should be treated as an objection to jurisdiction; that an arbitration agreement cannot derogate from the jurisdiction of the Turkish courts, and that the other objections were similarly unfounded.

[5] “The parties submitted the contract and relevant documents. It is noted that the parties accept that on the second page (applicable law and arbitration) of the contract of carriage concluded between the parties on 16 January 2003, it is stated under the special terms that all other clauses of the contract were accepted as per the GENCON 76 Charter Party; that these clauses were acquiesced in by the parties; that it is expressly agreed in the sections of the GENCON Charter Party relating to the applicable law and arbitration that disputes shall be settled by arbitration in London according to the 1950 and 1979 Arbitration Acts, as amended and legally in force, and that the settlement shall be reached under English Law; that the parties signed the contract and accepted this agreement as it is, and that they are bound thereto.

[6] “As it appears from earlier decisions rendered by this Court on this issue, which have been affirmed by the Supreme Court of Cassation and have become final, copies of which are attached to the file, in accordance with the contractual terms binding on the parties, the dispute between the parties should be settled by arbitration in London, and we hold as follows, dismissing the claim on the ground of lack of jurisdiction.

[7] “On the above grounds, we unanimously hold on 19 November 2004, read and explain to the parties’ attorneys that, on the ground that the dispute between the parties should be settled by arbitration, the claim is dismissed on the ground of lack of jurisdiction of this court, without prejudice to an appeal to the Supreme Court of Cassation.”

Supreme Court, 19 January 2006

[8] “In the case between the parties, upon the determination that the claimant’s attorney requested the Supreme Court of Cassation to review the decision rendered by the First Commercial Court of First Instance in Izmir, dated 19 November 2004 and numbered 2004/245-2004/862, and that the appeal
petition was timely submitted, we argue and hold [the following], after studying
the report by Investigating Judge Mutlupinar and also reading and examining the
petition, pleadings, records of hearing and all other documents in the file.

[9] “The claimant’s attorney, reserving his client’s further rights, sought

(i) payment of US$ 30,000, currently, because of freight differences;
(ii) [payment] of US$ 111,947 as his client’s loss, together with interest at the
exchange rate applied to sales to the Central Bank on the date of payment;
(iii) 10,000 Turkish Lira, currently, being extra port and warehousing expenses,
together with interest from the date of payment;
(iv) the determination of his client’s economic loss of profit due to the failure to
timely carry the cranes to Turkey as a result of the defendant’s fault, as well as
(v) payment of 1,000,000,000 New Turkish Lira, currently, as compensation for
the economic loss, together with interest.

He argues that, even though the defendant company undertook to carry his
client’s two port cranes situated in Dubai [to Turkey] by sea, the cranes had to
stay for a long time in Dubai port because the defendant could not make ready
the ship which would carry the cargo, and that, upon failure in the carriage due
to the defendant’s fault, his client was obliged to have the cranes carried by two
separate ships.

[10] “The defendant’s attorney first requested dismissal of the case on ground
of jurisdiction, because pursuant to the clause in the contract of affreigment
concluded between his client and the claimant, the GENCON Charter Party was
made a part of the contractual relationship between the parties, and the dispute
should thus be settled by arbitration in London.

[11] “Taking into account the claim, the defence and the overall file, the court
of first instance dismissed the case on ground of jurisdiction and held that it had
no jurisdiction by stating that, according to the terms of the contract binding the
parties, the dispute had to be settled by arbitration in London. The claimant’s
attorney appealed against this judgment.

[12] “We consider the documents in the file, the evidence and reasons relied on
for the judgment, and the clear arbitration clause in the terms of the ‘GENCON
76 Charter Party’ referred to in the written document on which the claimant
relied, and we hold that such arbitration clause agreed to in this manner is
compatible with Art. II(2) of the [1958 New York Convention], to which Turkey
became a party in 1991. Hence, we find the claimant’s defence based on the
nullity of the arbitration clause because of the lack of the claimant’s signature on
the standard contract to be unfounded. All the grounds for appeal raised by claimant’s counsel are rejected.

[13] “Based on the above grounds, we unanimously hold ... that all the grounds for appeal of the claimant’s attorney are rejected, and that the judgment [of the lower court] is affirmed pursuant to the procedure and the law.”

Parties:  
Claimant: Buyer (nationality not indicated)  
Defendant: Seller (nationality not indicated)

Published in:  
Available online at <www.kazanci.com.tr> (Turkish Electronic Database for Case Law, subscription required)

Articles:  
V(1)(a) (by implication)

Subject matters:  
– incapacity of party to arbitration agreement  
– power of attorney to sign arbitration clause

Commentary Cases: ¶ 505

Facts

By two contracts dated 12 and 13 July 2004, the seller agreed to supply and the buyer to purchase 440 tons of lentils. Both contracts contained an arbitration clause.

A dispute arose between the parties when the seller failed to provide the lentils as agreed and the claimant had to make purchases from third parties in order to meet its obligations. The dispute was referred to arbitration as provided for in the contracts; the seat of the arbitration was not indicated in the decision. On 15 March 2005, an arbitral tribunal rendered an award in favor of the buyer. The buyer then sought enforcement of the award in Turkey.

The court of first instance hearing the request for enforcement granted enforcement, finding that there was an arbitration clause in the contracts between the parties, that the subject matter of the dispute did not affect public policy and that there had been no violation of due process in the arbitration.

The Supreme Court overruled the lower court’s decision, on the grounds that the Turkish Code of Obligations requires that a specific authorization be given...
to attorneys for, inter alia, concluding an arbitration agreement. The Court deemed that it could not uphold the enforcement without ascertaining the merits of the seller’s defense that one of the persons who signed the contracts containing the arbitration clauses was not duly authorized to do so.

Excerpt

[1] “It is not appropriate to render a ruling stating grounds in writing without reviewing the defendant’s objection that [the claimant’s attorney] – who is not involved in the dispute but who has signed the contract including the arbitration clause – was unauthorized to sign an arbitration agreement. Without a special authorization, an attorney shall not file a lawsuit, make a settlement and arbitrate.

[2] “After the defendant’s attorney appealed the decision granting the claim and requested a hearing for reasons stated in the decision issued at the conclusion of the enforcement proceeding between the parties, summons were sent to the relevant persons. The hearing commenced in the presence of Attorney N. and Attorney K.; having heard oral clarifications by the attorneys and having ascertained that the appeal petition had been timely filed, the file was reviewed and the following decision was given.

[3] “The claimant’s attorney argued that his client and the defendant company agreed on the sale and purchase of 440 tons of lentils by two agreements dated 12 July 2004 (no. 52700) and 13 July 2004 (no. 52703), respectively; that due to the defendant’s failure to deliver the lentils in breach of its contractual obligations, the claimant made purchases from third parties in order to meet its obligations; that the dispute was submitted to arbitration as per the agreements for the compensation of damages; that an arbitral award was rendered on 15 March 2005 and that such award became final; and that [the claimant] sought enforcement of the arbitral award dated 15 March 2005.

[4] “In its defense, the defendant requested the dismissal of the claim by arguing that there was no valid arbitration agreement between the parties. The Court of First Instance granted enforcement on the grounds that the agreement between the parties included an arbitration clause, that the subject matter of the dispute arising out of that agreement did not affect public policy and that there had been no violation of due process. The defendant appealed this decision.

that ‘an attorney shall not file a legal action, make a settlement or arbitrate without special authorization’.

[6] "In this case, it is not deemed appropriate to make a ruling without reviewing the defendant’s objection as to the absence of the authorization of [the claimant’s attorney], who is not involved in the dispute but who has signed the agreement including the arbitration clause, to conclude an arbitration agreement. 

[7] "For the reasons stated above, it has been unanimously decided on 21 May 2007 to overrule the decision of the Court of First Instance in favor of the defendant...."
UNITED KINGDOM

Accession: 24 September 1975
1st Reservation

84. High Court of Justice, Queen’s Bench Division (Commercial Court), 1 April 2009, Case No: 2008 Folio 64 and Case No: 2008 Folio 667

Parties:
Claimant: National Navigation Co (Egypt)
Defendant: Endesa Generacion SA (Spain)

Published in: Available online at <www.bailii.org>

Articles: II(3)

Subject matters:
– declaration on existence, validity of arbitration agreement
– foreign court decision on validity of arbitration agreement
– referral to arbitration is mandatory under 1958 New York Convention
– applicable law to existence, validity of arbitration agreement
– incorporation of arbitration clause in bill of lading
– waiver of arbitration by commencing court proceedings
– comity
– anti-suit injunction (injunction enjoining foreign lawsuit)

Commentary Cases:
Facts

Endesa Generacion SA, an electrical generating company, and its co-subsidiary Carboex SA (Carboex) entered into an exclusive supply agreement (the Carboex Supply Agreement) under which Carboex agreed to supply and Endesa agreed to purchase coal for use by Endesa in its power plants. On 14 December 2007, Endesa entered into an individual contract under the Carboex Supply Agreement to purchase from Carboex a certain quantity of sub-bituminous steam coal in bulk, to be delivered at the port of Ferrol in northwest Spain. The coal had been shipped on 6 December 2007 in Indonesia aboard the vessel WADI SUDR, as evidenced by a Bill of Lading issued on that date. The vessel was owned by National Navigation Co (NNC).

The Bill of Lading stated on the reverse that “all terms, liberties and exceptions of the Charterparty dated as overleaf, including the Law and Arbitration clause are herewith incorporated”. No charterparty however was indicated on the front page of the Bill of Lading. The WADI SUDR was subject at the time to three charters: (1) a time-charter dated 1 October 2007 between NNC and China National Chartering Corporation (Sinochart) (the Head Charter), providing for the application of English law and arbitration of disputes under the Rules of the London Maritime Arbitrators Association (LMAA); (2) a sub-timecharter between Sinochart and Morgan Stanley Capital Group Inc (Morgan Stanley); (3) a voyage charter dated 25 September 2007 between Morgan Stanley and Carboex (the Voyage Charter), providing for arbitration of disputes in London by three LMAA members.

On 1 January 2008, the WADI SUDR sustained damage to her rudder; general average was declared and the cargo of coal was discharged on 30 January 2008 at Carboneras, in southeast Spain, rather than at Ferrol. Claiming that it had been forced to purchase a second shipment of coal for its plant because of the difficulties in transporting the coal from southeast to northwest Spain, Endesa sought reimbursement of this additional cost from NNC. Proceedings in Spain and England followed; only the relevant procedural steps are mentioned below.

In Spain, on the morning of 23 January 2008, Endesa made an application to the Mercantile (First Instance) Court in Almería for the arrest of the WADI SUDR as guarantee for its claim against NNC (the Spanish Action). On 25 January 2008, an ex parte order was granted and the vessel was arrested. Endesa duly served its substantive claim for compensation in the Spanish Action on 22 February 2008 under Art. 5 of Council Regulation (EC) No. 44/2001 (the Regulation), which lists the cases in which a person domiciled in an EU Member State may be sued in another Member State. NNC challenged the Almería court’s
jurisdiction claiming that the dispute should be referred to arbitration in London; it was not however in possession of a copy of the Voyage Charterparty between Morgan Stanley and Carboex containing the arbitration clause, nor could it obtain it from the contracting parties or Endesa.

In England, NNC commenced an action in the Commercial Court in London against Endesa on the afternoon of 23 January 2008, a few hours after the Spanish claim was filed, seeking a declaration that it was under no liability to Endesa (the Commercial Court Action). On 9 June 2008, NNC also started arbitration proceedings in London against Sinochart, allegedly in order to obtain a copy of the Voyage Charter. On 10 June 2008, it issued an application in the Commercial Court Action for disclosure of the Voyage Charter (the Disclosure Application).

In Spain, NNC sought a stay of proceedings under Art. 27 of the Regulation, on the grounds that the Commercial Court had jurisdiction as it was first seized of the matter within the meaning of the Regulation because the action there had been filed prior to the filing of Endesa’s substantive claim in the Spanish Action.

On 31 July 2008, the Almería court issued its decision, holding that it had jurisdiction because no arbitration clause was validly incorporated from any charterparty into the Bill of Lading under Spanish law and, in any event, by commencing the Commercial Court Action in England NNC had waived its right to arbitrate the dispute; on 3 December 2008, the Almería court affirmed its 31 July 2008 decision (collectively, the Spanish court decisions).

In England, in the meantime, NNC had issued an arbitration claim form in the proceedings before the Commercial Court on 8 July 2008 (the Arbitration Action). It sought (i) disclosure of the Voyage Charter; (ii) a declaration that the London arbitration clause in the Voyage Charter was validly incorporated into the Bill of Lading; (iii) an injunction to restrain Endesa from proceeding with claims arising out of the Bill of Lading other than by way of London arbitration.

On 2 October 2008, NNC finally obtained disclosure of the Voyage Charter. On 16 October 2008, it argued before the Commercial Court that the court had jurisdiction under the Regulation to grant the declaration and the injunction because the contract to arbitrate was a contract to which Art. 5 of the Regulation applied and London was the place of performance of the relevant obligation.

The present decision concerned several applications in the Commercial Court Action and the Arbitration Action. Only NNC’s application in the Arbitration Action for (1) a declaration that the arbitration clause in the Voyage Charter was validly incorporated into the Bill of Lading and the disputes between the parties were therefore referable to London arbitration (the Declaration Application) and
(2) an anti-suit injunction against Endesa, restraining it from prosecuting proceedings in Spain (the Anti-Suit Application) are reported below.

The High Court, per Gloster, J, granted NNC’s Declaration Application and dismissed its Anti-Suit Application. The court briefly noted at the outset, in respect of the latter, that the decision of the European Court of Justice in *The FRON T COMOR* (see below) prevented it from granting such an injunction.

The court then found that it needed to answer five questions in order to reach a decision on the Declaration Application, and dealt with each separately.

The court first reasoned (*first issue*) that in the light of *The FRON T COMOR* the Spanish court decisions in relation to the two relevant issues (incorporation and waiver) (i) were decisions within the scope of the Regulation; (ii) did not fall within the arbitration exception of the Regulation (iii) and had prima facie to be recognized in another Member State — here, in England — (iv) even in proceedings such as the present one which were outside the Regulation by reason of the arbitration exception.

However, none of the factors in *The FRON T COMOR* were present: the declaration sought by NNC “would not threaten or impede or otherwise obstruct any decision by the Spanish court as to its own jurisdiction”, prevent the Spanish courts from exercising their substantive jurisdiction under the Regulation in relation to Endesa’s claim or bar or restrain Endesa from pursuing its claim in the Spanish courts. Nor would the English court review the jurisdiction of the Almería court or determine whether that court had jurisdiction; “all the English court would be doing” would be deciding whether there was a valid arbitration agreement between the parties and, if so, refer the parties to arbitration, in compliance with its obligations under Art. II of the 1958 New York Convention.

The court acknowledged that its position could appear to “run counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No. 44/2001 is based”, as mentioned in *The FRON T COMOR*. However, it held that since arbitration actions are expressly excluded from the system of jurisdiction under the Regulation, there can be no assumption that a Member State having obligations under the New York Convention will or should accept, on grounds of comity, “the decision of the court of another Member State, as to the incorporation or validity of an arbitration clause, in circumstances where the latter may well have applied its own law to the question. In other words, the position in relation to a declaration — which is not interfering with the exercise by another Member State of the exercise of a Regulation jurisdiction — is different from that in relation to the grant of an anti-suit injunction.”
The court added that in any event it could refuse to recognize the Spanish decisions, though “with some degree of hesitation”, because it would be contrary to English public policy to recognize a judgment obtained in breach of a valid arbitration agreement, where there is “a clear obligation for an English court to give effect to an arbitration agreement that is valid in accordance with its proper law under English law and Art. II(1) of the New York Convention”.

Having decided not to recognize the Spanish decisions, the Commercial Court determined independently whether the Bill of Lading validly incorporated an arbitration agreement. It considered (second issue) that English law applied as both the Head Charter (explicitly) and the Voyage Charter (impliedly) contained a choice of English law, and held (third issue) that it was unnecessary to determine to which charterparty the Bill of Lading was meant to refer, as both charters contained a London arbitration clause.

The court then held (fourth issue) that NNC did not waive the arbitration agreement by issuing the Commercial Court Action. It reasoned that on the facts of the case an objective observer — as required in English law — would not conclude that NNC had evinced to Endesa an intention not to be bound by the arbitration agreement.

Finally, the court examined whether it should, as a matter of discretion, refrain from granting a declaration as to incorporation that would conflict with the judgment by a court of another Member State (fifth issue). It concluded that it should not, reasoning that the exclusion of arbitration from the scope of the Regulation may lead occasionally to conflicting judgments in different Member States in relation to arbitration issues.

Only the relevant parts of the decision are reported below.

Excerpt

[1] “On 9 February 2009, I circulated a draft of my judgment in this matter for the purposes of a formal hand-down on 13 February 2009…. However, by an irony of fate, on 10 February 2009 … the [European Court of Justice] delivered its judgment in *The FRONT COMOR*. The Court answered the question raised by the House of Lords as follows:

1. “10 February 2009, Case C-185/07 [reported in this Yearbook, pp. 485-493 (European Union no. 2)].”
'It is incompatible with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.'

In the circumstances, I received further written submissions on 12 and 13 February 2009, and heard further oral argument from counsel on 13 February 2009 on the implications of the decision in The FRONT COMOR.

[2] “It was common ground between Mr. Lord [counsel for Endesa] and Ms. Selvaratnam [counsel for NNC] that the decision in The FRONT COMOR prevented this court from granting an anti-suit injunction, and that, accordingly, NNC’s Anti-Suit Application should be dismissed. However, Ms. Selvaratnam submitted that, notwithstanding the decision in The FRONT COMOR, this court could, and should, still grant the declaration sought by NNC in its Declaration Application in the Arbitration Action. Mr. Lord submitted to the contrary, namely, that, in the light of the decision in The FRONT COMOR, there was no jurisdiction to make such a declaration. The further arguments which I heard from counsel on this date were principally directed to this issue.

(....)

[3] “The declaration that NNC seeks is in the following terms:

‘The London arbitration clause of a Charterparty dated 25 September 2007 and made between Morgan Stanley Capital Group Inc as disponent owners and Carboex SA as charterers of the vessel WADI SUDR (the Carboex charter) is validly incorporated into the Bill of Lading no. CIL 07/49 dated 6 December 2007 issued by the Claimant in respect of a cargo of 64,609 MT steam coal in bulk shipped at Indonesia aboard the said vessel (the Bill of Lading) and is binding upon the Defendant.’

[4] “The issues that arise in connection with the Declaration Action can be summarized as follows:

Issue One: Are the decisions of the Almería Court dated 31 July and 3 December 2008 in relation to NNC’s jurisdictional challenge, to the effect that: (a) no arbitration clause was incorporated into the Bill of Lading; and (b) NNC had waived its right to rely on any arbitration agreement by starting the Commercial Court Action, judgments which require to be recognized in England under
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[Council Regulation (EC) No. 44/2001 – the Regulation], as judgments given in a civil or commercial matter?

Issue Two: If not, and this court is entitled, and indeed obliged, under Sect. 32 of the 1982 Act [see below], to look at the matter afresh, is Spanish or English law the proper law to apply to the incorporation issue and the waiver issue?

Issue Three: Applying the appropriate law, was the arbitration clause, in either the Voyage Charter or the Head Charter, incorporated into the contract between NNC and Endesa?

Issue Four: Applying the appropriate law, did NNC waive or repudiate any arbitration agreement by issuing the Commercial Court Action?

Issue Five: Should this court, as a matter of discretion, grant a declaration as to incorporation that conflicts with a judgment by a court of another Member State?”

1. RECOGNITION OF THE SPANISH COURT DECISIONS UNDER REGULATION NO. 44/2001

(....)

[5] “A preliminary question arises as to the binding nature of the ECJ’s decision in The FRONT COMOR. I reject Ms. Selvaratnam’s submission that I can disregard certain aspects of the ECJ’s judgment in The FRONT COMOR as not binding upon this court, on the grounds that they were not part of the ratio decidendi of the decision, or not strictly necessary for the purpose of answering the question posed by the House of Lords in its reference. The case of [Da Costa en Schaake NV v. Nederlandse Belastingadministratie [1963] CMLR 224, on which Ms. Selvaratnam relied] is not relevant to the point and certainly does not support the proposition that the ratio decidendi of an ECJ judgment is limited to the decision on the actual question, or that the binding effect of such a decision was limited in any other way. I was not referred by counsel to any European or English authority, to any text book, or to any article, to suggest that an English court could reject clear propositions of law in an ECJ judgment, on the grounds that they did not fall within the strict scope of the ratio decidendi of the decision. Indeed, the particularly common law distinction between ratio decidendi and obiter dicta would not appear to be a feature of any broad system of precedent in European private law.”


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3. “Further, and in any event, the statement by the ECJ in para. 26 of its judgment that:

‘In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No. 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) (the Brussels Convention”), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.’

and likewise in para. 27 that:

‘It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No. 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Arts. 1(2)(d) and 5(3) of that regulation.’

appear to be clearly part of the Court’s ratio for its conclusion that the use of an anti-suit injunction to restrain proceedings within the Regulation, in another Member State, on the grounds that such proceedings would be contrary to an arbitration agreement, are incompatible with the Regulation.”

[7] The court quoted Sect. 32 of the Civil Jurisdiction and Judgments Act 1982 and continued: “In the light of this provision, and the submissions of the


(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if:

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parties, it appears to me that the following sub-issues arise for my determination under Issue One:

(i) Are the judgments of the Almería Court, in relation to the relevant issues, judgments within the Regulation, in the sense of being judgments given in civil or commercial matters?

(ii) If the judgments of the Almería Court are within the Regulation, does that mean that they are prima facie required to be recognized, pursuant to Art. 33(1) of the Regulation, in proceedings in another Member State, which are not themselves proceedings within the Regulation, but rather proceedings outside the Regulation, by reason of the arbitration exception contained in Art. 1(2)(d)?

(iii) If the Almería Court judgments are prima facie required to be recognized, pursuant to Art. 33(1), for the purposes of Sect. 32 of the 1982 Act, in
proceedings outside the scope of the Regulation (viz. the Arbitration Action in the present case), is this court entitled nonetheless to refuse to recognize the judgments pursuant to Art. 34(1) of the Regulation on the grounds that such recognition would be manifestly contrary to public policy in the United Kingdom?

[8] “It was common ground that, if the Almería Court’s judgments were not required to be recognized under the Regulation, Endesa could not, in the light of Sect. 32(3) of the 1982 Act, rely on ordinary principles of res judicata and issue estoppel to contend that they were binding on this court under the common law.”

1. The Spanish Court Decisions Fall Under Regulation No. 44/2001

[9] “In my judgment, there can now be no doubt, that, in the light of the ECJ’s judgment in The FRONT COMOR,7 the Almería Court’s judgments in relation to the two relevant issues, and the proceedings involving NNC’s challenge to the jurisdiction of the Spanish court leading up to those judgments, have to be characterized as proceedings and judgments within the scope of the Regulation. Thus the judgments are prima facie qualifying judgments within the Regulation, as having been given in proceedings in civil or commercial matters. They are not within the arbitration exclusion contained in Art. 1(2)(d).8

[10] “One might regard it as disappointing that, in coming to its conclusions (a) that the proceedings relating to the preliminary issue as the applicability and validity of the arbitration agreement before the Italian Court were within the scope of the Regulation, and (b) that the anti-suit injunction granted by the English court was incompatible with the Regulation) the ECJ did not take the opportunity of explaining its reasons for rejecting certain previous views expressed by Mr. Jenard and Professor Schlosser …9 and the compelling analysis

6. Art. 34(1) Regulation reads:

“A judgment shall not be recognised:
1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;...”

7. “See in particular paras. 25-27 of the judgment.”

8. “See also the recent decision of the Court of Appeal in Youell and Others v. La Reunion Arienne and others [2009] EWCA Civ 175, at para. 34.”

of Advocate General Darmon in *Marc Rich*,\(^{10}\) as to the breadth of the arbitration exception now contained in Art. 1(2)(d) of the Regulation, and for preferring\(^{11}\) instead the views contained in the Evrigenis-Kerameus Report on the 1989 Accession Convention.\(^{12}\) Likewise, from the academic perspective, given the significance of the issue and the controversy to which it has given rise,\(^{13}\) one might have preferred to see an analysis by the ECJ not only of the approach previously taken by that Court itself in *Marc Rich*\(^{14}\) and *Van Uden*,\(^{15}\) and by the English and other national Courts in cases such as *Marc Rich*, *The IVAN ZAGUBANSKI*,\(^{16}\) *Through Transport*\(^{17}\) and *The FRONT COMOR*, but also of at least some of the arguments rehearsed in numerous European academic articles on the topic. But, be that as it may, this court is bound by the ECJ’s conclusions on these two issues.

\(^{11}\) “Accordingly, I reject Ms. Selvaratnam’s arguments that I should treat those parts of the Almería Court’s judgments, which related to the relevant issues as severable from its decision to grant a stay under Art. 27,\(^{18}\) and severable from the main proceedings, and that I should characterize those judgments as within the

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11. “See para. 26 of the judgment in *The FRONT COMOR* cited above.”
14. “See, in particular, paras. 18, 26 and 29 of the ECJ’s judgment in that case.”
18. Art. 27 Regulation reads:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”
arbitration exception and therefore outside the scope of the Regulation. In the light of the decision of the ECJ in The FRONT COMOR, they fall within its scope.”

2. **The Spanish Court Decisions Must Be Recognized in Proceedings Outside the Regulation**

[12] “This sub-issue was not specifically articulated in these terms in argument by counsel. I was not provided with any authorities or academic articles relating to the point.

[13] “The argument is that, notwithstanding that the judgments of the Almería Court are within the Regulation, they are not required to be recognized, pursuant to Art. 33(1) of the Regulation, in proceedings in another Member State, which are not themselves proceedings within the Regulation. This is because, in the latter proceedings, the Regulation simply does not apply to the conduct of those proceedings.

[14] “It would appear that, in The FRONT COMOR, the Tribunale di Siracusa had not, at any relevant date, delivered a judgment in respect of West Tankers’ jurisdictional objection to the Italian Courts on the grounds of an alleged arbitration agreement, so the issue of recognition in this context did not arise. However, in Through Transport,\(^{19}\) at the date of consideration by the English court, the Finnish Court had ruled that the party which had started the proceedings in Finland (New India) was not bound by a London arbitration clause, and that accordingly the P&I Club’s jurisdictional challenge, on grounds of an arbitration agreement, fell to be dismissed. The Court of Appeal (consistently with the subsequent characterization of the ECJ in The FRONT COMOR) regarded the English Commercial Court proceedings (in which declarations and an anti-suit injunction were sought on the basis of an allegedly binding arbitration agreement) as proceedings outside the scope of the Regulation, and the Finnish proceedings as within the scope of the Regulation.\(^{20}\) It held that, in those circumstances, there was no question of the English court declining jurisdiction or staying the proceedings under the Regulation, as the Regulation simply did not apply [paras. 21 and 49]. For similar reasons question of recognition of the Finnish judgment simply did not arise. In paras. 50 and 51, the Court stated:

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20. “See paras. 47-51 and 83 of the Court of Appeal’s judgment.”
50. A number of other questions which might arise under the Regulation were touched on in argument. In particular, there was some debate on the question whether the judgment of the District court of Kotka is entitled to recognition under Art. 33. However, we do not think that this question arises for decision at present. As we understand it, the judgment obtained to date is simply to the effect that that court has jurisdiction to entertain a claim by New India under the Finnish Act. That was essentially a matter for that court in proceedings which seem to us to be within the Regulation. Whether that judgment is entitled to recognition or not does not seem to us to be relevant to the question whether the judge was correct to grant the declarations or injunction which he did.

51. The fact that arbitration is excluded from the Convention means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise.

[15] “That approach, in my judgment, supports the argument that, although the judgments of the Almería Court are Regulation judgments, they are not required to be recognized, pursuant to Art. 33(1) of the Regulation, in proceedings in another Member State, which are not themselves proceedings within the Regulation, because, in the latter proceedings, the Regulation simply does not apply. As the Court of Appeal pointed out in Through Transport, at this stage (and before any separate proceedings to enforce a substantive judgment of the Almería Court on the merits of the case), such a decision is no more than a decision as to that Court’s jurisdiction to entertain Endesa’s Art. 5(1)21 claim.

21. Art. 5(1) Regulation reads:

"A person domiciled in a Member State may, in another Member State, be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
(c) if subparagraph (b) does not apply then subparagraph (a) applies...."
‘88. The question whether or not an action comes within the scope of the convention is determined by its subject-matter. That is an objective criterion. In order to decide that the convention is applicable, it is necessary to establish that, ratione materiae, a dispute is, by virtue of its particular features, covered by the provisions of the convention. But in no circumstances can the existence of another action pending before another court entail the result that application of the convention is extended to the dispute concerned if it was not already covered by the convention by virtue of its subject-matter. Nevertheless, that is the view advanced by Mr. Jenard. That view might in fact lead to the conclusion that the same dispute would come within the scope of the convention if another action were pending before a court in another contracting state, but on the other hand would not be governed by the convention if the other proceedings did not exist. The applicability of the convention to a particular dispute cannot be made subject to variable geometry in that way.

89. According to Mr. Jenard’s opinion, the scope of the convention may be shaped to suit different situations in a purely opportunistic manner. For that purpose, it is only necessary to refer to its objectives in order to render it applicable to any dispute, whether or not the latter falls within its purview.

90. Without doubt, the objectives of the Brussels Convention are of decisive importance for the interpretation of those provisions. But a mere reference to those objectives cannot justify neglect of the requirements of legal consistency or total disregard for the consequences which necessarily follow from the logic of the instrument but which are regarded as inconvenient.’

[16] “The argument is further supported by the analysis of Advocate General Darmon, in paras. 88-90 of his opinion in Marc Rich where he said:

[17] “I have given consideration as to whether the reasoning of the ECJ in The FRONT COMOR (in particular at paras. 24 and 27-32), as to the incompatibility of an anti-suit injunction with the Regulation (notwithstanding that one set of proceedings is outside the Regulation, and the other within), requires a similar conclusion in relation to the declaration sought by NNC that the arbitration clause in the Voyage Charter is validly incorporated into the Bill of Lading. The relevant paragraphs of the ECJ’s judgment are as follows:

22. “[1991] 2 CEC at 387.”
24. However, even though proceedings do not come within the scope of Regulation No. 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No. 44/2001.

(...)

27. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No. 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Arts. 1(2)(d) and 5(3) of that regulation.

28. Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Art. 5(3) of Regulation No. 44/2001, from ruling, in accordance with Art. 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No. 44/2001.

29. It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the caselaw of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, Gasser, paras. 48 and 49). It should be borne in mind in that regard that Regulation No. 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorize the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, para. 24, and Turner, para. 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (Overseas Union Insurance and Others, para. 23, and Gasser, para. 48).

30. Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No. 44/2001, namely
to decide, on the basis of the rules defining the material scope of that regulation, including Art. 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No. 44/2001 is based (see, to that effect, *Turner*, para. 24).

31. Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Art. 5(3) of Regulation No. 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

32. Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No. 44/2001.'

[18] “In my judgment, the reasoning of the ECJ in those paragraphs does not predicate a similar conclusion in relation to the declaration sought by NNC. Taking in turn the objections raised by the ECJ:

(1) The granting of the declaration sought by NNC would not amount to any attempt by this Court ‘to strip ... [the Almería Court] of the power to rule on its own jurisdiction under [the] Regulation’. Nor would it amount to an attempt by this Court to interfere with that Court’s ‘exclusive’ right to rule on its own jurisdiction pursuant to Arts. 1(2)(d) and 5(1). The purpose of the declaration sought by NNC is not to prevent or impede the Almería Court from assuming, or deciding upon, its own jurisdiction. The latter (subject to NNC’s outstanding appeal) has already done so. Although Mance J (as he then was), in *Toepfer International GmbH v. Molino Boschi SRL* 23 regarded Toepfer’s English proceedings (seeking a declaration that Molino was obliged to refer certain disputes to arbitration):

‘[i]n so far as it is to try to oblige or influence the Italian Court to accede to Toepfer’s defence in Italy that the matter falls within a binding

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Toepfer was a case where the Italian Court had not yet ruled and an anti-suit injunction was also sought. Moreover, in the present case, the purpose and object of the declaratory relief, as distilled from Ms. Selvaratnam’s submissions and all the circumstances, would appear to be:

(a) to allow the arbitration to proceed in London;\(^\text{24}\)
(b) if the arbitration results in an award in NNC’s favour, to enable NNC to enforce the award in jurisdictions other than Spain; and
(c) at a later stage, to assist in NNC’s resistance of the enforcement of any Spanish judgment in Endesa’s favour in the United Kingdom, by reference to Art. 34(3).\(^\text{25}\)

Whether any of those objectives would, or could, be achieved, or assisted, by the grant of the declaratory relief, is not for me to consider at this stage and I was not asked to do so. But in my view, any declaration granted by this Court would not threaten or impede or otherwise obstruct any decision by the Spanish court as to its own jurisdiction. The decision of this Court as to the arbitration issues would appear unlikely to have even any persuasive effect on the Spanish appeal court hearing NNC’s appeal against its jurisdictional challenge; to date, the Almería Court has regarded the question as one of Spanish procedural law and has applied Spanish law to the question. If, on appeal, the relevant Spanish court, contrary to the view of the Almería Court, were to consider that English law were indeed relevant, it would have the assistance of this Court’s decision on the arbitration issues. Accordingly, I see no conflict with the decision in The FRONT COMOR in this respect.

\(^{24}\) “I was told that the arbitrator has indicated that he will proceed with the arbitration hearing, in the event that there is a declaration from this court as to the existence of a binding arbitration agreement and that he was content that such an application should proceed before this court; accordingly no issue under Sect. 32 of the Arbitration Act 1996 was raised before me.”

\(^{25}\) Art. 34(3) Regulation reads:

“...A judgment shall not be recognised:
3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought...."
(2) In making a declaration, the English court would not be ‘reviewing’ the jurisdiction of the Almería Court, or determining whether that court had jurisdiction, so as to offend the principles described in para. 29 of the judgment of The FRONT COMOR. All the English court would be doing would be deciding, in compliance with its obligations under Art. II of the New York Convention, whether there was a subsisting arbitration agreement between the parties; and, if so, referring the parties to arbitration.26

(3) Nor would any such declaration of the English court prevent the Almería Court from exercising its substantive jurisdiction under Art. 5(1) in relation to Endesa’s claim in the Spanish proceedings, or, indeed, bar or restrain Endesa from pursuing its Art. 5(1) claim before the Almería Court – the mischief referred to in para. 31 of the judgment in The FRONT COMOR.

(4) With some hesitation, I have also concluded that the granting of a declaration would not come within the mischief broadly stated in para. 30 of the ECJ’s judgment in relation to anti-suit injunctions; viz. as being something that would run ‘counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under Regulation No. 44/2001 is based’. As Advocate General Darmon pointed out in his opinion in Marc Rich [at para. 76]:

‘Harmonisation of the solutions adopted by national courts does not constitute an aim in itself, at the expense of the specific features of the area concerned.’

He then went on to explain [paras. 102-104] that, necessarily, where one set of proceedings is outside the Regulation, there will always be a risk of conflicting judgments in different Member States in relation to issues such as those under consideration in the present case. This consequence was similarly recognized by the Court of Appeal in Through Transport [para. 51] by the House of Lords in The FRONT COMOR [paras. 14-16] and by Advocate General Kokott in her opinion in The FRONT COMOR [para. 70]. As Staughton J (as he then was) pointed out in Tracomin SA v. Sudan Oil Seeds Co Ltd (No. 1),27 there is a recognized difference between the approach of the common law and that of certain civil law jurisdictions to attempts to incorporate an arbitration clause into a contract. That difference of approach, however, should not deter a court that has jurisdiction, outside the system of allocation of court jurisdictions which the Regulation

27. “[1983] 1 Lloyd’s Rep 560 at 562.”
creates, to protect what it regards as the contractual right of a party to have its dispute determined by arbitration in that Member State.

(5) Thus, given that arbitration actions within Art. 1(2)(d) are not part of ‘the system of jurisdiction under [the Regulation]’, as described by the ECJ in The FRONT COMOR, there can, in my judgment, be no assumption, in circumstances where different Member States have their separate and respective obligations under the New York Convention, that one Member State will be in a position to accept, or should, on grounds of comity, accept, the decision of the court of another Member State, as to the incorporation or validity of an arbitration clause, in circumstances where the latter may well have applied its own law to the question. In other words, the position in relation to a declaration – which is not interfering with the exercise by another Member State of the exercise of a Regulation jurisdiction – is different from that in relation to the grant of an anti-suit injunction.

(6) Accordingly, I hold that the judgments of the Almería Court are not required to be recognized, pursuant to Art. 33(1) of the Regulation, in the Arbitration Action in this Court, since the latter proceedings are outside the scope of the Regulation, by reason of the arbitration exception contained in Art. 1(2)(d).”

3. Refusal of Recognition on Grounds of Public Policy

[19] “If I am wrong in the conclusion which I have reached above, and the Almeria Court’s judgments are prima facie required to be recognized in the Arbitration Action, notwithstanding that the latter is an action outside the Regulation, then the further sub-issue arises as to whether this Court entitled nonetheless to refuse to recognize the judgments pursuant to Art. 34(1) of the Regulation on the grounds that ‘such recognition would be manifestly contrary to public policy’ in the United Kingdom.

[20] “Again, this is a vexed question, even following the ECJ’s decision in The FRONT COMOR, characterizing the preliminary jurisdictional objection based on an alleged arbitration agreement, and, consequently, any judgment of the Italian Court on that issue, as proceedings within the Regulation. The topic has been the subject of considerable academic debate; see, by way of example, Dicey, Morris and Collins”28 and Briggs and Rees.29 In Philip Alexander Securities and Futures Limited

29. “Op cit. at para. 7.13, in particular at p. 508.”

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v. Bamberger and Others, Waller J (as he then was) expressed the view (obiter) that a ruling of a foreign court in a Member State, as to the invalidity of an arbitration agreement, should not have to be recognized by the English court, irrespective of whether the ruling was obtained from the foreign court at a preliminary stage or at the stage of the substantive determination of the dispute, and notwithstanding that the foreign court’s ruling was a Convention (now a Regulation) judgment. He reached that conclusion on the basis that it would be contrary to English public policy to recognize a judgment obtained in breach of an arbitration agreement that was valid by its proper law. He took the view that the prohibition in Art. 27(3) of the Convention (corresponding to Art. 35(3) of the Regulation), that the jurisdiction of the foreign court could not be reviewed on the grounds of public policy was not engaged, since the English court was not reviewing the jurisdiction of the foreign court on grounds of public policy, but rather marking its disapproval of a breach of contract. The approach of Waller J is approved by the commentary in both Dicey, Morris and Collins and in Briggs and Rees, in those passages cited above, albeit (obviously) without consideration of the subsequent decision of the ECJ in The FRONT COMOR.

The issue was also referred to in passing, although not determined, by Tomlinson J in the recent case of DHL GBS (UK) Limited v. Fallimento Finmatica Spa, a judgment given after the decision in The FRONT COMOR.

In my judgment, and with some degree of hesitation, I conclude that it would be manifestly contrary to the public policy of the United Kingdom to recognize the Almería Court’s judgments in relation to the non-incorporation of the arbitration agreement and the alleged waiver of any agreement.

My reasons for that conclusion may be summarized as follows:

(i) I agree with the view of Waller J, expressed in Philip Alexander Securities and Futures Limited v. Bamberger and Others, that it would be contrary to English public policy to recognize a judgment obtained in breach of an arbitration agreement that was valid by its proper law.

(ii) There is clear statutory and conventional obligation under English law for an English court to give effect to an arbitration agreement that is valid in accordance

30. “[1997] I.L.Pr. 73, at paras. 111-114 [reported in Yearbook XXII (1997) pp. 872-880 (UK no. 46)].”
31. “The Court of Appeal in the same case took the view that none of the arbitration agreements were enforceable, so it did not have to consider these issues.”
32. “[2009] EWHC 291 at paras. 21-23.”
33. “The word ‘manifestly’ did not appear in the previous Conventions. It is difficult to see what, if any, requirement it adds.”

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with its proper law: see Sect. 9(4) of the Arbitration Act 1996;34 Art. II of the New York Convention; and Sect. 32 of the 1982 Act. [Quotation of Art. II(1) Convention omitted.] I accept NNC’s submission that, if this Court were not able to give effect to a binding arbitration agreement that is valid in accordance with its proper law, that would be a contravention of the United Kingdom’s obligations under the New York Convention, a contravention of Sect. 9(4) of the 1996 Act, and thus contrary to public policy.

(iii) In the present case, (on the assumption that there was a binding and valid arbitration agreement), the breach of contract on the part of Endesa lay in not agreeing to submit its dispute to arbitration, at the latest by the time NNC had challenged the jurisdiction of the Almería Court to decide the substantive dispute between the parties.

(iv) This court is not (for the reasons already given [above at [18] under (2)] reviewing the Almería Court’s decision to take jurisdiction. That decision, according to the judgment dated 3 December 2008, appears to have been primarily based (a) on the procedural decision that there had been no application by NNC to apply for a stay on the grounds of an arbitration agreement [footnote omitted]; and (b) that, in any event, the effect that arbitration may have on judicial proceedings, was a procedural decision that had to be decided exclusively in accordance with Spanish law [footnote omitted]. Given this court’s views as the proper law (as to which see below), there is no question of this court examining issues of Spanish law, or the Spanish court’s application of Spanish law.

(v) Para. 33 of the ECJ’s judgment does not undermine this conclusion. The obligation in Art. II(3) is imposed upon each Contracting State which ‘is seized of an action in a matter in respect of’ an arbitration agreement. The Arbitration Action is such an action. As Leggatt LJ remarked in the course of his judgment in The ANGELIC GRACE35 in relation to Art. II(3):

‘It seems to me, however, that that provision does not confer an exclusive jurisdiction on the Court of the Contracting State concerned; and it is consonant with that provision that the Court of another Contracting State should make an order procuring the same result.’

34. Sect. 9(4) of the English Arbitration Act 1996 reads:

“(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”

[24] “However, contrary to NNC’s submissions, I do not regard Endesa’s conduct in relation to non-disclosure or non-production of the Voyage Charter before the Almería Court, as providing, in this context, the basis for any public policy considerations. I do not consider, on the evidence before me, that there was any ‘manipulation’ by Endesa of the court process. NNC could have made an urgent application for disclosure and production of a copy of the Voyage Charter for use in the Spanish proceedings much earlier than it did. It could, with due diligence, have obtained a translation of the Carboex Supply Agreement (which contained a specific reference to the relevant charter) much earlier than it did. Finally, the Almería Court did indeed consider whether the Voyage Charter affected its decision in its earlier judgment, and apparently concluded, by its ruling of 29 December 2008, that it did not do so.

[25] “Accordingly I am not required to recognize the Almería Court’s judgments, in relation to the issues of incorporation and waiver of the arbitration agreement, under the Regulation and it follows that, pursuant to Sect. 32 of the 1982 Act, I am not bound by its decision in relation to those issues. I have to decide for myself the issue whether the arbitration clause here was validly incorporated in the contract between the parties, and, whether, by starting the Commercial Court Action, or otherwise, NNC waived or repudiated any arbitration agreement. As the authors of Civil Jurisdiction and Judgments 36 point out, ‘the Section precludes the possibility of either party relying on the previous decision of a foreign court as an issue estoppel.’

II. APPLICABLE LAW TO INCORPORATION OF ARBITRATION CLAUSE IN BILL OF LADING

[26] “Mr. Lord made detailed submissions supporting Endesa’s contention that Spanish law was the proper law to apply to the incorporation and waiver/repudiation issues, including:

(i) that the concept of the proper putative law governing the incorporation of an arbitration agreement should have no application where, as here, the Bill of Lading contract was valid in itself, and the question was rather whether a term of one of the two other contracts is incorporated in it; the starting point should be the Bill of Lading in the absence of any incorporated clause;

37. “At para. 7.48, fn. 422.”
(ii) that the correct law to apply was Spanish law, as it had the closest connection with the Bill of Lading;

(iii) that Art. 4(1) of the Rome Convention\(^{38}\) applied, since the construction of the Bill of Lading was not a matter that had arbitration as its principal focus.

[27] “Ms. Selvaratnam submitted that, applying the principles set out in Dicey, Morris and Collins (op. cit) at Chapter 16, paras. 16-R-001 to 16-26, English law applied to the question of incorporation (and therefore waiver) as the putative proper law of the arbitration agreement.

[28] “In my judgment, whether one approaches the matter by considering what is the proper law of the Bill of Lading, or by considering the putative law of the arbitration agreement, the correct answer is that English law is the applicable proper law to decide the issue of incorporation. As the editors of Dicey, Morris and Collins (ibid.) state, at para. 16-016, in most cases, the correct solution will be found in the construction of the agreement as to the parties’ choice of law; autonomy of choice is clearly preserved by the Rome Convention: see Art. 3, even on the assumption that it were applicable at all to the first approach, given the exclusion of arbitration agreements from its scope under Art. 1(2)(d).

[29] “Here, the Bill of Lading, as one of its conditions of carriage, expressly provided that ‘the Law and Arbitration Clause’ of the relevant charter party were incorporated into the Bill. The Head Charter had an express choice of English law, and the Voyage Charter had an implied choice of English law.\(^{39}\) Thus, construing the Bill of Lading on any rational commercial basis, one must conclude that the parties to the Bill of Lading intended that English law would govern the contract of carriage evidenced by the Bill of Lading. So, whether it is correct to approach the incorporation issue on the basis of the proper law governing the Bill of Lading contract, or on the basis of the putative law of the arbitration agreement (as a separate contract), English law applies to that issue. That conclusion is consistent with The PAROUTH\(^{40}\) and The ATLANTIC EMPEROR,\(^{41}\) which are binding on me. I see no reason to distinguish them.”

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39. “See Compagnie Tunisienne de Navigation SA v. Compagnie d’Armement Maritime SA [1971] AC 573 at 609, per Lord Diplock; Egan Oldendorff v. Liberia Corp (No 2) [1996] 1 Lloyd’s Rep 380 at 390, per Clark J (as he then was); Dicey, Morris and Collins, op. cit. at para. 32-994 to 32-097.”

40. “[1982] 2 Lloyd’s Rep 351, CA.”

41. “[1989] 1 Lloyd’s Rep 548 per Hirst J at pp. 552-553; subsequently approved by the Court of Appeal at p. 544.”
III. INCORPORATION OF ARBITRATION CLAUSE INTO BILL OF LADING

[30] “In the present case, the Bill of Lading does not identify the charter whose terms are to be incorporated. As Mr. Lord accepted, it is well-established that where a bill of lading purports to incorporate a charter, but fails to identify its date or other details of the charter concerned, that is not fatal to the incorporation of the charter if it can otherwise be properly identified: see The SAN NICHOLAS;42 and The SLS EVEREST.43 Even in circumstances where there are two or more potentially relevant charters, the courts are very reluctant to hold that the contract is void for uncertainty, as this does not give effect to the obvious intention of the parties that the terms of a charter are to be incorporated, The SAN NICHOLAS [footnote omitted] and The SEVONIA TEAM.44

[31] “Although the general rule is that the head charter, to which the shipowner is party, is incorporated45 the position may well be different where, as here, the head charter is a time charter, on the basis of the presumed unlikelihood of the parties wishing to incorporate the terms of a time charter which are different in kind.46 As stated in Carver on Bills of Lading:47

‘There is no easy answer to the problem raised by the cases of the kind here under discussion. The only general statement which can safely be made about them is that where the courts have to choose between two or more charterparties, they will be inclined to favour the incorporation of terms of that charter which are the more (or the most) appropriate to regulate the legal relations of the parties to the bill of lading contract. Where each (or more than one) of the charterparties is equally appropriate for this purpose, the courts might determine the issue by holding the relevant charterparty to be that one which governed the contractual relations between the original parties to the bill of lading and in pursuance of which the bill was issued.’ (Emphasis added)

[32] “There was no suggestion by either party that the sub-time charter to Morgan Stanley (no doubt for financing purposes) was relevant. In my judgment,

42. "[1976] 1 Lloyd’s Rep 8."
43. "[1981] 2 Lloyd’s Rep 389 at 392 per Lord Denning, MR."
44. "[1983] 2 Lloyd’s Rep 640 at 644, per Lloyd J (as he then was)."
45. "The SAN NICHOLAS, supra ...; The SEVONIA TEAM, supra; and Bills of Lading (Aikens, Lord and Books), 2006, para. 7.104."
46. "Bills of Lading, op. cit. at para. 7.115."
the more appropriate candidate for incorporation here is the Voyage Charter, for the following reasons:

(i) the Head Charter is a time charter, many of the terms of which would not be relevant in the context of the Bill of Lading contract;
(ii) the Voyage Charter is a contract of affreightment on voyage charter terms, for the carriage of the coal from the loading port in Indonesia to Ferrol (alternatively, Carboneras); and
(iii) the ‘corresponding charter party’, as referred to in clause 6 of the Carboex Supply Agreement, must have been intended to have been a reference to the charterparty to which Carboex was itself a party as charterer of the vessel carrying the coal, viz. the Voyage Charter. Accordingly, Endesa should be taken to have been accepting the application of the terms of the Voyage Charter where appropriate.

[33] “But, even if the Head Charter were the relevant charter, the Bill of Lading, on either basis, is subject to a London arbitration clause and English law.”

IV. WAIVER OF ARBITRATION AGREEMENT (NO)

[34] “It was common ground between Mr. Lord and Ms. Selvaratnam that the law relating to the repudiation of an arbitration agreement (on the assumption that English law is the proper law to apply) was as set out in Chitty on Contracts:48

‘If, contrary to an agreement to refer a matter to arbitration, one party resorts to legal proceedings in an English court in respect of that matter, the court has jurisdiction to hear the dispute. The existence of the arbitration agreement, or even the fact that an arbitration is already in progress, affords no defence to the action. The appropriate course is for the other party to apply for a stay of the legal proceedings. Conversely, there is no principle that requires arbitral proceedings to terminate if a party to the arbitration resorts to legal proceedings. Nor does resort to legal proceedings of itself constitute a repudiation of the arbitration agreement. However, where one party denies that he is bound by the arbitration agreement and thereby repudiates it, the issue of legal proceedings by the other party may amount to an acceptance of the repudiation and so bring

the agreement to an end. If there are concurrent or overlapping proceedings in respect of the same matter, both in arbitral and legal proceedings, the court may grant an injunction to restrain the continuance of the arbitral proceedings. But it will not necessarily do so and may allow them to continue. Yet in such a case it would seem that an award in concurrent proceedings without the consent of both parties would then have no effect.’ (Emphasis added)

[35] “It followed that it was also common ground that the following summary by Mr. Askins [one of NNC’s lawyers] [footnote omitted] correctly stated the position:

‘72. It is clear from English case law that proceeding both before the Courts and by way of London arbitration in respect of the same dispute is not by itself a renunciation of the arbitration agreement:

(1) The mere issue of proceedings in a foreign court in respect of a London arbitration clause does not amount to a repudiation or renunciation of the arbitration agreement: The MERCANAUT [1980] 2 Lloyd’s Rep 183 (Lloyd J);
(2) The mere issue of a High Court claim form does not involve the automatic termination of an arbitration or amount to a repudiation of the arbitration agreement itself and the two sets of proceedings may run concurrently: Lloyd v. Wright [1983] 3 WLR 223 (Court of Appeal);
(3) The mere issue of a cross-claim in High Court proceedings against another party to the arbitration agreement does not amount to a renunciation or repudiation of the arbitration agreement itself: The GOLDEN ANNE [1984] 2 Lloyd’s Rep 489 (Lloyd J).

73. For there to have been a renunciation of the arbitration agreement requires proof of clear and unequivocal conduct establishing a repudiation of the arbitration agreement: The GOLDEN ANNE per Lloyd J at 494.
74. Such conduct is not lightly to be inferred: The MERCANAUT per Lloyd J at 185.
75. Moreover, any repudiation must be accepted by the other party to the arbitration agreement if the agreement to arbitrate is to come to an end: The MERCANAUT per Lloyd J at 185.
76. Yet further, as the mere issue of court proceedings (whether before the English courts or abroad) is not itself sufficient to establish repudiation of the arbitration agreement, regard must be had to the subsequent conduct
of the party alleged to have repudiated the arbitration agreement in order to ascertain whether the Court proceedings do in fact amount to a renunciation of the arbitration agreement (that is to say, a clear and unequivocal intention not to be bound by the arbitration agreement).

77. It was for this reason that in *The MERCANAUT* Mr. Justice Lloyd held that the issue of a protective [writ] in a foreign jurisdiction did not amount to a renunciation of the arbitration agreement where subsequently the party issuing that writ made clear that it was (i) a protective writ; and (ii) indicated a continuing intention to be bound by the arbitration agreement.'

[36] “As Mr. Lord submitted, the crucial question is whether an objective observer would conclude that NNC had evinced to Endesa an intention not to be bound by the arbitration agreement. Mr. Lord contended that an objective observer would conclude that NNC had evinced an intention to repudiate any arbitration agreement. In support of this he submitted as follows:

(i) After Endesa commenced proceedings before the Almería Court, NNC’s first, and for a long while only, response was to institute proceedings in the Commercial Court.

(ii) The claim form in the Commercial Court Action did not evince any intention to rely on any arbitration agreement and did not refer to any arbitration agreement or arbitration claim. Rather, NNC asked the Commercial Court to settle the question of liability.

(iii) No adequate explanation had been given by NNC for commencing the Commercial Court action. This is highly relevant, as held by Cooke J in *Bea Hotels NV v. Bellaway LLC*.49 In the authorities to which Mr. Askins referred (*The GOLDEN ANNE* (supra) and *The MERCANAUT* (supra)), there was an adequate explanation for the allegedly repudiatory action.

(iv) Accordingly, the objective observer would believe (as would Endesa) that NNC had repudiated any agreement to arbitrate.

(v) Further, the cases cited by Mr. Askins were readily distinguishable: in *The GOLDEN ANNE*, the conduct allegedly evincing an intention not to be bound by the arbitration agreement was essentially a ‘neutral act’ involving a cross-claim after another party had brought the party alleging repudiation into the litigation.50 Likewise, in *The MERCANAUT* the allegedly repudiating party had commenced arbitration on the same day that it issued its writ and it was clear that

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50. “*The GOLDEN ANNE*, p. 495 col. 1.”
an objective observer would conclude that there was no intention to abandon/repudiate the arbitration agreement. In the present case however, there was no adequate explanation for commencing the Commercial Court Action and for failing to commence arbitration proceedings in parallel or in the alternative. (vi) He also submitted that the repudiation had been accepted by Endesa, not least by Endesa’s filing its own submissions on the merits before the Almería Court, and in particular making the points made as to waiver of the arbitration agreement. That repudiation could not be undone or refuted by NNC’s submissions when addressing Endesa’s challenge to the jurisdiction of the English court. As held by Cooke J in Bea Hotels: ‘conduct after the alleged acceptance of the repudiation is irrelevant’ (supra, at p. 26). NNC’s repudiation was accepted prior to its submissions to this court. Accordingly, NNC have repudiated the agreement to arbitrate, and must defend Endesa’s claim before the Spanish courts.

[37] “In my judgment, NNC has not demonstrated such clear and unequivocal conduct by its institution and prosecution of the Commercial Court Action as to amount to repudiation of any arbitration agreement between the parties. Despite my criticisms of the lack of transparency in relation to the claim form in the Commercial Court Action, the fact is that, at that stage, NNC had not been supplied with a copy of the Voyage Charter and it was, through no fault of its own, operating in the dark to some extent. Moreover, although, as I have already described, NNC’s position in the Spanish proceedings, and in the two sets of English proceedings, was confusing as to precisely what its case was as to jurisdiction, there can be little doubt that, at all material times, Endesa, at least, was under the impression that NNC, both in the Spanish proceedings and elsewhere, was indeed maintaining its contention that the correct forum for resolution of the dispute (or at least a possible correct forum) was London arbitration.

[38] “This is clear from [the first witness statement of Mr. Alegre, Carboex and Endesa’s lawyer] dated 12 May 2008…. Notwithstanding Endesa’s contention before the Almería Court that, by commencing the Commercial Court Action, NNC had waived such rights to arbitration as it had, the description in Mr. Alegre’s witness statement of NNC’s conduct does not demonstrate clear unequivocal conduct evincing an intention not to be bound by the arbitration agreement. On the contrary, as that witness statement describes, NNC, at all times, was persisting in its submission that London arbitration was, or at least might be, the contractually agreed jurisdiction. Moreover, the communications between Mr. Alegre and Mr. Askins in the period January to May 2008 … did
not demonstrate any such ‘clear unequivocal conduct’ or intention not to be bound by the arbitration clause; see, for example, Mr. Askins’ email to Mr. Alegre dated 27 May 2008 at 18:19, which stated:

‘A simple confirmation of the existence of the jurisdiction regime in the voyage charter would allow us to take instructions on withdrawing the High Court application if in fact the matter is subject to Arbitration.’

[39] “Accordingly, I reject Mr. Lord’s submission that an objective observer would, in the circumstances, have concluded that NNC had evinced an intention not to be bound by the arbitration agreement.”

V. DISCRETION TO GRANT DECLARATION

[40] “Mr. Lord contended that I should not, as a matter of discretion, grant a declaration that conflicted with the judgments of the Almería Court, which had already decided that there had been no such incorporation of the arbitration clause. To do so, he submitted, would offend notions of comity, particularly in circumstances where NNC had allowed the Almería Court to proceed to judgment and in the light of the ECJ’s judgment in The FRONT COMOR. He also submitted that I should not grant a declaration on grounds of (a) NNC’s abuse of process in connection with the Commercial Court Action and (b) NNC’s delay.”

1. Comity

[41] “In my judgment, principles of comity should not prevent this court from exercising its discretion to make the declaration sought by NNC. I have already expressed my views as to why, notwithstanding the decision in The FRONT COMOR, the grant of such a declaration would not be incompatible with the Regulation. As I have already said, the fact that arbitration is excluded from the scope of the Regulation means that, from time to time, there are likely to be conflicting judgments in different Member States in relation to ‘arbitration’ issues such as those under consideration in the present case.

[42] “The factual circumstances of the case do not appear to me to give rise to any additional reasons as to why such a declaration would offend notions of comity between Member States. The Almería Court, in its judgment dated 3 December 2008 [para. 4], clearly recognized that its decision would not be binding on this court, and that this court might well decide the incorporation and
waiver/repudiation issues under English law in an opposite manner from that in which the Almería Court had decided such issues as a matter of Spanish law. Moreover, the Almería Court emphasized that it had ‘only rejected submission to an arbitration clause on the grounds of form’, although it went on to add: ‘... and on the basis of basic legal grounds …’ [para. 4]. The substantive proceedings in Spain have not got very far; there is still an appeal outstanding on NNC’s jurisdictional challenge, which, as I understand it, will now proceed once the Commercial Court Action has been struck out and if, and when, the stay granted by the Almería Court is lifted.”

2. Abuse of process

[43] “I do not consider that NNC’s conduct in bringing the Commercial Court Action … would be a sufficient reason to deprive it of its entitlement to a declaration in the Arbitration Action, if I were of the view that it was otherwise entitled to one. In my judgment, that would be a disproportionate sanction for NNC’s conduct in connection with the Commercial Court Action.”

3. Delay

[44] “The principal submissions made by Endesa in relation to delay were in the context of NNC’s application for an anti-suit injunction where Endesa relied upon NNC’s delay from 23 January 2008 (when the Commercial Court Action was started) until 5 September 2008, which was the date on which NNC for the first time applied for an urgent interim anti-suit injunction. (Upon the adjournment of that application to 29 October 2008, it was agreed between the parties, as reflected in a consent order made by me on 22 September 2008, that Endesa was not entitled to rely on any delay after 5 September 2008.) No separate submissions were made in relation to the Declaration Application, which was issued on 8 July 2008 as part of the substantive relief sought by NNC…. Accordingly any relevant delay in relation to that application would only be from January to July 2008.

[45] “The authorities show that, in a case such as this, I have a wide discretion even in relation to the grant of a declaration. However, whilst I take the view that NNC could, on the basis of the information available to it in January 2008 about the existence of an arbitration clause, have issued the Arbitration Action, applied for urgent disclosure of the Voyage Charter and applied for a declaration at a much earlier stage, the reality is that part of the real problem facing NNC was that it did not have a copy of the Voyage Charter, albeit that it did have a
copy of the Head Charter. That it did not have such a copy (prior to any disclosure application being made) was due to Endesa’s refusal to provide NNC with such a copy. Endesa was at all material times, from a practical point of view, clearly able to obtain a copy of the Voyage Charter from Carboex (given that it was a co-subsidiary and Endesa’s rights under the Carboex Supply Agreement), and indeed had done so, since a copy had been forwarded to Endesa’s leading and previous junior counsel (although this was said to be have been in error). … [F]or the purposes of the issue of delay, I take into account the fact that NNC’s lack of knowledge as to the precise terms of the arbitration clause was at least to a certain extent due to Endesa’s refusal to provide a copy of the Voyage Charter.  

[46] “In retrospect, I consider that NNC could, given the knowledge available to it, have started the arbitration proceedings coupled with an application for disclosure of the Voyage Charter, and an application for a declaration as early as January or February 2008, and certainly in June 2008, after Mr. Alegre, in his second witness statement [footnote omitted], dated 24 June 2008, had stated that:

‘... the only evidence (as opposed to speculation concerning the ... Carboex charter party ... indicates it contains a London arbitration clause’.

[47] “However, although I consider that there has been unnecessary (and in that sense, culpable) delay in issuing the application for a declaration, I do not consider that it is so serious, or has caused any real prejudice to Endesa, such as to deprive NNC of the declaratory relief to which I consider it is otherwise entitled. The facts are that NNC was entitled to mount the jurisdictional challenge to the Spanish proceedings (and, as I have said, Endesa do not rely on that challenge as evidence of delay), that the Spanish proceedings have not gone beyond the jurisdictional stage, and indeed are currently stayed pending Endesa’s jurisdictional challenge to the Commercial Court Action; and Endesa is, in my judgment, in breach of its obligations under the arbitration clause to submit its disputes under the Bill of Lading to London arbitration.”

VI. CONCLUSION

[48] “Accordingly, I propose to grant the Declaration in the terms sought by NNC, namely:
The London arbitration clause of a Charterparty dated 25 September 2007 and made between Morgan Stanley Capital Group Inc as disponent owners and Carboex SA as charterers of the vessel *WADI SUDR* (the Carboex charter) is validly incorporated into the Bill of Lading no. CIL 07/49 dated 6 December 2007 issued by the Claimant in respect of a cargo of 64,609 MT steam coal in bulk shipped at Indonesia aboard the said vessel (the Bill of Lading) and is binding upon the Defendant. [The costs of and occasioned by that application are to be paid by Endesa (on a standard/indemnity basis) and referred to a detailed assessment].“

(....)
85. High Court of Justice, Queen’s Bench Division (Commercial Court), 7 May 2009, Case No: Folio 1588 of 2007

Parties:
Claimants: (1) Roger Shashoua (nationality not indicated);
(2) Rodemadan Holdings Limited (nationality not indicated);
(3) Stancroft Trust Limited (nationality not indicated)
Defendant: Mukesh Sharma (nationality not indicated)

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Articles: II(3) (by implication)

Subject matters:
– anti-suit injunction prohibiting annulment action
– injunction protecting leave-to-enforce decision
– seat v. venue of arbitration
– choice of seat of arbitration implies choice of procedural law
– applicable law to arbitration determines annulment forum

Commentary Cases: ¶ 229; [1]-[14] = ¶ 221

Facts

On 1 July 1998, Roger Shashoua and Mukesh Sharma (the defendant) entered into a Shareholders Agreement to set up a joint venture for the purpose of constructing and running an exhibition and convention centre in India. Clause 17.6 of the Shareholders Agreement provided that the agreement was governed by the laws of India; clause 14 provided for ICC arbitration of disputes and specified that “the venue of arbitration shall be London, United Kingdom”. Clause 14.5 provided that each party should bear its own costs in connection with arbitration.

A dispute arose between the parties; arbitration and court proceedings followed in England and India. On 21 May 2005, Roger Shashoua, Rodemadan Holdings Limited and Stancroft Trust Limited (collectively, the claimants) made
an application to the High Court in New Delhi under Sect. 9 of the Indian Arbitration and Conciliation Act 1996 (IACA), seeking interim measures of protection (inspection of the joint venture’s books of account, stopping of board meetings, prevention of the use of bank accounts and of disposal of assets) prior to the institution of arbitration.

On 26 May 2005, the claimants commenced ICC arbitration in London as provided for in the Shareholders Agreement, paying their own and the defendant’s share of the advance on the costs of the arbitration. By an award on jurisdiction of 12 February 2007, the ICC arbitral tribunal dismissed the defendant’s challenge to its jurisdiction. On 26 March 2007, it dismissed the defendant’s request to apply to the English court to compel the production of documents and oral evidence from third parties. By an interim award of 15 November 2007, the arbitrators issued an award on costs directing the defendant to pay the costs of the hearing of the jurisdictional challenge, its share of the advance on costs and the costs of the disclosure application (the Costs Award). On 4 December 2007, the Commercial Court gave leave to the claimants to enforce the Costs Award against the defendant.

On 11 January 2008, the defendant sought to challenge the Costs Award in the Commercial Court under Sects. 68 and 69 of the Arbitration Act 1996. Because the claim was made outside the requisite time limit, he also applied for an extension of time. On 8 February 2008, the Court, per Andrew Smith, J dismissed the application for an extension of time and as a consequence the challenge application. Also on 11 January 2008, the defendant applied to the Commercial Court seeking annulment of the order giving leave to enforce the Costs Award. On 18 February 2008, that application was denied as it depended upon the Sects. 68 and 69 application. In both cases the defendant was ordered to pay the claimants’ costs for the application.

In the meantime, on 20 December 2007, the defendant filed a petition in the High Court of Delhi to set aside the Costs Award under Sect. 34(2)(iv) IACA. This action was pending at the time of the present decision. On 24 March 2008, he further applied for an order restraining the claimants from taking any steps to enforce the Costs Award. This application was dismissed both in the first instance and on appeal.

In England, the claimants obtained a freezing order in respect of sums owed by the defendant under the Costs Award and subsequently, on 5 March 2008, an Interim Charging Order against the interest of the defendant in a house he owned in the United Kingdom. The defendant’s application to set aside the Interim Charging Order was dismissed and a Final Charging Order was made on 10 June 2008.
On 29 November 2008, the defendant applied to the ICC Court to remove one of the arbitrators, Mr. Harish Salve, and to annul all orders and awards rendered by the arbitral tribunal on the basis of an alleged failure by the arbitrator to make proper disclosure under the ICC Rules.

The present decision concerned the claimants’ application for an anti-suit injunction against the defendant in respect of the Costs Award. On 30 January 2009, Andrew Smith, J, granted the application by an interim order.

The High Court, per Cooke, J, affirmed the interim order. It first held that it had jurisdiction to grant the anti-suit injunction because the provision in the Shareholders Agreement that “the venue of the arbitration shall be London, United Kingdom” amounted to a designation of London as the seat of the arbitration. The court conceded that venue and seat are different concepts; however, it accepted the claimants’ argument that if the seat is to be different from the named venue, it would be expected that the seat would also be specifically named. The venue, but not the seat, was indicated in the Shareholders Agreement.

The court dismissed the defendant’s submission that the law of the arbitration agreement was Indian law because Indian law was the proper law of the Shareholders Agreement. The court held that on the contrary it appears from recent authorities that “it is much more likely that the law of the arbitration agreement will coincide with the curial law”.

The court then dealt with the defendant’s argument that “the landscape of anti-suit injunctions” has changed after the European Court of Justice decision in the FRONT COMOR (see below), where an English anti-suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be incompatible with EC Regulation No. 44/2001. The defendant argued that the reasoning in the FRONT COMOR also applied to countries which were parties to the 1958 New York Convention, as evidenced by the statement in the decision that its finding is compatible with Art. II(3) Convention. The court disagreed, finding that the European Court of Justice was merely concerned that there was no incompatibility or inconsistency between its position as a matter of European law and the New York Convention. The FRONT COMOR does not apply to a relationship between England and a non-European State, whether or not that State is a party to the New York Convention.

The High Court therefore granted the anti-suit injunction sought by the claimants and enjoined the defendant from challenging the validity of the Costs Award or contesting the English court’s orders enforcing that Costs award in India “or anywhere else other than the courts of England and Wales”.

1. SEAT AND LAW OF THE ARBITRATION

[1] “It is common ground between the parties that the basis for this court’s grant of an anti-suit injunction of the kind sought depends upon the seat of the arbitration. The significance of this has been explored in a number of authorities including in particular *ABB Lummus Global v. Keppel Fels Ltd* [1999] 2 LLR 24, *C v. D* [2007] EWHC 1541 (at first instance) and [2007] EWCA CIV 1282 (in the Court of Appeal), *Dubai Islamic Bank PJSC v. Paymnetech* [2001] 1 LLR 65 and *Braes of Doune v. Alfred McAlpine* [2008] EWHC 426. The effect of my decision at paras. 23-29 in *C v. D*, relying on earlier authorities and confirmed by the judgment of the Court of Appeal at para. 16 and 17 is that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. Not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. Subject to the FRONT COMOR [see below] argument which I consider later in this judgment, the Court of Appeal’s decision in *C v. D* is to be taken as correctly stating the law.

[2] “For this reason the parties focused initially on the issue of the seat of the arbitration provided for in the Shareholders Agreement.

[3] “The concept of the seat of an arbitration was known to English law prior to the 1996 Arbitration Act but Sect. 3 of that Act set out a statutory definition.”

[4] “The Shareholders Agreement provided that ‘the venue of arbitration shall be London, United Kingdom’ whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the Shareholders Agreement itself would be the laws of India. It is accepted by both parties that the concept of the seat is one which is...
fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which arbitration hearings take place. It is certainly not unknown for hearings to take place in an arbitration in more than one jurisdiction for reasons of convenience of the parties or witnesses. The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as ‘venue’ is not synonymous with ‘seat’, there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties’ agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.

[5] “In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK).

[6] “The defendant relies upon the nature of the Shareholders Agreement, the provision for the proper law of the agreement to be that of India, the application of the ICC Rules and the Interim Measures Application made by the claimants in India as pointing to Indian law as, not only the curial law, but also that of the agreement to arbitrate. Furthermore reliance is placed on clause 14.5 of the Shareholders Agreement which provides that each party is to bear its own costs of the arbitration, which, on its face, is inconsistent with Sect. 60 of the Arbitration Act. It is said that this conflict, when seen objectively, must militate against the application of English law to the arbitration and to the seat being London.

[7] “In my judgment none of these matters will bear the weight which the defendant seeks to put upon them.

[8] “The defendant contends that the law of the agreement to arbitrate is Indian law, essentially because the proper law of the Shareholders Agreement is Indian law. As appears from the decided authorities however, although there have been
dicta to this effect, recent decisions, where the focus has been on the seat of the arbitration and the agreement to arbitrate, establish that it is much more likely that the law of the arbitration agreement will coincide with the curial law. This does not therefore much assist the defendant and the argument that the nature of the Shareholders Agreement points to Indian law as the curial law is in reality no more than an argument that its nature points to Indian law as the substantive law of the Shareholders Agreement, which is in any event expressly provided.

[9] “The submission on Sect. 60 of the English Arbitration Act is a weak argument because it is most unlikely that the parties would have had that section in mind when agreeing the costs provision in the Shareholders Agreement. Moreover Sect. 60 exists for the very reason that parties agree to English arbitration with clauses of this kind in their agreement. Clause 14.5 does not count for nothing in the sense that the arbitrators can take it into account but are not bound by it, as was accepted by the defendant in his submissions to the arbitrators and as reflected in the Costs Award. Moreover, there is in clause 14.1 reference to the possibility of an umpire which under the [Indian Arbitration and Conciliation Act 1996 (IACA)] is an impossibility, if Indian law is the curial law. Whilst the reference to arbitrator/umpire in that sub-clause is hardly a model of clarity, there is at least the possibility of an umpire in English law, even though the IACA requires one or three arbitrators and, in this very case, the panel does consist of three arbitrators.

[10] “The two authorities relied on by the defendant, the Dubai Islamic Bank decision of Mr. Justice Aikens and the Braes of Doune decision of Mr. Justice Akenhead do not take the defendant’s argument any further. In the Dubai Islamic case, there was no designation of any seat or venue at all. Having decided that there were no provisions indicating expressly or impliedly what law governed the arbitration agreement (in the governing Visa Regulations) or the arbitral procedure itself and that there was no specific reference to either the seat or the place of any arbitration under the Visa Regulations, the judge held that the seat had to be determined by the court at the date of commencement of the arbitration. He held that the location of the board meeting at which the appeal was heard was entirely adventitious, since it could have taken place in any number of places. Having weighed the various factors that are ordinarily taken into account in determining the proper law of an agreement, in looking for the law with which the Arbitration had its closest and most real connection, he concluded that this was California. The critical point was that the Visa Regulations which set up the dispute procedure appeared to contemplate that the appeal arbitral process would be handled through the Visa offices in California, but additional factors also supported that conclusion.
“In the *Braes of Doune* decision, the EPC contract, under which the dispute arose, was governed by the laws of England and Wales and, subject to the arbitration clause, the contract provided that the courts of England and Wales were to have exclusive jurisdiction to settle any dispute arising out of or in connection with the contract. The arbitration clause provided for arbitration pursuant to the CIMA Rules and then stated in terms that ‘this arbitration agreement is subject to English law and the seat of the arbitration shall be Glasgow, Scotland’. The CIMA Rules expressly referred to the Arbitration Act 1996 in many places. In looking therefore for the ‘juridical seat’, the Judge searched for the jurisdiction which the parties are taken to have chosen to supervise the arbitration. Given the express references to English law as the law of the arbitration agreement itself and to the Arbitration Act, it is hardly surprising that the Judge found that there was a conflict between that and the reference to Glasgow as ‘the seat of the arbitration’. As I pointed out at para. 26 in *C v. D* and as the Court of Appeal accepted in paras. 22-26 in that case, it is rare for the law of the arbitration agreement to be different from the law of the seat of the arbitration. Mr. Justice Akenhead was therefore persuaded that the reference to the ‘seat’ of the arbitration was merely a designation of the place where the arbitration was to be held, whereas all the other references showed that the parties were agreeing that the seat and the curial law or law which governed the arbitral proceedings was that of England and Wales.

“In *Dicey, Morris and Collins on The Conflict of Laws*, the authors at para. 16-035 state that the seat

‘is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties ... agreed to choose another seat for the arbitration and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration.’

Although the concept of the seat of the arbitration is a juridical concept and the legal seat must not be confused with the geographically convenient place chosen to conduct particular hearings, I can see no reason for not giving the express choice made in clause 14.4 full weight.

Whilst there is no material before me which would fully support an argument on estoppel, it is interesting to note that at an earlier stage of the history of this matter, the defendant had no difficulty in putting forward London as the seat of the arbitration. On 14 February 2006 the defendant’s lawyers,
when writing to the arbitral tribunal stated ‘the seat of the arbitration is London and the first respondent submits that the curial law of the arbitration is English law. That means the arbitration is governed by the Arbitration Act 1996.’ Further, when challenging the appointment of Mr. Salve as an arbitrator, in its application to the ICC, the defendant said that

‘the fact that the present arbitration is an English seated ICC arbitration is undisputed. Accordingly ICC Rules shall be paramount in adjudicating the present challenge. Further, the curial seat of arbitration being London, settled propositions of English law shall also substantially impinge upon the matter. This position is taken without prejudice to the first respondent’s declared contention that the law of the arbitration agreement is Indian law, as also that the substantive law governing the dispute is Indian law.’

[14] “‘London arbitration’ is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties’ agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of Sect. 3 of the Arbitration Act.”

II. NO IMPACT OF THE FRONT COMOR DECISION OUTSIDE EUROPEAN UNION

[15] “Mr. Timothy Charlton QC on behalf of the defendant submitted that the landscape of anti-suit injunctions had now been changed from the position set out by the Court of Appeal in C v. D by the decision of the European Court of Justice in the FRONT COMOR – Case C185/07 ECJ [2009] 1 AER 435. There, an English anti-suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be

3. Reported in this Yearbook, pp. 485-493 (Court of Justice of the European Communities no. 2).
incompatible with Regulation No. 44/2001. Although it was conceded that the decision specifically related to countries which were subject to Community law, it was submitted that the reasoning of both the Advocate General and the court should apply to countries which were parties to a convention such as the New York Convention. Reliance was placed on para. 33 of the European Court’s judgment where, having found that an anti-suit injunction preventing proceedings being pursued in the court of a Member State was not compatible with Regulation No. 44/2001, the court went onto say that the finding was supported by Art. II(3) of the New York Convention, according to which it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The Advocate General, in her Opinion said ‘incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject matter of the proceedings under Regulation No. 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself’.

[16] “It is plain from the way in which the matter is put both by the European Court of Justice and the Advocate General, that their concern was to show that there was no incompatibility or inconsistency between the position as they stated it to be, as a matter of European Law, and the New York Convention. This does not however mean that the rationale for that decision, which is binding in Member States, applies to the position between England on the one hand and a country which is not a Member State, whether or not that State is a party to the New York Convention. An examination of the reasoning of the European Court and the Advocate General reveals that the basis of the decision is the uniform application of the Regulation across the Member States and the mutual trust and confidence that each state should repose in the courts of the other states which are to be granted full autonomy to decide their own jurisdiction and to apply the provisions of the Regulation themselves. Arts. 27 and 28 provide a code for dealing with issues of jurisdiction and the courts of one Member State must not interfere with the decisions of the court of another Member State in its application of those provisions. Thus, although the House of Lords was able to find that anti-suit injunctions were permitted because of the exception in Art. 1(2)(d) of the Regulation which excludes arbitration from the scope of it, the European Court held that, even though the English proceedings did not come within the scope of the Regulation, the anti-suit injunction granted by the English court had the effect of undermining the effectiveness of the Regulation by preventing the attainment of the objects of unification of the rules of conflict of
jurisdiction in civil and commercial matters and the free movement of decisions in those matters, because it had the effect of preventing a court of another Member State from exercising the jurisdiction conferred on it by the Regulation (para. 24).

[17] “None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v. D would now have to be decided differently. Both the USA (with which C v. D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v. D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Art. V of the Convention there are limited grounds upon which other contracting states can refuse to recognize or enforce the award once made.

[18] “The Regulation provides a detailed framework for determining the jurisdiction of member courts where the New York Convention does not, since it is concerned with recognition and enforcement at a later stage. There are no ‘Convention rights’ of the kind with which the European Court was concerned at issue in the present case. The defendant is not seeking to enforce any such rights but merely to outflank the agreed supervisory jurisdiction of this court. What the defendant is seeking to do in India is to challenge the award (the Sect. 34 IACA Petition) in circumstances where he has failed in a challenge in the courts of the country which is the seat of the arbitration (the Sect. 68 and 69 Arbitration Act applications). Whilst of course the defendant is entitled to resist enforcement in India on any of the grounds set out in Art. V of the New York Convention, what he has done so far is to seek to set aside the Costs Award and to prevent enforcement of the Costs Award in England, in relation to a charging order over a house in England, when the English courts have already decided the matters, which plainly fall within their remit. The defendant is seeking to persuade the Indian courts to interfere with the English courts’ enforcement proceedings whilst at the same time arguing that the English courts should not interfere with the Indian courts, which he would like to replace the English courts as the supervisory jurisdiction to which the parties have contractually agreed.

[19] “In my judgment therefore there is nothing in the European Court decision in the FRONT COMOR which impacts upon the law as developed in this country in relation to anti-suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the
European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the ANGELIC GRACE [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v. D)."

III. CONTENT OF THE ANTI-SUIT INJUNCTION

[20] “In para. 4.4 of the draft order sought by the claimants, there appears a list of orders of this court, together with the Costs Award, which are to be the subject of the order. The claimants seek to prevent proceedings outside England and Wales that in substance challenge or impugn or have as their object or effect the prevention or delay in the enforcement of any of these items. It is however rightly accepted by the claimants that it is not open to this court to prevent the defendant from objecting to the recognition or enforcement of the Costs Award in a country where such recognition or enforcement is sought, on the limited grounds permitted by the New York Convention. What the defendant should not be allowed to do however is to challenge the validity of the Costs Award itself in India or anywhere else other than the courts of England and Wales. For exactly the same reasons, he should not be allowed to challenge the validity of any further awards made by the arbitrators, save in these courts. Moreover he should not be permitted to apply to the Courts of India to seek their intervention in enforcement proceedings in this jurisdiction, although I am confident that, as a matter of comity the Courts of India would not concern themselves with enforcement of English court orders in England any more than the English courts would concern themselves with enforcement of Indian court orders in India. If the claimants should seek to enforce English court orders in India then once again it would be a matter for the Indian courts to determine whether there were valid grounds for refusing to recognize or enforce such orders within their own jurisdiction.

[21] “From the evidence put before me it is clear that the defendants are seeking to challenge the Costs Award by their Sect. 34 petition before the Delhi High Court. It is also clear that, as part of that, the defendant is seeking to prevent the claimants from enforcing the final charging order made in the English courts in respect of a house within this jurisdiction. Furthermore there is a real risk, notwithstanding the protestations made in statements on behalf of the defendant, that an application might be made to the Indian court to seek further ‘recourse’ in respect of Mr. Salve’s appointment as arbitrator. Whilst it is now said that
English proceedings are contemplated for that purpose, that rings somewhat hollow in the face of the arguments put that India is the seat of the arbitration and the actions already taken by the defendant in India, in relation both to the arbitration and to orders made by these courts in relation to enforcement here of the award already made.”

IV. DELAY

[22] “The defendant asserts that there has been more than one year’s delay in contesting the jurisdiction of the Indian courts. It is right that the defendant’s Sect. 34 petition in India was launched in December 2007 and the claimants’ application for an anti-suit injunction was not made until January 2009. The claimants’ case is that it was not necessary for them to seek such an injunction until January because none of the steps taken by the defendant in India up to that point appeared to have any imminent or realistic prospect of success or of causing difficulties or disruption to the arbitration itself or to enforcement in England. It was the defendant’s conduct in January in making an application to the Indian court, seeking to challenge the enforcement of the English charging order in England that exhibited an imminent risk of disruption, combined with the intimations of an intention to seek recourse to the courts for the removal of Mr. Salve from his position as arbitrator. The email from the defendant’s Indian advocate gave rise to a real fear in that respect when he sought information because of the desire for ‘further recourse’. The Sect. 34 challenge has not as yet, on the claimants’ evidence, even got to the point where they are required to make any response in India because of the absence of notice from the court and they have been making their jurisdictional objections clear throughout the period since they became aware of the Petition. Whilst this is the subject of dispute, it is not a matter upon which I can reach a decision without hearing oral evidence.

[23] “As I have already stated, I am unimpressed by the suggestion that the defendant only has it in mind to challenge Mr. Salve’s appointment in the courts of this country, given the prior history of the matter and it is noteworthy that he has not offered to give an undertaking to this court not to mount a challenge in India, whether or not he intends to mount a challenge in this country first or at the same time. It is noticeable that he has not, as yet, made any application of that kind here.

[24] “I am satisfied that the claimants took active steps to seek an anti-suit injunction in the light of the two matters which they say operated as triggers for their application. I was referred to the decisions in Markel International v. PMMM
Craft [2006] EWHC 3150 and to Verity Shipping v. NV Norexa [2008] EWHC 213 and the ANGELIC GRACE (ibid.) where the proviso set out for the grant of an anti-suit injunction was expressed in the following terms:

‘The English court ought not to feel any diffidence in granting the injunction providing it was sought promptly and before the foreign proceedings were too far advanced.’

[25] “I am satisfied that, subject to the matters upon which I can reach no decision, the claimant does not fall foul of that proviso, particularly since the Sect. 34 petition in India has hardly got off the ground yet, at least on the claimants’ evidence.”

V. CLAIMANTS’ SUBMISSION TO THE JURISDICTION OF THE INDIAN COURTS

[26] “The defendant submits that the claimants have submitted to the jurisdiction of the Delhi High Court by making an application in 2005 under Sect. 9 IACA for interim protective measures. The claimants submit that under Art. 23 of the ICC Rules, they were entitled, before the file was transmitted to the arbitral tribunal (and in appropriate circumstances thereafter) to apply to any competent judicial authority for interim or conservatory measures. By that Article the application to such a judicial authority for such measures is not to be deemed to be an infringement or waiver of the arbitration agreement and is not to affect the relevant powers reserved to the arbitral tribunal. It cannot therefore affect the seat of the arbitration, the agreement to the curial law and the exclusive supervisory powers of the English courts in relation to the conduct of the arbitration and the validity of the award.

[27] “The defendant also submits that the claimants’ conduct before the Delhi High Court when making submissions to the Indian court in the context of the defendant’s Sect. 34 petition throughout 2008 also amounts to a submission to the jurisdiction of that court, whilst the claimants maintain that, not only is it impossible for them to have submitted prior to notice being issued in the proceedings, but that, in any event, as a matter of fact, their counsel throughout made it plain that the claimants did object to the jurisdiction of the court to determine the matters which the defendant wished to put before it.

[28] “On both these matters there is a large body of factual evidence which is seriously in dispute. There are conflicting statements from Indian lawyers as to what actually took place in the Indian courts. There are also conflicting
statements from two former Chief Justices of India on the law of India and the
effect of what was and was not done in the Indian courts. Disputes on Indian law
and practice constitute matters of fact for this court and it is therefore clear to me
that I cannot decide either primary issues of fact or issues of Indian law and
practice on the basis of the statements put before me. This inevitably means that
a mini trial is required for determination of these points with oral evidence.
Although it was contended that the burden of proof of submission to the
jurisdiction lay upon the defendant and only went to the matter of this court’s
discretion in the context of the granting of the anti-suit injunction, where the
issues of principle have been decided by me in favour of the claimants, it is plain
that my discretion would be influenced by a finding that the claimants had
submitted to the jurisdiction of the Indian courts in the context of the Sect. 34
application, whether that submission was seen through the eyes of Indian law or
the principles of English private international law.”

VI. NON-DISCLOSURE

[29] “The defendant submits that, when obtaining the interim anti-suit
injunction from Andrew Smith J, the claimants failed to disclose the Sect. 9
application made by the claimants to the Indian court for protective measures and
that, regardless of the claimants’ contention before this court that this application
was irrelevant to the exercise of the court’s jurisdiction, the claimant should have
appreciated that there was, at the very least, room for argument so that the Judge
should have been told about it. It was said that the English court should have been
informed that there was a potential argument about submission to the jurisdiction
of the Indian court. The court was of course told about the Sect. 34 application
but again, not told of the potential argument about the claimants’ submission to
the Delhi High Court in that respect. The claimants say that there was nothing
relevant to disclose, in the light of their evidence about the proceedings before
the Delhi High Court, and their evidence of Indian law about lack of submission
to the jurisdiction and the impossibility of any such argument succeeding.
[30] “For the same reasons as set out above in the context of the arguments
about submission to the jurisdiction of the High Court of Delhi, I am unable to
come to a final conclusion about this without hearing full evidence about what
took place and the effect of it from the perspective both of Indian law and the
principles of English conflict of laws.”
VII. CLAIMANTS’ MOTIVATION

[31] “The defendant suggested that there were legitimate doubts about the reasons for the claimants’ delay in bringing the anti-suit proceedings and that the true reason was a sudden change in tactics on the part of the first claimant, as the result of a company of which he has control being subjected to a penalty in relation to a failure to pay stamp duty on a transaction, amounting to something of the order of £2 million, which occurred on 29 December 2008. It was said that the first claimant had been happy to have matters heard in India until this order was made at the end of December. I was unable to see any real connection between these matters which were labelled by the claimants as no more than a ‘smear’ as were other allegations made about the deceit of the court by the claimants’ Indian counsel when a hearing was to be fixed in relation to the defendant’s Sect. 34 application at the end of January. This latter allegation was abandoned by the defendant.

[32] “The former allegation is tied in with the arguments about submission to the jurisdiction which, for the reasons set out above, I cannot finally decide without oral evidence.”

VIII. CONCLUSION

[33] “Subject to arguments about the claimants’ submission to the Indian court’s jurisdiction, about non-disclosure of matters which took place in relation to the Indian proceedings and to arguments relating to delay which are linked to the Indian proceedings, I am satisfied that this is an appropriate case for an anti-suit injunction to be granted, on the test enunciated in the authorities. The defendant has established no good reason why such an injunction should not be granted, let alone any strong or compelling reason. The defendant has taken action in India to challenge the Costs Award, this court’s orders enforcing the Award and has applied to the Indian court in that context, even after the anti-suit injunction was granted. There is good reason to believe he intends to challenge the appointment of Mr. Salve in India. This whole stance is one of asking the courts in India to do that which should only be done by the courts of the country of the seat of arbitration. The defendant has submitted to the jurisdiction of these courts and sought its assistance in the past in relation to the arbitration but has pursued simultaneously and subsequently proceedings in India as described earlier in this judgment. Subject to the issues yet to be decided it is indeed a paradigm case for an anti-suit injunction.
“There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that court, because it was best fitted to determine such issues under Indian law. Whilst I found this idea attractive initially, I am persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this court to decide in the context of an anti-suit injunction. As I have said, the question of submission goes to the exercise of my discretion to grant an injunction and this is not simply a matter of Indian law. The principles of English private international law are called into play when deciding whether what took place in India and its effect in Indian law should impact upon the exercise of this court’s discretion. If for example the claimants had submitted to the jurisdiction of the Indian courts as a matter of technicality, whilst making it plain that they had no intention of doing so, that would be a much less forceful point for the defendant than a full blown submission to the jurisdiction of the Delhi High Court, which would be recognized anywhere in the world as being a voluntary acceptance of that court’s jurisdiction to act at the behest of the defendant to do all the things which the claimant now says it should not do. Whether there was a submission, the form which that submission took, the ambit of it and the nature of it are all matters which might well affect the decision of this court.

Moreover there are practical difficulties because the issue of submission to the jurisdiction in India does not arise as such there. It did not arise in the Sect. 9 application in 2005 and it does not currently arise in the Sect. 34 application. In practice there would have to be a specific hearing arranged to determine this point, not for the purpose of the Indian proceedings as such but in order to assist the English court. That does not seem to make sense. At the end of the day, the points of Indian law and Indian practice are susceptible of an answer here with evidence of the ordinary kind, albeit that these matters cannot be dealt with on statements alone.

On the handing down of this judgment I will therefore give directions, after hearing submissions from the parties, as to the appropriate time tabling of a further hearing when the matters which I cannot currently decide can be the subject of determination. In the meantime the anti-suit injunction granted by Andrew Smith J will continue, subject only to a liberty to apply in the event that the defendant wishes to mount a challenge to recognition or enforcement of the award in a specific jurisdiction on grounds set out in Art. V of the New York
Convention. I am not prepared to insert a general proviso to the injunction for fear that it would give rise to further arguments as to whether or not any application did truly fall within the ambit of Art. V. As is clear from the application on 2 February 2009 filed by the defendant before the Delhi High Court, following the grant of the anti-suit injunction by Andrew Smith J, the defendant either ignored this court’s order or interpreted it so generously that it felt able to make an application which, in my judgment, it was enjoined from making. If the defendant therefore wishes to make applications to the Indian court, or to any other court in the world, the liberty to apply will enable him to come before this court, with a copy of the application he proposes to make, so that permission can be given, if it falls within the ambit of challenges to recognition and enforcement which are allowed by the Convention.

[37] “Although I cannot make a final decision because of the matters which remain yet to be decided, it is clear that the defendant has lost the arguments in relation to the major matters of principle on which it challenged the grant of the injunction and costs on those issues would, in the ordinary way, be payable by it. Subject to hearing the parties however, I consider that I should make no final decision on this, because, if there was non-disclosure or strong discretionary reason not to grant the injunction by reason of the matters I have yet to determine, the overall position would have to be considered before making any order about costs.”
86. High Court of Justice, Queen’s Bench Division (Commercial Court), 21 May 2009, Case No: 2009 Folio No 60

Parties: Claimant: Classic Maritime Inc. (nationality not indicated)
Defendants: (1) Lion Diversified Holdings Berhad (nationality not indicated);
(2) Limbungan Makmur Sdn Bhd (nationality not indicated)

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Articles: II(3)

Subject matters: – stay of court proceedings and referral to arbitration
– arbitration agreement “null and void” because of forum selection clause in related guarantee (no)
– connexity of claims

Commentary Cases: [1]-[17] = ¶ 220; [18]-[23] = ¶ 227

Facts

By an e-mail recap of 29 July 2008, Classic Maritime Inc. (Classic) and Limbungan Makmur Sdn Bhd (Limbungan) concluded a Contract of Affreightment (COA) incorporating a charterparty (the July COA). By an e-mail recap of 13 August 2008, Classic and Limbungan entered into a second COA (the August COA), which expressly incorporated the July COA as well as a charterparty. All the relevant documents (July COA, August COA and the charterparties) contained an arbitration clause.

On 11 and 14 August 2008, Classic forwarded draft guarantees for the July and August charterparties, respectively, to Limbungan. Each provided that the guarantee – which guaranteed the obligations of Limbungan under the COAs – was to be issued by Lion Industries Corporation Berhad (Lion Industries), which held 20 percent of the shares of Limbungan’s parent company, Lion Diversified Holdings Berhad (Lion). On 28 August 2008, guarantees were issued to Classic.
by Lion rather than Lion Industries. The guarantees included a clause providing for the jurisdiction of the English courts.

A dispute arose between the parties under the August COA. Classic commenced an action in the High Court against Lion and Limbungan. Limbungan sought a stay of the proceedings on the basis of the arbitration clause in the August COA. Lion sought a stay on case-management grounds, arguing that the extent of its liability to Classic under the guarantee would involve the same considerations as those which would have to be determined in the Classic/Limbungan arbitration and that concurrent arbitration and court proceedings could lead to conflicting decisions on the same matters.

The High Court, per Cooke, J, granted the stay of the proceedings against Limbungan and denied Lion’s application.

Classic argued in respect of the former that the guarantee was given pursuant to the terms of the August COA and was procured by Limbungan; as a consequence, Limbungan impliedly agreed that it could be sued in the English courts, thereby varying the arbitration clause in the August COA.

The court disagreed, reasoning that such an agreement cannot lightly be implied and holding that it could not be implied here on the material before the court. It noted that the guarantee was specifically concluded between Classic and Lion only; also, the terms of the guarantee explicitly provided that Lion’s obligations were independent of those of Limbungan and that Classic could sue Lion and Limbungan either in the same action or in separate actions, and that it could sue Lion directly without having first to pursue Limbungan.

The court then denied Lion’s application, holding that a stay would achieve the very opposite of what was envisaged by the terms of the guarantee, which provided for the obligations of the guarantor to be considered independently of those of Limbungan. Only the relevant part of the decision is reproduced below.

Excerpt

1. VALID ARBITRATION AGREEMENT

[1] “There is no issue between the parties that Limbungan was party to an arbitration agreement with Classic contained in the documents making up the August COA, as set out in the Recap for that COA, the Recap for the July COA and the Charterparty document incorporated in both. The issue between the parties is whether Limbungan has agreed to vary that arbitration agreement by virtue of the guarantee given by Lion to Classic or in the negotiations for that
guarantee, or has represented in the guarantee or negotiations that it would accept the English court’s jurisdiction, either instead of or in addition to the provision for disputes to be resolved by arbitration.

[2] “This is an issue with which this court must grapple since it must, under Sect. 9 of the Arbitration Act, decide whether the arbitration agreement is null and void, inoperative or incapable of being performed, if it is not to stay the action in favour of arbitration. The issue turns on the construction and effect of the guarantee given by Lion and some email negotiations and in particular whether Limbungan is bound, in one way or another by the contents of a clause in the guarantee.

[3] “Classic relies on the terms of the guarantee which includes the following provisions:

‘The Guarantor’s obligations under this guarantee are independent of Limbungan Makmur Sdn Bhd’s obligations under the Charterparty. The Counterparty may bring and prosecute separate actions against Classic Maritime Inc. and the Guarantor or may join the Guarantor and Limbungan Makmur Sdn Bhd in one action.

(....)

This guarantee shall be governed by and construed in accordance with English law without regard to principles of conflicts of laws. The guarantor irrevocably submits to the non-exclusive jurisdiction of and agrees that any action to enforce this guarantee may be determined by the courts of England and waives any objection to the English courts on the grounds of inconvenient forum or otherwise in connection with this guarantee. In any action to enforce this guarantee the guarantor agrees to accept, in lieu of personal service, service of process by postage prepaid registered or certified mail, return receipt requested, to the guarantor at the address specified pursuant to the notice provisions of this guarantee.’

[4] “Although infelicitously drafted, it is clear that the reference to ‘the Counterparty’ in the first paragraph set out above means Classic and that where, in the second sentence, the Counterparty is referred to as bringing separate actions against Classic Maritime and the Guarantor, the reference should be to Limbungan and the Guarantor since the sentence goes on to refer to the entitlement to join the Guarantor and Limbungan in the same action. Classic relies on this provision which, on its face, gives Classic the right to sue Limbungan and Lion in the same action whilst the later paragraph cited above sets out the agreement of Lion to submit to the jurisdiction of the English court.
Putting the two together, Classic says that it is entitled to sue Limbungan and Lion jointly in the English court, although I was unclear whether it went so far as to say that it could pursue Limbungan on its own there, though that must be the logic of its position if Limbungan, as opposed to Lion, is bound by the provision.

[5] “Classic submits that, as the guarantee was given pursuant to the terms of the August COA, it was therefore procured by Limbungan and Limbungan must have impliedly agreed that it could be sued in the English courts alongside the Guarantor, Lion, at Classic’s option, thereby varying the arbitration clause in the COA. It is further suggested that Limbungan must be taken to have represented that it would not object to being sued in the English courts, even if it was not party to an implied agreement. If Classic is right on either point, then Limbungan has agreed to be sued or represented that it may be sued in the English court either separately or jointly with Lion.

[6] “I cannot imply any such agreement from the material put before the court. Such an agreement cannot lightly be implied, whether from words or conduct. The burden of proof must rest upon Classic in this regard to show the necessity for any such implied contract, as exemplified in The ARAMIS [1989] 1 Lloyd’s Rep 213, The HANNAH BLUMENTHAL [1983] AC 854 and The GUDERMES [1993] 1 Lloyd’s Rep 311.

[7] “Although the negotiation of the interlinked July and August COAs are inadmissible for the purpose of construing them, they must be of significance in assessing whether some implied contract has been agreed. The negotiations for the July COA show discussion of an arbitration clause and rival positions as between the parties as to the seat of that arbitration, namely London or Singapore. London arbitration was then specifically agreed as set out in the fixture Recap, which also included the provision for the obligations of Limbungan to be fully guaranteed by Lion Industries Corporation Berhad (Lion Industries), which was not the company which ultimately gave the guarantee.

[8] “On 11 August 2008 Classic sent to Captain Khor, a senior manager in the Shipping and Chartering Department of LDH Management Sdn Bhd, a draft of the guarantee to be given under the July COA and on 14 August a draft of the guarantee to be given under the August COA. In each case the heading of the email referred to the relevant ‘Limbungan/Classic COA’ and stated:

‘As per main terms agreed, attached please find guarantee wording which kindly get Lion Industries to affect in accordance with Charterparty. Please confirm when same will be affected.’
In an email dated 18 August Limbungan’s brokers forwarded to Captain Khor a draft email to go to the owners which included corrections to the draft guarantee drafted by the ‘Chtrs Legal Dept’. From this it is to be inferred that there was discussion of the terms of the guarantee between the legal department acting for ‘Charterers’ and Limbungan and the terms of the guarantee itself were negotiated between persons acting for Limbungan and Classic. In due course the agreed form was put before the Lion company for signature, at the behest of Limbungan, albeit that, by that time, the guarantor was to be Lion rather than Lion Industries.

On this basis it is submitted by Mr. Richard Southern QC for Classic that Limbungan must be taken to have agreed the terms of the guarantee to be given by the guarantor with the inclusion of the provision allowing Classic to bring and prosecute separate actions against Limbungan and Lion or joining both in one action. Thus, it is said that Limbungan agreed to be sued in an action and specifically agreed to be sued jointly in an action with Lion which, by the terms of the guarantee itself, accepted the jurisdiction of the English courts.

I cannot accept this submission. There is no allegation that Lion acted as agent for Limbungan in entering into the guarantee. The guarantee is in itself specifically an agreement between Classic and Lion to which Limbungan is not a party whether or not Charterers’ legal department is Limbungan’s legal department or a legal department which acts for numerous members of the Lion Group. Whether or not the form of the guarantee was negotiated between Limbungan and Classic, there is no basis for construing negotiations or the guarantee as amounting to an agreement on the part of Limbungan itself to the terms of a clause in a document to which it was not a party. For the same reasons it cannot be said that there is a representation made on behalf of Limbungan when forwarding a document which is to take effect between Classic and Lion, once executed by them.

Both the July and August COAs were concluded with the arbitration clause in each, at a time when a draft of the guarantee to be given by a Lion company had been furnished but not agreed, with its proposed clauses.

The terms of the paragraphs quoted above in the guarantee between Lion and Classic are not, in my judgment apt to oust the arbitration agreement in the COAs between Limbungan and Classic. As Mr. Vernon Flynn QC submitted on behalf of Limbungan, the terms of the guarantee go to some length to provide that the obligations of Lion to pay are to be treated independently of those of Limbungan, not only in the first provision set out above but also in the preceding paragraphs of clause 2 of the guarantee which read as follows:
2. Guarantees and promises to pay to Classic Maritime Inc., on demand, any and all amounts (the “Obligations”) that Limbungan Makmur Sdn Bhd becomes obligated to pay to Classic Maritime Inc. as a result of Limbungan Makmur Sdn Bhd’s failure to perform its obligations or otherwise under the Charterparty when each of the Obligations becomes due, and guarantee that if any payment that Limbungan Makmur Sdn Bhd makes to Classic Maritime Inc. on account of the Obligations is recovered from or is repaid by Commodities in any bankruptcy, insolvency or similar proceeding instituted by or against the Classic Maritime Inc., then this guarantee will continue to apply to those Obligations to the same extent as though the payment so recovered or repaid never had been made or received.

This is (a) a guarantee of payment and not of collection and (b) a continuing, absolute and irrevocable guarantee irrespective of (i) any release of or granting of time or any other indulgence to the Obligor and (ii) any other circumstance which might constitute a defense available to, or a legal or equitable discharge of, a guarantor under a guarantee given by it.’

[14] “As Mr. Flynn submitted, Lion’s liability to Classic does not accrue until such time as Limbungan becomes obliged to make a payment to Classic under the August COA but once that has occurred, Lion has an obligation to pay Classic which is independent of Limbungan’s obligation to pay so that Classic is entitled to sue both Lion and Limbungan. Under the terms of the guarantee it may do so either in the same action or separate actions but Classic is also entitled to proceed to enforce Lion’s obligation without having first to pursue Limbungan, to realize any other security or pursue any other remedy. Of course Classic would have to establish, in its claim against Lion, that Limbungan had been obligated to make a payment to Classic under the August COA, for the guarantee to be triggered. Although this would be the position under English law anyway it is perhaps not surprising that the parties wished to state the position expressly for the avoidance of doubt, but none of this can affect the specific arbitration clause in the COA with Limbungan.

[15] “Whilst Lion may agree that actions can be pursued against Limbungan and itself separately or together and itself agree to English jurisdiction, it did not purport to commit Limbungan to that and there is no basis for suggesting that Limbungan itself agreed to it. Lion was expressing its willingness to be sued independently or jointly with Limbungan but I do not see how that can be said to be binding on Limbungan. The thrust of the paragraphs quoted is to deal with the independence of any suit against Lion, to which it agrees and though it also
agrees to be jointly sued with Limbungan, this cannot affect Limbungan’s right

to insist on arbitration which is contained in the contract to which it is a party.

[16] “For the same reasons there is no evidence of any independent

representation made by Limbungan that it consented to be pursued in the courts

in England, as opposed to arbitration. Limbungan is neither a party to the

guarantee nor party to any representation or unequivocal promise which could
give rise to any estoppel which would prevent it relying on the arbitration

provisions of the COA: nor is there anything which would give rise to that result.
The ingredients for such an estoppel, such as a reliance and unconscionability are
not put forward nor established in any event.

[17] “It follows therefore that the claim against Limbungan must be stayed

because it arises under the August COA and it must therefore be referred to

arbitration in accordance with the parties’ agreement which is valid.”

II. STAY ON CASE-MANAGEMENT GROUNDS

[18] “The basis of Lion’s application for a stay was as follows. Limbungan

intends to institute arbitration proceedings against Classic, if Classic does not do

so. In those proceedings liability would be contested by Limbungan on the

ground of frustration/force majeure and Limbungan would be looking to test

whether Classic took appropriate steps to mitigate its loss, whilst also challenging

the quantum of its claim for damages. In such circumstances, self-evidently, the

extent of Lion’s liability to Classic under the guarantee would involve the self

same considerations as those which would have to be determined in the

Classic/Limbungan arbitration. If there were separate proceedings in this

country against Lion, there would be a risk of inconsistent decisions and in

consequence there should be a stay of the proceedings against Lion pending the

conclusion of the arbitration between Classic and Limbungan.

[19] “The gravamen of the submission is the risk of inconsistent decisions by this

court and the arbitral tribunal – a factor which the court is apt to take into

account when considering proceedings in rival jurisdictions between the same

parties and which can even amount to a ‘strong reason’ for the Court not

enforcing an exclusive jurisdiction clause.

[20] “Here however, a stay would achieve the very opposite of what was

envisioned by the terms of the guarantee to which I have already drawn attention,

which provide for the obligations of the guarantor to be considered

independently of those of Limbungan. Lion specifically agreed that separate

actions could be brought against it and Limbungan and could be submitted to the
non-exclusive jurisdiction of the English court. Whilst it also agreed to Classic joining it and Limbungan in one action, it is its own subsidiary, Limbungan which has, in this court, insisted on its separate right to arbitration. If it, as a subsidiary of Lion, and Lion itself, were anxious to avoid the risk of inconsistent decisions, the solution lay in their own hands, namely by Limbungan agreeing to the English court’s jurisdiction. What Lion and its subsidiary Limbungan are seeking to do before this court is to uphold the arbitration agreement in the August COA, so that Limbungan cannot be sued in these courts whilst Lion evades its own agreement to the jurisdiction of this court on supposedly case management grounds. Limbungan and Lion want to preserve Limbungan’s right to arbitrate with Classic under Limbungan’s agreement with Classic but to override Classic’s right to litigate with Lion in these courts under its contract with Lion. That will not do.

[21] “Moreover, it is common ground between the parties that the decision of an arbitral tribunal in the dispute between Classic and Limbungan would not be binding as between Classic and Lion. Lion’s offer of an agreement to be bound by the arbitration award merely accentuates its desire to avoid the effect of the jurisdiction clause in the guarantee of which Classic is entitled to take advantage.

[22] “Classic is entitled to come before this court and to make its claim for summary judgment without delay and, if entitled to summary judgment, that in itself would constitute a good reason for the absence of any stay on case management grounds.

[23] “In my judgment therefore there is no good reason, whether for case management purposes or otherwise, why this court should prevent Classic from pursuing its claim against Lion. If well grounded, it is entitled to speedy judgment, regardless of the position of Limbungan and any arbitration proceedings which may be pursued against it. The specific agreement to the separateness of the obligations of Limbungan and the separateness of the proceedings are extremely cogent reasons against the stay sought. I therefore refuse Lion’s application.”

(….)
87. Court of Appeal (Civil Division), 20 July 2009, Case No: 2008/2613

Parties:
Appellant: Dallah Real Estate and Tourism Holding Company (Saudi Arabia)
Respondent: The Ministry of Religious Affairs, Government of Pakistan

Published in:
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Articles: III; V; V(1)(a); V(1)(e)

Subject matters:
– non-signatory defendant not bound to arbitration clause
– applicable law to existence, validity of arbitration agreement
– extent of judicial review of arbitrators’ findings as to existence of arbitration agreement
– primary v. secondary jurisdiction under 1958 New York Convention
– estoppel (issue)
– waiver of right to oppose enforcement by not seeking setting aside of award (no)
– discretion to enforce award where there is ground for refusal

Commentary Cases:
[3]-[12] = ¶ 001 + ¶ 301; [13]-[34] = ¶ 507 (non-signatory); [14]-[15] = ¶ 506; [37]-[45] + [52]-[58] = ¶ 303; [46]-[50] + [59]-[76] = ¶ 500

Facts

In December 1994, the Government of Pakistan (GoP) approved a proposal to establish the Awami Hajj Trust (the Trust), which would invest savings of members in order to facilitate and fund their pilgrimage to Mecca (Hajj). In 1995, Mr. Shezi Nackvi, a director of a company owned by the Albaraka Group, proposed to the Ministry of Religious Affairs of Pakistan (the MORA) that another Albaraka company, Dallah Real Estate and Tourism Holding Company
(Dallah), provide to the GoP a housing complex in Mecca on a long-term lease for use by Pakistani Hajj pilgrims.

On 24 July 1995, a Memorandum of Understanding (MOU) was concluded between Dallah and the President of the Islamic Republic of Pakistan through the MORA. The MOU provided that Dallah would acquire land within Mecca, construct housing facilities for Pakistani pilgrims on that land and lease the houses and the land to the GoP on a ninety-nine-year lease, subject to Dallah arranging the necessary financing for the GoP. The MOU provided that it was governed by Saudi Arabian law and for arbitration of disputes in Saudi Arabia.

On 17 August 1995, Mr. Nackvi, on behalf of Dallah, sent to Mr. Lutfallah Mufti (Secretary of the MORA) Dallah’s proposals in respect of the lease and financing of the project. The GoP did not approve the proposals within the contractually agreed period of ninety days. On 18 November 1995, Dallah nevertheless acquired 43,000 square meters of land in Mecca.

On 31 January 1996, the President of Pakistan promulgated Ordinance No. VII of 1996, establishing the Trust as a corporate entity. Mr. Mufti was appointed Secretary of the Board of Trustees. Under the Constitution of Pakistan, an Ordinance is repealed after four months if it is not laid before Parliament, though it can be renewed. Ordinance VII of 1996 was renewed on 2 May 1996 and 12 August 1996; no further renewals were promulgated thereafter. As a consequence, the Ordinance lapsed on 12 December 1996 and the Trust ceased to exist as a legal entity.

In the meantime, on 10 September 1996, Dallah and the Trust entered into an agreement (the Agreement) providing for the construction of housing for 45,000 Pakistani pilgrims against payment by the Trust to Dallah of a lump sum of US$ 100 million, subject to Dallah arranging a financing facility in the same amount against a guarantee of the GoP. The Trust and the Trustee Bank – a bank that had been appointed by the Trust’s Board to collect, maintain and invest the members’ deposits – were to provide a counter-guarantee in favor of the GoP. The Agreement did not provide for a governing law; clause 23 was an ICC arbitration clause.

A dispute arose between the parties when Mr. Mufti wrote to Dallah on 19 January 1997, stating that Dallah had failed to submit the project’s specifications and drawings within the agreed time limit. This was a breach of a fundamental term of the Agreement and amounted to repudiation, “which repudiation is hereby accepted”. The letter also stated that Dallah failed to arrange the financing facility, on which the effectiveness of the Agreement depended.

On the following day, 20 January 1997, the Trust commenced proceedings against Dallah in the Court of the Senior Civil Judge in Islamabad, seeking a
declaration that the Agreement stood repudiated on account of Dallah’s breach. Dallah applied to the court to stay proceedings on the basis of the arbitration clause in the Agreement. On 21 February 1998, the Judge issued an order stating that at the time the proceedings were started, the Trust had ceased to exist and could not bring any proceedings in its name. On 2 June 1998, the MORA started proceedings in its own name against Dallah before the same Islamabad court.

On 19 May 1998, Dallah in turn commenced ICC arbitration against “the Ministry of Religious Affairs, Government of Pakistan”. By a letter of 5 June 1998, the MORA informed the ICC that it had filed court proceedings in Pakistan and that under the Pakistani Arbitration Act 1940 arbitration was invalid unless court proceedings were stayed first. Arbitration nevertheless proceeded. By a letter of 15 August 1998, the GoP informed the ICC that it would not submit to arbitral jurisdiction because there was no contract or arbitration agreement between the GoP and Dallah. On 16 September 1998, an arbitrator was appointed for the GoP and the seat of the arbitration was fixed in Paris.

The ICC arbitrators rendered three awards: (1) a First Partial Award on 26 June 2001, holding that “the Ministry of Religious Affairs, Government of Pakistan” was bound by the arbitration agreement in clause 23 of the Agreement and that the dispute fell within the scope of that arbitration agreement; (2) a Second Partial Award on 19 January 2004, determining that Saudi Arabian law applied to the merits of the case and that the MORA’s termination letter of 19 January 1997 constituted an unlawful repudiation of the Agreement; and (3) a Final Award on 23 June 2006, ordering the defendant to pay Dallah US$ 18,907,603 by way of damages for breach of the Agreement, as well as the costs of the arbitration and Dallah’s costs.

On 10 July 2006, Dallah sought leave to enforce the Final Award in the High Court in London. On 9 October 2006, Clarke J granted Dallah’s application. The GoP applied to set aside the enforcement order. (On 19 February 2007, the GoP sought an extension of the time for its application, stating that it had been considering with its French lawyers whether it could and should challenge the Final Award (and possibly the Partial Awards) in the French courts but had eventually decided not to do so. On 23 February 2007, Langley J extended the time for the GoP to apply to set aside Clarke J’s order until 23 March 2007. The application was issued on that day.)

On 1 August 2008, the High Court, per Aikens, J, granted the GoP’s application and set aside the enforcement order, holding that the arbitration clause in the Agreement did not validly bind the GoP because there was no evidence of a common intention of the parties that the GoP be so bound. The court reached this conclusion under French law, which it found to apply to the
issue of the validity of the arbitration agreement, being the law of the country of rendition of the award.¹

On 20 July 2009, the Court of Appeal, before Ward, Rix and Moore-Bick, LJ, in an opinion by Moore-Bick, affirmed the lower court’s decision.

The court first noted that under the 1958 New York Convention the courts of the country of rendition of an award have primary or supervisory jurisdiction, while the courts of the country of enforcement have secondary jurisdiction. This does not mean however that the enforcement court is limited to a narrow review and cannot carry out a re-hearing of the issues determined by the arbitrators. Art. V(1) Convention requires the party against whom enforcement is sought to “furnish proof” of the matters to which it refers; a party can only do so in the manner and to the standard ordinarily required in proceedings before the enforcing court.

The court therefore re-examined the issue of the validity of the arbitration clause in the Agreement in respect of the GoP. It concluded that on the evidence, the lower court correctly held that it was not the subjective common intention of all the parties that the GoP should be bound by the Agreement or the arbitration clause.

The court of appeal then dismissed Dallah’s contention that the GoP was estopped by the decision of the arbitrators in the First Partial Award from denying that it was a party to the Agreement. The court noted that Dallah’s argument depended on two propositions: (i) that the tribunal was a court of competent jurisdiction for this purpose and (ii) that the GoP’s failure to challenge the award before the French courts has rendered the award final.

The court held in respect of the first proposition that arbitral tribunals are courts of competent jurisdiction, whose decisions can create estoppel, only if the parties have conferred jurisdiction upon them. Here, if the GoP and Dallah were not bound by an agreement providing for ICC arbitration, “the arbitrators had no jurisdiction over them, and the award was a nullity”. The second proposition was also flawed, in that the Final Award could still be challenged in the French courts, as witnessed by the French law experts before Aikens, J. The court added that even if it were not so, this would not be sufficient to prevent the GoP from opposing enforcement of the award in England. The court finally held that the lower court correctly found that it should not exercise its residual discretion to enforce the award, once it had reached the conclusion that there was no valid arbitration agreement between Dallah and the GoP.

Rix, LJ filed a concurring opinion which is also reproduced below.

¹. The High Court decision ([2008] EWHC 1901 (Comm)) is not reproduced here.
UNITED KINGDOM NO. 87

Excerpt

[1] “The present proceedings were started by an arbitration claim form seeking leave under Sect. 101(2) of the Arbitration Act 1996 to enforce the tribunal’s Final Award in the same manner as a judgment of the High Court. On 9 October 2006 Christopher Clarke J made an order without notice giving Dallah permission to enforce the award, which led in turn to an application by the Government to set aside the order on the grounds that the arbitration agreement on which the award was based was not valid within the meaning of Sect. 103(2)(b) of the Act.”

2. Sect. 101 of the English Arbitration Act 1996 reads:

"(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
As to the meaning of ‘the court’ see Sect. 105.
(3) Where leave is so given, judgment may be entered in terms of the award.”

3. Sect. 103 Act 1996 reads:

"103. Refusal of Recognition or Enforcement.
(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –
(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
(4) An award which contains decisions on matters not submitted to arbitration may be recognised
[2] “Aikens J held that, since the parties had not agreed the law by which clause 23 of the Agreement should be governed, it was subject to French law as the law of the country where the award was made. He heard expert evidence of French law, on the basis of which he made certain findings which he applied in determining whether the Government was a party to clause 23 of the Agreement. He held that it was not, that there was therefore no valid arbitration agreement between it and Dallah and that the award should therefore not be enforced.”

[3] “The tribunal itself considered and determined the question of its jurisdiction, which it recognized depended on whether the Government had entered into an arbitration agreement with Dallah. In the proceedings before the court the Government sought to prove that the arbitration agreement on which Dallah relied as the basis for the tribunal’s Final Award was not valid because it had not entered into any such agreement. The issue before the court, therefore, was the same as that which had been before the tribunal. The question raised by Miss Heilbron’s submissions [for Dallah] is whether in those circumstances proceedings under Sect. 103(2) should take the form of a full re-hearing or a more limited review.

[4] “The judge treated this issue as essentially one of statutory interpretation. In paras. 81-84 of his judgment he said:

‘81 .... Miss Heilbron [for Dallah] submitted that international comity and the general “pro-enforcement” approach of both the Convention and Part III of the Act, suggested that a limited enquiry should be carried out by the English court if a party made an application under Sect. 103(2)(b).”

or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.”
82. I cannot agree with this submission. It seems to me that I am bound by the wording of the Act itself, which reflects faithfully that of the Convention. A party who wishes to persuade a court to refuse recognition or enforcement of a Convention award has to prove one of the matters set out in paras. (a) to (f) of Sect. 103(2). Those paragraphs are definitive of what a party can prove in order that a court “may” refuse recognition or enforcement of a Convention award. If a party has to “prove” a matter, that must mean, in the context of English civil proceedings, prove the existence of the relevant matters on a balance of probabilities. Challenges under Sect. 103(2) will be challenges to the recognition and enforcement of awards that have been made in a country other than England and Wales. Therefore, so far as English law is concerned, the matters set out in paras. (a) to (f), including issues of foreign law, are all matters of fact.

83. Thus, a party must be entitled to adduce all evidence necessary to satisfy the burden of proof on it to establish the existence of one of the grounds set out in Sect. 103(2)…. [I]t seems to me that the statutory wording of Sect. 103(2) requires that the party wishing to challenge the recognition and enforcement of a Convention award must be entitled to ask the court to reconsider all relevant evidence on the facts (including foreign law), as well as apply relevant English law.

84. I have already set out the test that the arbitrators stated had to be applied to see if the GoP [Government of Pakistan] was a party to the arbitration clause. The GoP’s French law expert, M. Le Bâtonnier Vatier, accepted that, in general, the arbitrators had applied the correct test as would be enunciated by a French court. However, it seems to me, on the correct construction of Sect. 103(2) that despite this concession, I cannot evade going through the exercise of considering all the relevant evidence to see whether the GoP has proved (applying French law principles) that it is not a party to the arbitration clause, which is therefore not valid. The exercise is, to that extent, a rehearing, not a review.’

[5] “The essence of Miss Heilbron’s submission was that in so construing the statute the judge failed to have sufficient regard to the policy behind the Convention and that, in order to give proper effect to what she described as its ‘pro-enforcement’ philosophy, the court when considering a challenge under Sect. 103(2) to the enforcement of a foreign arbitration award should not conduct a full trial of the issues of fact and law to which the application gives rise, but should limit itself to an enquiry more in the nature of a review, accepting any relevant findings of fact and decisions of the tribunal unless they can be shown to
be clearly wrong. She accepted that the weight to be accorded to the tribunal’s conclusions might vary depending on the circumstances of the case, but she submitted that the court should normally pay particular regard to them. That submission was based to a significant extent on the distinction that she submitted is to be drawn between the role of the courts of the seat of the arbitration (the ‘supervisory’ or ‘primary’ court) and the courts of the state in which enforcement is sought (the ‘enforcing’ court). In the present case the French courts were the supervisory courts and the High Court no more than an enforcing court. The tribunal was composed of eminent lawyers and the decision it reached in its First Partial Award was one that was clearly open to it. She submitted that the judge should therefore have given particular weight to its decision and, having done so, should have rejected the Government of Pakistan’s application.

[6] “The language of Sect. 103(2) of the Arbitration Act follows very closely that of Art. V(1) of the Convention, although in some respects its structure is slightly different. [Quotation of Art. V(1) omitted.] As is apparent, therefore, it is directed to matters which, if established, undermine the legitimacy of the award as giving rise to a binding obligation created in accordance with the will of the parties as expressed in the arbitration agreement.

[7] “Art. V(1)(e) and Sect. 103(2)(f) both recognize that the courts of the country in which, or under the law of which, the award was made have a supervisory role. The scope of the supervisory court’s powers and therefore the extent of that role varies in accordance with its own domestic law, but will normally include the power to set aside the award in cases where the arbitral process has failed to conform to the terms of the arbitration agreement or has failed to meet certain basic standards of fairness. In some jurisdictions, notably our own, the court also has the power to entertain a challenge to the award on the grounds of an error of law. The power of the supervising court to annul the award is, therefore, of a substantive nature. It extends beyond the mere refusal to recognize or enforce the award, which is the limit of the powers available to courts of other states that are parties to the Convention.

[8] “Miss Heilbron submitted that the distinction between the powers of the supervisory court and the powers of enforcing courts naturally points to the conclusion that as a matter of policy the Convention accords primacy to the supervisory court. In one sense that is not controversial because Art. V(1)(e) itself recognizes that the supervisory court has the power to set aside or suspend the award, a step which of itself entitles (but does not require) courts of other jurisdictions to refuse enforcement. However, there is nothing in the Convention to suggest that the supervisory court is intended to have primacy in the sense that
enforcing courts are expected, much less required, to treat the award as valid and binding unless and until successfully challenged in the supervisory court. If that had been intended, Art. V(1) would have taken a very different form. In particular, it would not have given courts of other jurisdictions an unrestricted power to refuse enforcement in cases where defects in the arbitral process of the kind which it describes could be proved. On the contrary, it is well established, and indeed was common ground, that a person against whom an award has been made is not bound to challenge it before the supervisory court in order to challenge its enforcement in another jurisdiction: see Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania (No. 2) [2006] EWCA Civ 1529, [2007] QB 886 at para. 104 and the cases there cited. In my view the terms of Art. V(1) read as a whole amply bear out the submission of Mr. Landau Q.C. [for the Government of Pakistan] that one of the fundamental principles enshrined in the Convention is that such a person is entitled to oppose the enforcement of an award on the grounds that it is not based on a valid agreement to arbitrate.

[9] "Miss Heilbron suggested a number of additional reasons why primacy should be accorded to the supervisory court, but they were all essentially of a pragmatic nature. Thus, she submitted that it would promote certainty, since in many cases the law governing questions relating to the validity of the arbitration agreement will be that of the supervisory court, which is much better placed to decide them than any other. It would also, she submitted, remove the possibility of enforcement being opposed in separate proceedings in many different jurisdictions with potentially different outcomes. Other considerations, however, may point in a different direction. One of the attractions of international arbitration is that it gives the parties the power to insulate the proceedings from local jurisdictions. The effect of requiring foreign courts to defer to the courts of the country where the arbitration has its seat would be to reinstate in all but name the 'double exequatur' rule which the Convention displaced and would significantly increase the influence of the courts of that jurisdiction. That would not be universally welcome. It may well be that the particular considerations to which Miss Heilbron referred were present to the minds of those who were responsible for negotiating the Convention, but if they were, they were rejected in favour of the safeguards contained in Art. V(1) which are designed to ensure the fundamental integrity of the award.

[10] "Miss Heilbron submitted that the Convention policy of giving primacy to the supervisory court meant that Art. V(1) contemplated a review within a narrow compass and not a wholesale re-hearing of the issues determined by the
tribunal, a matter that should be left to the supervisory court. As will be apparent, I am unable to accept that there is any policy of the kind she suggested, but quite apart from that, her argument founders on the language of Art. V(1) itself, which requires the party against whom enforcement is sought to ‘furnish proof’ of the matters to which it refers (an expression accurately reflected in the more modern language of Sect. 103(2) of the Act). In a case where the tribunal has determined its own jurisdiction there is an obvious possibility that a party opposing enforcement will wish to challenge some of its findings of fact or conclusions of law and I find it very difficult to interpret the expression ‘furnish proof’ as meaning anything other than requiring proof in the manner and to the standard ordinarily required in proceedings before the enforcing court.

[11] Moreover, I have to say that I find it difficult to understand exactly what Miss Heilbron had in mind when submitting that the court should accord deference to the tribunal’s conclusions, particularly in view of the fact that she asserted that the principle was flexible in its application. If it meant no more than that the court should have regard to the tribunal’s reasoning in reaching its own conclusion, I should have little difficulty with it, since the tribunal’s reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is not, however, what I understood her to mean, since it was essential to her argument that the court should at least accord great weight to the tribunal’s conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when reviewing the exercise of a judicial discretion and a full re-hearing, not to mention one that is also capable of flexibility in its application. Moreover, for the court to defer to the tribunal’s conclusions in the manner suggested by Miss Heilbron when it is required to decide whether a particular state of affairs has been proved would be to give the award a status which the proceedings themselves call into question. It is for similar reasons that our courts have consistently held that proceedings challenging the jurisdiction of an arbitral tribunal under Sect. 67 of the Arbitration Act involve a full rehearing of the issues and not merely a review of the arbitrators’ own decision.

[12] I agree with Miss Heilbron that a statutory provision which gives effect to an international convention of this kind should be construed with due regard to the purpose of the convention and with a view to ensuring consistency of interpretation and application, but there is no reason to think that the judge was not alive to that principle. In the absence of any authority, either in this country or abroad, which tends to support the conclusion that the language of Art. V(1)
is to be given a meaning different from that which it naturally bears and in the light of the close similarity of language between the Convention and the statute, I think the judge was right to treat the question as one of statutory interpretation and that his conclusion on the meaning of Sect. 103(2) was clearly correct.”

II. VALIDITY OF ARBITRATION CLAUSE

[13] “Before dealing with Miss Heilbron’s submissions on French law and its application to the facts of this case it is necessary to say a little more about the First Partial Award, the tribunal’s identification of the law applicable to the arbitration agreement, and the application of that law to the facts which it found.

[14] “Neither the Agreement as a whole nor clause 23 contained any express choice of governing law. Before the tribunal Dallah argued that both were governed by Saudi Arabian law, being the system of law with which the contract had its closest and most real connection. The Government of Pakistan argued on similar grounds that both were governed by the law of Pakistan. As far as clause 23 was concerned, the tribunal did not accept either of those submissions, nor did it hold that by choosing arbitration in Paris the parties had made an implied choice of French law. Instead, it held that all issues relating to the validity and scope of clause 23, including the question whether the Government of Pakistan was a party to it, were to be determined by reference to ‘those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business’. The tribunal then proceeded to examine in some detail the conduct of the Government before, at the time of and after signing the Agreement and reached the conclusion that it had demonstrated that it had always been, and considered itself to be, a party to the Agreement with Dallah. As a result, applying the transnational principles to which it had earlier referred, the tribunal held that the Government of Pakistan was a true party to the Agreement, including the arbitration clause.

[15] “I am conscious that this brief summary does not do full justice to the tribunal’s reasoning, but the two important matters to emphasize are, first, that it did not purport to apply French law in order to determine the issue before it and, second, that its decision was based mainly, if not entirely, on inferences drawn from the documents. The judge, on the other hand, not only had some additional documents before him, but, more importantly, was bound by Sect. 103(2) of the Act to apply French law to the facts as he found them.
The judge had the benefit of hearing evidence from two experts in French law, M. Derains and M. Le Bâtonnier Vatier. In para. 85 of his judgment he set out the following passages from their Joint Memorandum which encapsulated the principles which they agreed were applicable to the present case:

‘Under French law, in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the said agreement and, as a result, by the arbitration clause therein. The existence of a common intention of the parties is determined in the light of the facts of the case. To this effect, the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement.

When a French court has to determine the existence and effectiveness of an arbitration agreement over the parties to an arbitration which is founded upon that agreement, and when for these purposes it must decide whether the said agreement extends to a party who was neither a signatory nor a named party thereto, it examines all the factual elements necessary to decide whether that agreement is binding upon that person.’

The judge then referred to the oral evidence and found that:

‘Both experts agreed that when the court is looking for the common intention of all the potential parties to the arbitration agreement, it is seeking to ascertain the subjective intention of each of the parties, through their objective conduct. The court will consider all the facts of the case, starting at the beginning of the chronology and going on to the end and looking at the facts in the round.’

‘It is important to recognize that the judge not only had the benefit of hearing the witnesses give their evidence, but also had the opportunity of clarifying with them through direct questions his understanding of the relevant principles of French law, an opportunity of which he took full advantage. Having seen the evidence before him, I am of the view that it fully supported his finding that French law is concerned to ascertain the ‘real’ or ‘subjective’ intentions of the parties in order to determine whether an agreement existed between them.”
It is unnecessary to consider that evidence or the basis for the judge’s findings in any greater detail because Miss Heilbron accepted that the judge had correctly found that French law required him to ascertain the common intention of the parties by reference to their behaviour during the negotiation, performance and, if applicable, termination of the agreement. She submitted, however, that he had erred in two respects in his understanding and application of the principle. First, he concentrated too much on the subjective intention of the Government of Pakistan and too little on the objective evidence of its intention in the way it had conducted itself throughout the period in question. Second, he misunderstood the relevance and status of transnational law in this context and so failed to take into account the interests of justice and good faith which French law recognizes as important.

[18] “The application of foreign law by an English court depends not merely on the judge’s finding of the relevant principles, but on his understanding of their content and the way in which they are applied by the courts of the country in question. In this case, as I have pointed out, the judge had the opportunity of debating with the experts the essential nature of the relevant principles of French law and thereby of gaining a fuller understanding of them which he could bring to bear when applying them to the material before him. In those circumstances I think an appellate court, which has not had the same benefit, should be slow to hold that the judge, having formulated the principles correctly, erred in his application of them.

[19] “Miss Heilbron’s criticism of the judge depended heavily on the contention that he had failed to give sufficient recognition to the fact that, as he himself had found, the parties’ subjective intentions are to be ascertained by reference to their objective conduct. To that end she was at pains to emphasise that right from the outset to the point of its eventual collapse the project with Dallah was one in which the Government was directly interested and which it controlled at the highest level. In the period leading up to the signature of the Memorandum of Understanding all negotiations were carried on by the Government and the Memorandum of Understanding itself embodied an agreement between Dallah and the Government. After the establishment of the Trust the Government continued to direct the project and to handle all negotiations with Dallah. Although it existed as an independent legal person, the Trust itself played no separate role. In effect, her submission was that the Trust was little more than a vehicle which the Government directed and used for the purposes of implementing the arrangements it had made with Dallah.

[20] “In my view that is not an unfair way of describing the respective roles of the Government and the Trust in practical terms, but the judge was clearly well
aware of the Government’s involvement in the project, which in any event does not take one very far in deciding whether it was the common intention of the parties that it was to be a party to the Agreement. Given Miss Heilbron’s emphasis on the importance of ascertaining the parties’ intentions by reference to their conduct, it is worth recording that Mr. Landau accepted two propositions that are reflected in the judge’s findings of French law and which seem to me to be important. The first was that although French law seeks to ascertain the parties’ real intentions, it does so by examining their conduct and communications and to that extent the exercise necessarily involves an element of objectivity. The second is that we are concerned in this case with the common intention of the parties, not their individual intentions, and that before one can find that two parties were in agreement it is necessary to be satisfied that each was aware that the other was of the same mind; and that in turn requires some communication between them.

[21] “The judge seems to have had all these matters well in mind. Although the principles of French law determined the question he had to ask himself, the ascertaining of the parties’ real intentions and the existence of any common intention was a matter of fact. He examined the material before him (which was to a large extent the same as had been before the tribunal) and considered what inferences could properly be drawn from it. In the course of doing so he took into account the views expressed by the tribunal in the award. Prior to the establishment of the Trust the Government was the only party with whom Dallah could negotiate and its position was made clear in the Memorandum of Understanding, a document which was drafted in formal terms and clearly intended to be legally binding. In my view, however, the establishment of the Trust and, most importantly, the execution of an Agreement between the Trust and Dallah represented a fundamental change in the position and must have been recognized as such by all parties. Indeed, correspondence which preceded the Agreement shows that Dallah was well aware that it would be contracting with the Trust rather than the Government. The Government was not expressed to be a party to the Agreement, nor did it sign the Agreement in any capacity. It is difficult, therefore, to infer that Dallah, the Trust and the Government each intended (and knew that each of the others intended) that the Government was to be a party to it. If that had been their common intention the Government would surely have been named as a party to the Agreement, or would at least have added its signature in a way that reflected that fact. Other aspects of the Agreement, to which the judge referred, tend to bear out that conclusion. The fact that the Agreement contemplated that the Government would guarantee the Trust’s obligations in respect of a loan required to enable it to finance the project
is certainly evidence of its continued involvement and support, but the fact that
the Agreement does not purport to impose any such obligation on the
Government directly is telling when it comes to deciding whether it was
intended that it should be a party to it.

[22] “The judge then dealt with events that occurred between the execution of
the Agreement and the letter of 19 January 1997, in particular with various
letters dealing with the establishment of the bank that was to collect and invest
payments made to the Trust. Miss Heilbron submitted that he misunderstood the
nature of those letters. I do not think he did, but their significance, if any, lies
only in the fact that they were written by officials of the Ministry of Religious
Affairs. That is certainly further evidence that the Government was managing the
project on behalf of the Trust, but in my view goes no farther than that.

[23] “The piece of evidence on which Miss Heilbron placed most emphasis was
the letter of 19 January 1997 itself, the significance of which was said to lie in the
fact that the Government purported to accept Dallah’s repudiation of the
Agreement as if it were itself a party to it. The letter was written on the headed
paper of the Ministry of Religious Affairs. It referred to the Agreement and to
Dallah’s obligation to obtain the Trust’s approval of detailed specifications and
drawings within ninety days of its execution. It continued:

‘However, since you have failed to submit the specifications and drawings
for the approval of the Trust to date you are in breach of a fundamental
term of the Agreement which tantamounts [sic] to a repudiation of the
whole Agreement which repudiation is hereby accepted.

Moreover, the effectiveness of the Agreement was conditional upon
your arranging the requisite financing facility amounting to
US$ 100,000,000.00 within thirty (30) days of the execution of the
Agreement and your failure to do so has prevented the Agreement from
becoming effective and as such there is no Agreement in law.

This is without prejudice to the rights and remedies which may be
available to us under the law.’

[24] “The arbitrators placed a good deal of weight on this letter and Miss
Heilbron submitted that to a French court it would have provided strong
evidence that the Government regarded itself as bound by the Agreement.
However, the judge, she said, had approached the matter as an English lawyer,
seeking to analyze what the writer had in his mind. Her submissions echoed the
findings of the tribunal who found that the letter confirmed that the Government
regarded itself as a party to the Agreement and entitled to exercise rights in relation to it.

[25] “I think that Miss Heilbron was right in saying that the judge paid close attention to the letter itself and to the circumstances in which it was written in order to ascertain the writer’s intention, but that is hardly surprising given the nature of the task that he had to perform under French law and indeed she herself approached the matter in a similar way. In my view, however, too close an analysis is apt to mislead. For example, some play was made on both sides with the fact that when this letter was written the Trust had ceased to exist, with the result that, as a matter of law, Mr. Lutfullah Mufti could not have been writing as secretary to the Board of Trustees. Strictly speaking, that is true, but it does not necessarily follow that he was writing on behalf of the Government or that the Government viewed itself as a party to the Agreement. That is a matter to be judged in the light of the surrounding circumstances as a whole. Indeed, it seems likely that when the letter was written the writer was unaware of the fact that the Trust had ceased to exist, because the very next day proceedings were commenced in the name of the Trust seeking a declaration that it had no liability to Dallah. The fact that the letter was written on the headed stationery of the Ministry of Religious Affairs also loses much of its significance when it is appreciated that the Trust did not possess its own headed stationery. Equally, the fact that the letter was written by a Government official counts for little when one realizes that the Ministry of Religious Affairs had routinely dealt with correspondence and carried out similar functions on behalf of the Trust and that the writer was (or had been) its secretary. Such evidence no doubt demonstrates that the Government continued to be closely involved in the project and was behind the scenes pulling the strings, but it is not evidence that the Government, the Trust and Dallah shared a common intention that the Government was to be a party to the Agreement. If, as I think likely, the letter was written in ignorance that the Trust had ceased to exist, it is almost certain that Dallah was equally unaware of the fact and that it was read and understood as written on behalf of the Trust. It is interesting to note in this context that although French law directs the court to the common intention of the parties as the foundation of any agreement, little attention appears to have been directed to the question whether Dallah demonstrated any intention to enter into an agreement with the Government of Pakistan. If it did intend to do so, it is surprising, to say the least, that it was content for the Government neither to be named as a party to the Agreement nor to sign it in any capacity and that it did not seek any other formal or informal statement of its intention to be bound.
“One further submission falls for consideration at this point. Miss Heilbron submitted that it is possible in French law for a person to become a party to an agreement by what in English law would be recognized as a process of adhesion, provided that the existing parties consent to his doing so. Again, therefore, it is necessary to find a common intention of the parties. The principle itself does not appear to have been controversial, but there are obvious potential difficulties in the way of applying it in this case, given that one of the parties to the Agreement had ceased to exist and with it, perhaps, the Agreement itself. However, unless Miss Heilbron can successfully challenge the judge’s finding that the Government did not intend to become a party to the Agreement, this argument must fail. I find it difficult in all the circumstances to accept that the letter can properly be viewed as indicating that the Government intended at that late stage to become a party to an agreement which the writer was purporting to treat as discharged by repudiation.

“Finally, it is necessary to mention the proceedings in Pakistan on which again Miss Heilbron placed some reliance. The proceedings started in the name of the Trust on 20 January 1997 were the first in a series of actions which were pursued over the following two and a half years in an attempt to obtain a decision from the courts in Pakistan that neither the Trust nor the Government had incurred any liability to Dallah. The claim in the name of the Trust was dismissed on the grounds that the Trust no longer existed and could not therefore maintain an action. However, in the course of his judgment delivered on 21 February 1998 the judge in Islamabad observed that the Ministry of Religious Affairs as the Trust’s parent department for whom the Ordinance had been issued could sue and be sued in respect of matters done under it.

“On 29 May 1998 the ICC wrote to the Government informing it that Dallah had made a request for arbitration under the Agreement. In the light of that development and of the observation made by the judge when dismissing the earlier proceedings, it is not surprising that on 2 June 1998 the Ministry started its own action in Islamabad seeking a declaration that the Agreement had been repudiated by Dallah and an injunction restraining Dallah from asserting any rights against it. In the opening paragraphs of its statement of claim the Ministry made it clear that it claimed in a derivative capacity following the demise of the Trust and later in the document it referred to the fact that the action started in the name of the Trust had been dismissed because the Trust had ceased to exist.

“In para. 121 of his judgment Aikens J noted that the tribunal had found that Dallah had made a request for arbitration under the Agreement. In the light of that development and of the observation made by the judge when dismissing the earlier proceedings, it is not surprising that on 2 June 1998 the Ministry started its own action in Islamabad seeking a declaration that the Agreement had been repudiated by Dallah and an injunction restraining Dallah from asserting any rights against it. In the opening paragraphs of its statement of claim the Ministry made it clear that it claimed in a derivative capacity following the demise of the Trust and later in the document it referred to the fact that the action started in the name of the Trust had been dismissed because the Trust had ceased to exist.

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a party to the Agreement, except in para. 16 where the Agreement was said to have been entered into between ‘the parties’ in Islamabad, an allegation which he attributed to a need to found jurisdiction there. He was unable to accept that the pleading contained an admission on the part of the Government that it was or had become a party to the Agreement.

[30] “Miss Heilbron criticized the judge’s conclusion on the grounds that there are many references in the statement of claim to ‘the plaintiff’ in connection with the Agreement or its termination that are consistent with an acceptance by the Government that it was and always had been a party to the Agreement. It is quite true that at various points in the statement of claim the expression ‘the plaintiff’ is used in connection with the Agreement or its termination where a reference to the Trust might have been expected, but that is a flimsy basis on which to read the document as containing an admission by the Government that it was a party to the Agreement. When read as a whole I think that the nature of the Ministry’s (and therefore the Government’s) case is clear: it was suing in a purely derivative capacity as the department that had sponsored the Ordinance under which the Trust had been established. A more careful pleader would no doubt have avoided many of the references to ‘the plaintiff’ as being inapposite, but I do not think that their use detracts from the obvious meaning of the pleading. Moreover, it is necessary to bear in mind that French law did not require the judge to engage in a technical exercise in which the Government could be impaled on an apparent admission. It required him to ascertain the common intention of the parties on the basis of the evidence as a whole. Taken fairly as a whole this pleading does not provide any support for the conclusion that the Government always intended to be a party to the Agreement. I regard this criticism of the judge as misplaced.

[31] “I return at this point, therefore, to Dallah’s real complaint, namely, that when considering the material before him the judge concentrated too much on the Government’s private intentions and too little on its intentions as evidenced by its behaviour. It is true that there are some passages in the judgment which, taken in isolation, might lend some support to that argument, but in reality there is nothing in the point since there was no evidence from Mr. Lutfullah Mufti or anyone else representing the Government of what was actually in its mind. All that the judge could do, therefore, was to deduce from the objective evidence what the Government’s real intentions were and that is what he did. To make such findings based on evidence of that kind is exactly what French law, as found by the judge, required of him.

[32] “Miss Heilbron also criticized the judge for failing to consider the overall justice of the case or the requirements of good faith, despite the fact that the experts agreed that it was an important factor to be taken into account in
ascertaining the intentions of the parties. In fact, in para. 128 of his judgment the judge specifically referred to the need to take account of the doctrine of good faith, so it was clearly present to his mind, but it is difficult to see how its relevance to the present case could ever have gone beyond providing a context in which the conduct and utterances of the Government were to be judged. The judge expressed his conclusions on this part of the case as follows in para. 129 of his judgment:

‘On the evidence before me, my conclusion is that it was not the subjective intention of all the parties that the GoP [Government of Pakistan] should be bound by the Agreement or the arbitration clause. In fact, I am clear that the opposite was the case from beginning to end. That is why the GoP distanced itself from the contractual arrangements in the Agreement and that is why it sought to argue from the time of the Termination Letter that the Agreement was void and illegal. As for the doctrine of good faith, I accept that the parties are obliged to act in good faith. But I do not see how the doctrine can carry matters any further. There is no evidence that the GoP acted in bad faith at any stage. Even if it did, that could not make it a party to the arbitration agreement.’

[33] “I agree. Miss Heilbron submitted that the Government had sought to avoid its obligations by setting up an independent body in the form of the Trust to enter into the contract with Dallah and subsequently allowing it to disappear when it became politically convenient to do so. A state which acts in that way may well lay itself open to criticism, but it does not amount to bad faith of a kind that has a bearing on the particular question the judge had to decide. What matters is whether there was a common intention that the Government was to be a party to the Agreement. If its conduct, understood in accordance with the doctrine of good faith, did not indicate any such intention, no complaint can be made. That was clearly recognized in one of the leading cases in French law on this subject, Southern Pacific Properties v. Arab Republic of Egypt, in which the Egyptian state enterprise responsible for tourism and hotels had signed an agreement with Southern Pacific for the construction of tourist complexes near the pyramids. Although the Government was not named as a party, the Minister for Tourism had signed the agreement under the words ‘approved, agreed and ratified’. The Cour de Cassation held that the Government of Egypt had not become a party to the agreement by signing it in that way, since its signature was

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intended merely to confirm its approval of the contract made by the state enterprise. In the end Miss Heilbron did not pursue this part of her submissions.

[34] “In my view the judge correctly applied the principles of French law to the evidence before him and his conclusion on this issue is not open to criticism.”

III. ESTOPPEL AND DISCRETION TO ENFORCE

[35] “Miss Heilbron submitted that the Government of Pakistan was estopped by the decision of the tribunal in its First Partial Award from denying that it was a party to the Agreement and that the judge should therefore have exercised his discretion in favour of allowing the award to be enforced. At first sight that is a surprising proposition because the First Partial Award and the Final Award both depend for their validity on the existence of an arbitration agreement between the Government and Dallah which it was the very purpose of these proceedings to challenge. The submission therefore has an element of unreality about it. Miss Heilbron put her argument on the basis that the Government had waived its right to challenge the award in France and had thereby given it a status that it would not otherwise have enjoyed. She did not seek to argue, however, that its conduct had given rise to any other form of estoppel.

[36] “Before going any further I think it is desirable to disentangle two strands in the argument, estoppel and the exercise of discretion. The exercise of discretion in a case of this kind raises difficult questions to which I shall return in a moment, but it is in my view quite separate from the question of estoppel.”

1. Estoppel

[37] “Estoppel by record, which is the kind of estoppel on which Miss Heilbron sought to rely in this case, embodies a well-established rule of public policy favouring finality in litigation, namely, that the same issue should not be litigated between the same parties on more than one occasion. The principle applies to arbitration awards and to decisions of foreign courts. It requires a final decision of a court of competent jurisdiction on the merits in relation to the same issue in proceedings between the same parties: see The Sennar (No. 2) [1985] 1 W.L.R. 490, particularly at 499. If Miss Heilbron is right and the First Partial Award does finally determine as between Dallah and the Government of Pakistan whether the latter is a party to the arbitration agreement, the Government will be estopped from contending otherwise and as a result will be precluded from challenging the validity of the agreement in the present proceedings. It follows that the grounds
on which it seeks to challenge the enforcement of the award could not be established and the court would be bound to enforce the award. No question of the exercise of discretion would arise.

[38] “Miss Heilbron’s argument depends on two essential propositions: (i) that the tribunal was for these purposes a court of competent jurisdiction; and (ii) that the failure of the Government of Pakistan to challenge the award before the French courts has rendered the award final and conclusive as between the parties. Each of these propositions calls for closer examination.

[39] “Before the judge Miss Heilbron placed some emphasis on the decision of this court in Svenska Petroleum v. Government of Lithuania (No. 2), which concerned an agreement between Svenska and a state-owned body, subsequently privatized under the name AB Geonafta, for the exploitation of oil reserves in Lithuania. The agreement contained a clause providing for ICC arbitration in Denmark. A dispute subsequently arose between Svenska and AB Geonafta, as a result of which Svenska began arbitration proceedings against both AB Geonafta and the Government of Lithuania. The Government denied being a party to the agreement or the arbitration clause. The tribunal decided to determine the question of its jurisdiction first and published an award declaring that the Government was bound by the arbitration agreement. No steps were taken to challenge that award in Denmark and the tribunal later published an award dealing with the substance of the dispute in which it awarded Svenska a substantial sum in damages. When Svenska sought to enforce the award by proceedings in this country under Sect. 101 of the Arbitration Act the Government of Lithuania claimed immunity under Sect. 1 of the State Immunity Act 1978. A question whether the first award created an issue estoppel arose in relation to Sect. 9 of the Act, which provides that where a state has agreed in writing to submit a dispute to arbitration it is not immune as respects proceedings which relate to the arbitration. The court found as a fact that the Government of Lithuania had agreed with Svenska to submit disputes to arbitration, that the tribunal therefore had jurisdiction to decide the issues before it, that the award was no longer open to challenge before the courts of Denmark and that it was therefore final and conclusive as between the parties.

[40] “The judge accurately summarized the court’s reasoning on this issue in para. 141 of his judgment, but as he pointed out, there are significant differences between that case and the present. Two factors in particular stand out: first, in that case the court had found after considering the evidence that the Government was a party to the agreement and that the tribunal therefore had jurisdiction over it; second, the tribunal’s first award had already been recognized in proceedings in this country. In the present case, by contrast, the judge found that the
Government of Pakistan had not entered into an arbitration agreement with Dallah so that the tribunal did not constitute a court of competent jurisdiction for these purposes. He also held that the fact that the award had not been challenged in France was not sufficient to enhance its status so as to give rise to an issue estoppel. Finally, for good measure, he held that in any event the issue before him was not the same as that which had been decided by the tribunal, since he had to apply French law whereas it had applied transnational law.

[41] “Miss Heilbron submitted that the judge was wrong in all these respects. In support of her submission that the tribunal constituted a court of competent jurisdiction she drew our attention to the case of Watt v. Ashan [2007] UKHL 51, [2008] 1 AC 696, in which the House of Lords held that a decision of the Employment Appeal Tribunal as to the existence of its own jurisdiction created an issue estoppel between the parties to it. She submitted that the same principle applies to an arbitration tribunal which has jurisdiction to decide its own jurisdiction.

[42] “I am unable to accept that submission. It is important to recognize that the Employment Tribunal and the Employment Appeal Tribunal are creatures of statute. Their jurisdiction may depend on the existence of certain facts, but it does not depend on the agreement of the parties. The Employment Tribunal’s power to decide the existence of facts upon which its jurisdiction depends is derived from the statutory provisions and the decisions of the Employment Appeal Tribunal on questions of law are subject to review by the Court of Appeal. In these respects these tribunals differ from arbitral tribunals whose jurisdiction is entirely dependent on the parties’ agreement to submit disputes to them for determination. In my view it is not possible to transfer the reasoning in Watts v. Ashan to commercial arbitration.

[43] “It was common ground, quite rightly, that under Art. 6.2 of the ICC Rules the tribunal had jurisdiction to determine its own jurisdiction. Moreover, its decision on this point was final, in the sense that it could not be re-opened by the arbitrators themselves, who on publication of their award became functus officio in relation to that issue. It was not final in every sense, however, because it was subject to review by the French court exercising its supervisory jurisdiction and by enforcing courts under Art. V of the Convention. Accordingly, whether the tribunal represented a court of competent jurisdiction in the sense necessary to create an issue estoppel depends on whether the parties to the award had agreed to confer jurisdiction upon it, since the arbitrators’ jurisdiction was derived from the consent of the parties. If the Government of Pakistan and Dallah were not parties to an agreement providing for ICC arbitration, the arbitrators had no
jurisdiction over them, and the award was a nullity. That, of course, is the very issue that falls to be decided in these proceedings.

[44] “Miss Heilbron’s second proposition is also flawed. It is true that the Government of Pakistan has stated that it does not intend to challenge the award in France, but it was common ground between the French law experts that the time allowed for doing so does not begin to run until steps are taken to enforce it. Dallah has as yet taken no steps to enforce the award in France and therefore time has not begun to run against the Government for this purpose. It follows that even now the award has not become invulnerable to challenge in the French courts. However, even if that were the case, it would not in my view be sufficient to prevent the Government of Pakistan from challenging its recognition and enforcement in this country on the grounds set out in Sect. 103(2)(b) of the Act. It is in my view clear that the purpose of Art. V(1) of the Convention was to preserve the right of a party to a foreign arbitration award to challenge enforcement on grounds that impugn its fundamental validity and integrity. The fact that it has not been challenged or that a challenge has failed in the supervisory court does not affect that principle, although a decision of the supervisory court may finally determine such questions and thereby itself create an estoppel by record.

[45] “Finally, although there may be little difference in practice between the relevant principles of French law and the principles of transnational law which the tribunal applied, I agree with the judge that the issue that arose for decision before him was not the same as that which was determined by the tribunal and for that reason also no issue estoppel could arise.”

2. Discretion to Enforce

[46] “Miss Heilbron submitted that even if the Government of Pakistan were to establish that the arbitration agreement is not valid, the court would still have a discretion to allow enforcement of the award in this country and in this case should exercise that discretion in favour of doing so. It has been accepted in a number of cases that the use of the expression ‘enforcement of the award may be refused’ in Sect. 103(2)(b) gives the court a discretion to permit enforcement even where one of the grounds justifying refusal has been established. In Dardana Ltd v. Yukos Oil Co [2002] EWCA Civ 543, [2002] 2 Lloyd’s Rep. 326 Mance LJ expressed the view that the statute cannot have been intended to give the court an open discretion but one based on some recognizable legal principle. In Kanoria

v. Guinness [2006] EWCA Civ 222, [2006] 1 Lloyd’s Rep. 701 Lord Phillips CJ expressed his own doubts about whether Sect. 103(2) gives the court a broad discretion to allow enforcement of an award where one of the grounds set out in that sub-section has been established and cited with approval the observations of Mance LJ in Dardana v. Yukos. May LJ considered that Sect. 103(2) is concerned with the fundamental structural integrity of the arbitration proceedings and expressed the view that the court is unlikely to allow enforcement of an award if it is satisfied that its integrity is fundamentally unsound.

[47] “I respectfully agree with those observations with one caveat. Mr. Landau drew our attention to a work entitled Enforcement of Arbitration Agreements and International Arbitral Awards (ed. Gaillard and Di Pietro), in chapter 3 of which there is a valuable discussion of the effect of Art. VII(1) of the Convention (the so-called ‘more favourable right’ provisions). In the light of that discussion I think it may be necessary to consider on another occasion whether the discretion to permit enforcement may be somewhat broader than has previously been recognized and in particular whether there may be circumstances in which the court would be justified in exercising its discretion in favour of allowing enforcement of a foreign award notwithstanding that it had been set aside by the supervisory court. The question does not arise in this case, however, and I do not think that it would be helpful to do more at this stage than draw attention to the question.

[48] “In Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania [2005] EWCA 9 (Comm) Mr. Nigel Teare Q.C. sitting as a Deputy High Court Judge expressed the view that, where a person has unsuccessfully contested the issue of jurisdiction before the arbitral tribunal and has not sought to challenge its decision before the supervisory court, it may be appropriate for the court to exercise its discretion in favour of recognizing the award, even though the party opposing recognition could prove that he was not a party to the relevant arbitration agreement. Indeed, in that case the judge decided that, since the Government of Lithuania had not attempted to challenge the tribunal’s first award in Denmark, it was appropriate to exercise his discretion in favour of recognizing it.

[49] “It was unnecessary in Svenska Petroleum v. Government of Lithuania (No. 2) for this court to decide whether the judge had been right to take that course because it had already found that the Government of Lithuania was a party to the
arbitration agreement and that the tribunal therefore did have jurisdiction over it. Moreover, the judge’s decision had not been challenged and therefore remained binding as between the parties. In those circumstances I do not think that the court can be understood to have approved his decision rather than simply to have recognized its existence. In my view, however, if the person opposing recognition or enforcement of an award can prove that he was not a party to the relevant arbitration agreement, it will rarely, if ever, be right to recognize or enforce it solely on the grounds that he has failed to take steps to challenge it before the supervisory court. That would be contrary to the policy of the Convention and would significantly undermine the principle which this court accepted in para. 104 of its judgment in that case (see [at [7]-[8]] above).

[50] “For those reasons I do not consider that it would be a proper exercise of the court’s discretion in the present case to allow enforcement of the award once it had reached the conclusion that there was no valid arbitration agreement between Dallah and the Government of Pakistan. It follows that I can see no grounds for criticizing the way in which the judge exercised his discretion.”

IV. CONCLUSION

[51] “For these reasons I would dismiss the appeal. Since writing this judgment I have had the privilege of reading in draft the judgment of Lord Justice Rix. I have found his observations on the difficult questions of estoppel and the scope of the court’s discretion most illuminating and I agree with the additional reasons he gives for dismissing the appeal.”

Concurring Opinion of Rix, LJ

(....)

[52] “In an extensive and fluid submission, Miss Heilbron argues that the decision not to challenge the awards in France is tantamount to a waiver of the right to challenge and, what is more, the equivalent of a decision from the French court that the first award, and thus the final award too, is valid and enforceable. The Government of Pakistan is therefore estopped from challenging the enforceability of any of the awards on the ground that it is not a party to the Agreement. Alternatively, the situation is the equivalent of an issue estoppel, which prevents the Government of Pakistan from any defence to the enforceability of the awards on that ground. Alternatively, even if the
Government of Pakistan is or were able to show that it was not a party to the Agreement, the English court is entitled and ought to exercise its discretion for the purposes of Sect. 103(2) of the Arbitration Act 1996 (‘may be refused’) by not refusing to enforce, but enforcing the final award. In this connection she also invokes by way of analogy the provisions of Sect. 73(2) of the 1996 Act, whereby a party to arbitral proceedings covered by the English Act who fails to challenge an award or to do so within the time allowed (see Sects. 67(1) and 70(3)) may not object to a tribunal’s substantive jurisdiction on any ground which was the subject of the tribunal’s ruling. [Quotation of Sect. 103 Act omitted.]

[53] “The Convention contains similar provisions in Art. V(1)(a) and (e) and Art. VI. In particular the language at the beginning of Art. V contains similar language relating to what is described as the discretion of the court asked to enforce the award, viz ‘Recognition or enforcement of the award may be refused ... only if ...’. The French text, however, does not contain the language of discretion: ‘ne seront refusées’ (‘shall not be refused ... unless ...’).

[54] “French law does not provide for a defence to enforcement of a foreign New York Convention award on the Art. V(1)(e) ground that an award has been set aside by a competent authority of the country in which or under the law of which, that award was made: see Art. 1502 of New Code of Civil Procedure. On the other hand Art. 1504 permits an award made in France in an international arbitration to be set aside inter alia ‘Where the arbitrator ruled in the absence of an arbitration agreement ...’. Art. 1505 provides:

‘An action to set aside as provided for in Art. 1504 shall be brought before the Court of Appeals of the place where the award was made. Such an action is admissible immediately after the making of the award; it is no longer admissible if it has not been brought within one month of the official notification of the award bearing an enforcement order.’

[55] “It follows that, under French law, the Government of Pakistan has at no time been out of time for the purpose of challenging the awards. Moreover, since the awards are not English awards, our provisions relating to the challenging of them are not applicable. Even as a matter of analogy, Sects. 67(1) and 70(3) of the 1996 Act are not applicable, because the Government of Pakistan has never participated in the arbitration. In such circumstances, the analogous provisions of the English Act are those contained in Sect. 72: see the DAC [Departmental Advisory Committee on Arbitration] Report at paras. 295 and 298.

[56] “It also follows that there may be a number of reasons why the Government of Pakistan has chosen not to challenge the awards in France, although it was in
time to do so. One is that it was not obliged to do so. There is no requirement under the New York Convention that a party facing enforcement proceedings in a state other than the state where the award was made need bring its challenge in the latter state. Moreover, if nevertheless it does so, it runs the risk that the state where enforcement is sought may require security for payment of the award as a term for adjourning the enforcement proceedings until the challenge has been decided in the state where the award was made: Art. VI of the Convention and Sect. 103(2)(f) and (5) of the 1996 Act. Therefore one consequence of seeking to challenge the awards in France would have been the possibility of undertaking two sets of proceedings and of being required to provide security for the award. This may not have been an attractive alternative for the Government of Pakistan.

[57] “In effect, Miss Heilbron’s submission asks us to infer that the decision not to take proceedings to challenge the awards in France was tantamount to a concession that the awards would be upheld in France and thus to an issue estoppel. However, that is an impossible submission. Even if, for the sake of argument, the Government of Pakistan may have been advised or feared that the French courts would be likely to uphold the arbitrators’ application of transnational law and their conclusion that the Government of Pakistan was a party to the Agreement, it was entitled to finesse that possibility and undertake the burden under the Convention of proving that under French law, as the law of the country in which the awards were made, it was not a party. See also the jurisprudence discussed below.

[58] “It is impossible therefore to found any form of waiver, estoppel, or issue estoppel out of the Government of Pakistan’s choice, which under the Convention and under French law lay entirely in its option, to challenge the validity of the awards in England, where Dallah had for itself chosen to seek to enforce them.

[59] “I turn therefore to the question of a discretion under the Convention nevertheless to recognize or enforce the awards, even though the Government of Pakistan has succeeded in proving that it was not a party to the Agreement. It goes without saying that, if there is such a discretion, its positive use in this case to enforce an award when ex hypothesi the Government of Pakistan had never been a party to the Agreement, would be an immensely strong, not to say unjust, exercise of it. The whole basis of arbitration is that, as a means of deciding disputes, it is founded on consent.

[60] “Although on behalf of the Government of Pakistan Mr. Landau QC submitted that the discretion retained in the words ‘may be refused’ could not be exercised in favour of Dallah in this case, he nevertheless agreed that such a
discretion in theory existed and might be exercised even where a challenge to an
award had already succeeded in the country where the award was made. Indeed,
he presented extensive material in which its use in such a case has been discussed:
see, for instance, Gaillard and Di Pietro, *Enforcement of Arbitration Agreements and
International Arbitral Awards, The New York Convention in Practice* at chapter 3,
ICSID Rev 16 (1999). On closer examination, however, the thesis developed
there appears to a large extent to depend on:

(a) a theory of arbitration recognized in France and perhaps other civil law
jurisdictions rather than in England and other common law jurisdictions, to the
effect that arbitrators do not derive their powers from the state in which they
have their seat but rather from a transnational legal order which recognizes,
subject to certain conditions, the validity of arbitration agreements and awards;
(b) the absence from the French statute (see Art. 1502 referred to above) of the
defence to enforcement based on Art. V(1)(e) of the New York Convention;
(c) an argument derived from Art. VII of the New York Convention to the effect
that domestic law may be relied on for the purpose of upholding an award ‘to
the extent allowed by the law’ (the ‘more-favourable-right’ theory), which however
is itself dependent on (b); and
(d) a number of French court decisions which as a consequence have been
prepared to ignore a successful challenge to the validity of an award in the courts
of the country where it was made. Where, however, as in the case of our own
domestic statute, Art. V(1)(e) is a recognized source of a defence to enforcement
in our courts, it is not easy to understand why a successful challenge in the courts
of the country where an award was made cannot be relied on as an issue estoppel.

[61] “Moreover, it may be that this line of French jurisprudence depends not so
much on a free-standing discretion, as on the ability granted by Art. VII of the
Convention to states to enact in their domestic law tougher limits on the refusal
of recognition and enforcement than even the Convention permits in Art. V.
That this is a potentially controversial area may be indicated by Professor
Gaillard’s rejection of Professor van den Berg’s comment, described by the
former as having been made ‘somewhat derisively’, that ‘if an award is set aside
in the country of origin, a party can still try its luck in France’; see Gaillard in
ICSID Rev 16 (1999) at para. 36 and fn. 57. It is nevertheless possible to
understand the obvious French concern that the validity of an arbitration award
might, under certain circumstances, be attacked and destroyed by a party, such
as a government itself, with great influence in the country where the award was
made. Be that as it may, we are not concerned here with a successful challenge in the courts of France and it is unnecessary to comment further on this particular thesis.

[62] “Miss Heilbron’s reliance on the Art. V(1) or Sect. 103(2) discretion remains and I therefore turn to consider what light English jurisprudence throws on it. The earliest case to consider the discretion is a Hong Kong case, later referred to in England by our court of appeal. In Paklito Investment Ltd v. Klockner East Asia Ltd [1993] HKLR 399 an attempt to enforce a Chinese award was met with a successful defence on the basis that the defendant had been prevented in the arbitration from presenting its case. Nevertheless the court was asked to enforce the award under its discretion. Kaplan J refused, but discussed a possible instance when it might be exercised in order to enforce an award. He said (at 48-49):

‘He relied strongly upon the fact that the defendants had taken no steps to set aside the award in China and that this failure to so act was a factor upon which I could rely. I disagree. There is nothing in Sect. 44 nor in the New York Convention which specifies that a defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere.... It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.

That such a choice exists is made clear by Redfern and Hunter in International Commercial Arbitration p. 474 where they state:

“He may decide to take the initiative and challenge the award; or he may do nothing and resist any attempts by his adversary to obtain recognition and enforcement of the award. The choice is a clear one – to act or not to act.”

(....)

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I therefore conclude that the defendant’s failure to apply to set aside the award is not a factor upon which I should or could rely in relation to the exercise of my discretion. . . .

In relation to the ground relied on in this case I could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute. This view is supported by Professor Albert Jan van den Berg in his book, *The New York Convention of 1958*, at p. 302, where he states:

“Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation.”

It is not necessary for me in this judgment to decide whether this is the only circumstance where the discretion could be exercised or to lay down circumstances where it would be appropriate for the court to exercise its discretion after finding a serious due process violation.’

[63] “China Agribusiness Development Corporation v. Balli Trading [1998] 2 Lloyd’s Rep. 76” is only one of two English cases which have been brought to our attention in which the court has enforced a foreign award although a defence within our statute (then the Arbitration Act 1975) and the New York Convention had been established. The award was again a Chinese award following an arbitration in which the arbitration rules current at the time when the dispute arose rather than the old rules current at the time of agreement had been applied. However, the point had only been raised at the time of enforcement, and any relevant change in the rules (in their fee structure) was insufficient to prejudice the defendant. Longmore J accepted and applied the discretion to enforce despite the establishment of a defence under Art. V(1)(d) (now, Sect. 103(2)(e) of the 1996 Act) that ‘the arbitral procedure was not in accordance with the agreement of the parties’. Longmore J said (at 79-80):

‘It is clear from the terms of the statute that refusal to enforce a Convention award is a matter for the discretion of the Court. In that context it must be relevant to assess the degree of prejudice to Balli by the arbitration being conducted under the current, rather than the provisional,'
rules. Mr. Justice Kaplan so decided in the Chen Jen case and I gratefully follow his lead. (See [1992] I H.K. Cases 328 at p. 336.)

(...) A party who, only at the door of the enforcing Court, dreams up a reason for suggesting that a convention award should not be enforced is unlikely to have the Court’s sympathy in his favour, and for this reason also I would not on the facts of this case be prepared to refuse the enforcement of the award.’

[64] “However, in Dardana Ltd v. Yukos Oil Co [2002] EWCA Civ 543, [2002] 2 Lloyd’s Rep. 326 it was submitted that the discretion would permit enforcement of a Swedish award before the court had finally adjudicated on the Convention defence to enforcement that the defendant had not been party to the arbitration agreement. Mance LJ, in a judgment with which Thorpe LJ and Neuberger J agreed, regarded the discretion as a narrow one dependent on some other legal principle of preclusion. Thus he said (at para. 18):

‘Second, so long as the applicants’ application under Sect. 103(2) remained undetermined, there could have been no question of the Court allowing enforcement. That would have been a denial of justice. The word “may” at the start of Sect. 103(2) does not have the “permissive”, purely discretionary, or I would say arbitrary, force that the submission suggested. Sect. 103(2) is designed, as I have said in para. 8, to enable the Court to consider other circumstances, which might on some recognizable legal principle affect the prima facie right to have an award set aside in the cases listed in Sect. 103(2).’

Mance LJ had previously said at para. 8:

‘The use of the word “may” must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for that is found in van den Berg, The New York Convention of 1958 (Kluwer), p. 265.’


an arbitration between two Nigerian companies was first the subject-matter of proceedings in Nigeria to set aside the award and subsequently of enforcement proceedings in England. Gross J refused to proceed to consider immediate enforcement, but adjourned the proceedings on the payment of what was common ground to be indisputably due and of a further $50 million by way of security. He said:

11. For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that Sect. 103 of the Act embodies a pre-disposition in favour of enforcement of the New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: Mustill and Boyd, Commercial Arbitration, 2nd ed., 2001 Companion, at p. 87.

(....)

14. Fourthly, Sect. 103(5) “achieves a compromise between two equally legitimate concerns”: Fouchard, at p. 981. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin – the venue chosen by the parties for their arbitration: Mustill and Boyd, at p. 90....’

[66] “Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania [2005] EWHC 9 (Comm), [2005] 1 Lloyd’s Rep 515 is the other English case where a discretion to enforce has been exercised despite the (assumed) proof of a Convention defence. The Government of Lithuania had agreed to arbitration in Denmark under Lithuanian law. A final Danish award had been issued against the Government, which Svenska was seeking to enforce in England. There had been an issue in the arbitration as to whether the Government was a party to the relevant agreement, but under Lithuanian law the arbitrators had had full power to resolve their jurisdiction and the Government had fully participated in the arbitration. Nevertheless it now sought to argue in England that it was immune from execution under our State Immunity Act 1978. In order to make good that defence, it had to show that it had never agreed to arbitrate. Svenska applied to strike out summarily the Government’s application for sovereign immunity. Svenska said that the interim arbitration award which had resolved the question
of jurisdiction, to the effect that the Government was a party to the agreement, had created an issue estoppel. Svenska also submitted that in any event the English court had a discretion to recognize the interim award even on the assumed hypothesis that the Government could show that it was not a party. Mr. Nigel Teare QC, acting as a deputy high court judge, held: (i) that in his discretion he would recognize the interim award, even though the issue of whether the Government had agreed to arbitrate was still pending and was assumed to be decided against the Government; (ii) that therefore the interim award was capable of creating an issue estoppel on that question; however (iii) an issue estoppel had to be ‘final and conclusive’ as well as binding, and although it was binding, it was not ‘final and conclusive’ because it could still be challenged in the Danish courts. Therefore Svenska’s application for summary judgment failed.

[67] “We are concerned with what Mr. Teare said on the subject of discretion. He referred (at para. 19) to what Mance LJ had said in Dardana v. Yukos and sought to apply it to this case, applying by analogy the principle introduced into English law by Sect. 73(2) of the 1996 Act (at paras. 22-24). He concluded thus:

‘27. In my judgment the present case is an appropriate case in which to exercise the discretion conferred upon the Court by Sect. 103(2) of the Act to recognize an arbitration award by permitting the Claimants to rely upon it in defence of the Government’s claim to set aside the proceedings notwithstanding that, leaving aside the effect of that award, the Government could, it is assumed, prove that it was not a party to the arbitration agreement. Firstly, having objected to the tribunal’s jurisdiction on the grounds that it was not party to the arbitration agreement the Government participated in a two day hearing on that very issue in Denmark in October 2001 when both factual and expert evidence on the law of Lithuania was adduced. Secondly, the tribunal decided that issue against the Government in an interim award published in December 2001 of some 69 pages which set out extensively the facts and evidence relied upon, the expert evidence of Lithuanian law, the arguments of the parties and the reasoning and conclusions of the tribunal. Thirdly, having lost on that issue, the Government did not take the opportunity to seek a review of the interim award in the Danish Courts. No reason was suggested as to why this step could not have been taken. Fourthly, the Government participated in a 13 day hearing on the merits which resulted in a final award against the Government published in October 2003. Fifthly, having decided not to challenge the final award in the Danish Court in February

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2004 and to notify the Claimants of the Government’s position, the Government then, after the Claimants took steps to enforce the final award in April 2004, claimed immunity from the jurisdiction of this Court, a contention which could only made good if the State was not party to the arbitration agreement, contrary to the decision of the arbitral tribunal in its interim award which the Government had not challenged.’

[68] “The Government’s defence to the enforcement proceedings could not therefore be dismissed summarily. In the meantime, however, the time for challenging the interim award in Denmark had passed without challenge by the Government. In due course the enforcement proceedings were determined on the basis that (i) the Government had indeed agreed to submit disputes under the agreement to arbitration, and thus was no longer entitled to dispute enforcement under the State Immunity Act 1978; (ii) the interim award had in the meantime become ‘final’ and could therefore give rise to an issue estoppel; and (iii) on that ground too the interim award, having been recognized by Mr. Teare, provided an independent answer to the Government’s defence. It followed that the interim award was recognized and the final award enforced.


'(c) Was the first award “final”?
102. The judge found that by the time she came to give judgment in November 2005 sufficient time had passed since the publication of the first award for the Government to have lost its right to challenge that award under Danish law. In our view her decision, which involved the application of undisputed principles of Danish law to the facts of this case, cannot be faulted. Not only had there been a substantial lapse of time since the publication of the first award without any attempt to challenge it, but the Government had formally resolved in February 2004 not to challenge the second award, which depended for its validity on the correctness of the first award, and had formally communicated that decision to Svenska.

(d) Recognition
103. On the basis that the first award was no longer capable of being challenged in Denmark the judge held that it finally determined the question of the tribunal’s jurisdiction. We agree with her conclusion, primarily because we are satisfied that the Government had agreed to refer
disputes to arbitration under the ICC rules, but there is one other matter that must not be overlooked in this context and to which attention was drawn by Mr. Shackleton, namely the question of recognition.

104. Mr. Shackleton submitted that the Government’s failure to challenge the first award before the Danish courts did not prevent it from challenging its recognition and enforcement in this country on any of the grounds set out in Sect. 103(2) of the Arbitration Act 1996. In support of that submission he drew our attention to two decisions of the courts of Hong Kong, Paklito Investment Ltd v. Klockner East Asia Ltd [1993] 2 HKLR 39 and Hebei Peak Harvest Battery Co Ltd v. Polytek Engineering Co Ltd, but the proposition is not one which we find difficult to accept as a matter of principle. In the first place, Sect. 103 of the Arbitration Act is a mandatory provision which must be applied in accordance with its terms. It follows, therefore, that whenever an attempt is made to enforce or rely upon a foreign award the party against whom it is invoked is entitled to challenge its recognition on any of the grounds set out in the Section. Quite apart from that, however, the first question a court has to ask itself whenever a party seeks to rely on an arbitration award is whether that award should be recognized as valid and binding. In the case of a New York Convention award, Sect. 103(2) gives the court the right not to recognize the award if the person against whom it is invoked is able to prove any of the matters set out in that sub-section and if the court is satisfied that the award should not be recognized, the matter ends there. In the present case, therefore, it was always open to the Government to challenge the recognition of the award by the English courts and therefore the fact that the award could no longer be challenged in Denmark does not lead inexorably to the conclusion that it can be relied on as giving rise to an issue estoppel. In fact, however, the Deputy Judge decided that the award should be recognized and there has been no challenge to that decision. Accordingly, for the reasons given earlier, we agree that the first award is now to be regarded as having finally disposed of the issue of jurisdiction.’

[70] “I regard the two Svenska decisions as amounting to the recognition of the interim award in circumstances where (a) at the time of Mr. Teare’s judgment the issue on the merits of the Government’s consent to arbitration had not yet been determined and was assumed for the sake of argument to have been decided

12. Two decisions in this case are reported in Yearbook XXIII (1998) pp. 666-684 (Hong Kong no. 12) and Yearbook XXIV (1999) pp. 652-677 (Hong Kong no. 15).
against Svenska; but (b) at the time of the court of appeal’s judgment that issue
had been determined in Svenska’s favour and against the Government. In the
circumstances I do not consider that Mr. Teare’s judgment relating to the
Sect. 103(2) discretion has the added authority of this court. The matter was not
however fully developed before us in this case. Indeed, we were not taken by
Miss Heilbron to Mr. Teare’s judgment, even though it was in our bundles.
Speaking for myself, and I hope consistently with this court’s judgment in Svenska
(No. 2), I would be inclined to analyze the situation as follows. Mr. Teare
recognized the interim award in his discretion even upon the assumption that it
could be proved that the Government of Lithuania was not a party to the
agreement and he did so independently of and prior to his decision on whether
the award amounted to an issue estoppel. As it was, he decided that at that time
the interim award did not amount to an issue estoppel. In such a situation, I
would have myself doubted whether such a case could be brought within the
more restricted views of Mance LJ and of this court in Dardana v. Yukos. By the
time the matter reached this court in Svenska (No. 2), however, it had been
established both that the Government had consented to arbitrate and that the
interim award was final and so could amount to an issue estoppel: in such
circumstances, I would see no problem in recognizing the interim award. That
was entirely irrespective of the separate question of any discretion to do so even
where a Sect. 103 defence has been proved.

decided a little before Svenska (No. 2), an Indian arbitration took place in the
absence of Mr. Guinness, who was unwell. Mr. Kanoria sought to enforce the
resulting award in England. Mr. Guinness defended enforcement under
Sect. 103(2)(c) of the 1996 Act on the ground that he had been unable to present
his case to the arbitrators. This court held that this ground was made out. It was
invited nevertheless to enforce the award in its discretion, on the ground that
Mr. Guinness had had an opportunity to challenge the award in India, but had
failed in his challenge, which had been ruled out of time. However, this court
refused to enforce the award. Lord Phillips CJ referred to what Mance LJ had
said in Dardana v. Yukos and expressed ‘doubt as to whether the broad discretion
… is available to the court’ (at para. 25). In any event he would not exercise even
a broad discretion on the facts of that case (at para. 26). Sir Anthony Clarke MR
agreed. May LJ also referred to Dardana v. Yukos as being against an ‘open
discretion’ and continued (at para. 30):

‘Speaking generally, that is not surprising when the limited circumstances
in which an English court can be persuaded to refuse enforcement of a New
York Convention award concern, as I think, the structural integrity of the arbitration proceedings. If the structural integrity is fundamentally unsound, the court is unlikely to make a discretionary decision in favour of enforcing the award.'

[72] “These authorities as a whole, in my judgment, do not favour a broad discretion such as Miss Heilbron would need to pray in aid of her submission in this case. It is true that in *China Agribusiness* Longmore J exercised a discretion to enforce even where an Art. V defence had been made out, and that in *Svenska* at first instance Mr. Teare QC (as he then was) came closest, in a situation somewhat similar to the present case, to being willing to recognize an award even on the assumption that a Convention defence had been made out. However, in this court, the dicta in *Dardana* and in *Kanoria* suggest that any discretion is narrow and would be unlikely to be exercised where the award in question was subject to a fundamental or structural defect. There can hardly be a more fundamental defect than an award against someone who was never party to the relevant contract or agreement to arbitrate.

[73] “In any event, the differences between this case and *Svenska* need to be emphasized. In this case, the Government of Pakistan played no part in the arbitration, and there is no evidence before us that under French law the arbitrators had jurisdiction to decide their own jurisdiction free from review in the French courts. On the contrary, texts put before the court suggest that the rule in French law is the same as in English law, namely that, where the arbitrators’ jurisdiction is properly challenged, the court is entitled to investigate an issue of consent to arbitration from the bottom up: see in France, Fouchard, Gaillard, Goldman *On International Commercial Arbitration*, at paras. 1601 et seq., and in England the run of cases from *Gulf Azov v. Baltic Shipping* [1999] 1 Lloyd’s Rep. 68 to *Peterson Farms Inc v. C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd’s Rep. 603. In *Svenska* on the other hand, under Lithuanian law the arbitrators had full power to decide their jurisdiction: see *Svenska (No. 2)* in this court at para. 90. Moreover, the Government of Lithuania had played a full part in the arbitration, and had also (at any rate by the time of *Svenska (No. 2)*) waived the right of challenge in the Danish court, and for good measure had ‘formally resolved’ not to proceed to such a challenge and had informed Svenska of that decision (see at para. 102 of the court of appeal judgment). Moreover, Mr. Teare had proceeded on an assumption as to the making out of a Convention defence. I can conceive that where an estoppel could be proved, the court asked to recognize or enforce would be entitled to say that it need not investigate the defence. Where, however, a defence of no consent is proven, it seems to me
much harder to ignore that in the exercise of any discretion. In any event, there
is no question in this case of Dallah being able to rely on the interim award as any
form of issue estoppel.

[74] “In sum, I see no reason arising out of the interesting arguments put before
the court in this appeal to doubt, even if it was open to do so, this court’s views
in Dardana and Kanoria that any discretion to enforce despite the establishment
of a Convention defence recognized in our 1996 Act is a narrow one. Indeed, it
seems to me that in context the expression ‘may be refused … only if’ (Art. V),
especially against the background of the French text (‘ne seront refusées’), and the
expressions of the English statute ‘shall not be refused except’ and ‘may be
refused if’ (Sect. 103(1) and (2)), are really concerned to express a limitation on
the power to refuse enforcement rather than to grant a discretion to enforce
despite the existence of a proven defence. What one is left with therefore is a
general requirement to enforce, subject to certain limited defences. There is no
express provision however as to what is to happen if a defence is proven, but the
strong inference is that a proven defence is a defence. It is possible to see that a
defence allowed under Convention or statute may nevertheless no longer be
open because of an estoppel (Professor van den Berg’s view, see The New York
Convention 1958 at 265), or that a minor and prejudicially irrelevant error, albeit
within the Convention or statutory language, might not succeed as a defence (as
in China Agribusiness). But it is difficult to think that anything as fundamental as
the absence of consent or some substantial and material unfairness in the arbitral
proceedings could leave it open to a court to ignore the proven defence and
instead decide in favour of enforcement.

[75] “As for the case of a successful or unsuccessful (or waived) challenge in the
courts of the country of origin, that is a more controversial area. My own view
is that a successful challenge is not only in itself a potential defence under the
Convention or our statute but likely also to raise an issue estoppel. As for an
unsuccessful challenge, that may also set up an issue estoppel. As for a waived
challenge, that cannot in itself set up an issue estoppel and is unlikely to be of
significance, save possibly in the rare case where the residual discretion is in play.
In this connection Mr. Landau pressed us with the submission that to pay any
regard to what occurs in the country of origin is to run the risk of re-introducing
to the regime of the New York Convention the ‘double exequatur’ of the earlier
regime under the Geneva Convention of 1927. That was the need to show that
the award would be enforced in the country of origin as well as in the country
where enforcement was pursued. I agree that it is important to recognize this
important change brought about by the New York Convention and to avoid
interpreting it in ways which might prejudice that change. It is not clear to me,
however, that to have regard to the setting aside of an award by the courts of the country of its origin is to revert to the ‘double exequatur’ regime: on the contrary, it is a matter to which the New York Convention itself bids us have regard. A party seeking to enforce an award need prove nothing about its validity in its country of origin when he opts for enforcement in another country which is a party to the New York Convention. However, that is not to say that a party challenging the validity of an award can entirely ignore a challenge in the country of origin, at any rate where he has participated in the arbitration (a matter not considered by Kaplan J in Paklito).

[76] “Finally, I bear in mind (see [at 61]] above) the problem of an award perhaps improperly set aside in the courts of the country of origin. This is a delicate matter. However, it seems to me that this is not something which can be dealt with simply as a matter of an open discretion. The improper circumstances would, I think, have to be brought home to the court asked to enforce in such a way as either, in effect, to destroy the defence based on Art. V(1)(e), or, which is perhaps effectively the same thing, to prevent an issue estoppel arising out of the judgment of the courts of the country of origin. In this connection see Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853, 947 and Dicey, Morris and Collins, The Conflict of Laws, at Rules 41-45.”
UNITED STATES

Accession: 30 September 1970
1st and 2nd Reservation

653. United States District Court, Central District of California, 25 January 2007, Case No. CV 06-4574-SVW (Ex)
United States Court of Appeals, Ninth Circuit, 6 November 2008, Case No. 07-55071

Parties: Plaintiffs: (1) Michael Rogers (Trinidad and Tobago); (2) Hulya Kar (Turkey)
Defendant: Royal Caribbean Cruise Lines (nationality not indicated)

Plaintiffs/Appellants: (1) Michael Rogers (Trinidad and Tobago);
(2) Hulya Kar (Turkey) individually and on behalf of all other similarly situated seafarers and as private attorney general
Defendants/Appellees: (1) Royal Caribbean Cruise Lines (nationality not indicated);
(2) M/V MONARCH OF THE SEAS (nationality not indicated)

Published in: District Court: 2007 U.S. Dist. LEXIS 89088
Court of Appeals: 2008 U.S. App. LEXIS 23401

Articles: II(1); II(3)

Subject matters: – existence, validity of arbitration agreement
– arbitration agreement “null and void” because unconscionable (no)
– arbitration agreement “null and void” on public policy grounds (no)
– requirements for referral to arbitration (in general)
seamen’s employment contracts are commercial contracts subject to the 1958 New York Convention – relationship Chapters 1 and 2 (1958 New York Convention) of Federal Arbitration Act (FAA) – arbitrability of seamen’s wage litigation


Facts

Hulya Kar entered into an employment agreement with Royal Caribbean Cruise Lines (Royal Caribbean) to work as an assistant waitress on board a ship operated by Royal Caribbean. Michael Rogers allegedly entered into a similar agreement to work as a cabin boy and stateroom attendant (Royal Caribbean maintained that it had no record of him, but in the decisions below the courts assumed without deciding that he was in fact an employee). The agreement signed by Kar – and allegedly by Rogers – expressly incorporated the Collective Bargaining Agreement (CBA) between Royal Caribbean and the Norwegian Seafarers’ Union. Art. 26 of the CBA provides for arbitration of disputes pursuant to the 1958 New York Convention either “in the Seafarer’s country of citizenship or the Ship’s flag state, unless arbitration is unavailable under the Convention in those countries, in which case only said arbitration shall take place in Miami, Florida”.

A dispute arose between the parties. On 21 July 2006, Kar and Rogers (collectively, the plaintiffs) brought suit against Royal Caribbean in the United States District Court for the Central District of California, alleging that Royal Caribbean had not paid them their full wages within twenty-four hours of the end of each voyage, thereby violating 46 U.S.C. Sect. 10313(f). Royal Caribbean moved to compel arbitration under the 1958 New York Convention pursuant to the arbitration provision in the CBA.

By the first decision reported below, on 25 January 2007, the district court, per Stephen V. Wilson, US DJ, granted Royal Caribbean’s motion to compel arbitration, denying the plaintiffs’ argument that the arbitration clause was null and void and in any event inapplicable.

The district court first held that an arbitration agreement existed, as both plaintiffs had signed employment contracts which incorporated an arbitration clause. It was also valid because it was neither unconscionable nor in violation of
public policy, as alleged by the plaintiffs; it further encompassed the dispute between the parties.

The court then held that the dispute should be referred to arbitration under the New York Convention, since all requirements for referral were met: (1) there was a valid agreement in writing; (2) the agreement provided for arbitration in the plaintiffs’ countries – Turkey and Trinidad and Tobago – that is, in a Convention state; (3) the agreement arose out of a commercial legal relationship and (4) at least one of the parties – here, both plaintiffs – was not a US citizen. The court noted in respect of the third requirement that the Ninth Circuit had not yet addressed the issue whether seamen employment contracts are commercial contracts for the purposes of the New York Convention. It referred therefore to the conclusion reached by the Fifth and Eleventh Circuits, which both held that they are, and found accordingly that the agreement to arbitrate in the present case arose out of a commercial relationship.

The court dismissed the plaintiffs’ argument that arbitration could not be compelled because Sect. 1 of the Federal Arbitration Act (FAA) provides that contracts of employment of seamen are exempted from the FAA’s application and thus, in the plaintiffs’ opinion, also from the application of Chapter 2 FAA, which implements the New York Convention (the Convention Act). Lacking Ninth Circuit precedent, the court again referred to the case law of the Fifth and Eleventh Circuits, holding that the FAA seamen exemption does not apply to arbitration agreements under the Convention Act.

Finally the court dismissed the plaintiffs’ argument that their wage claims could not be referred to arbitration because of the 1971 Supreme Court decision in Arguelles (see below), which held that arbitration clauses in a CBA do not supersede a seaman’s right to bring a statutory wage claim pursuant to 46 U.S.C. Sect. 10313. The court held that reliance on Arguelles was misplaced here because its holding did not involve the Convention Act. This is the first decision reported below.

By the second decision reported below, on 6 November 2008, the United States Court of Appeals for the Ninth Circuit, before John T. Noonan, William A. Fletcher and Ronald M. Gould, CJJ, in an opinion by William A. Fletcher, affirmed the lower court’s decision. The Court decided, inter alia, the novel issues in that circuit: whether seamen’s employment contracts are commercial contracts within the meaning of the Convention Act (they are); whether the exemption in Sect. 1 applies in a New York Convention context (it does not) and whether the Convention Act supersedes the provision in Sect. 10313 that courts are available to seamen in respect of wage claims (it does). The Court agreed in all cases with the conclusions reached by the Fifth and Eleventh Circuits.
The Court of Appeals first gave an overview of the history of statutory protections for seafarers’ wages. It further noted that the United States made the commercial reservation when acceding to the New York Convention, limiting the Convention’s application to differences arising out of commercial legal relationships. Accordingly, Sect. 202 of the Convention Act provides that the Convention applies to arbitration agreements arising out of a legal relationship which is considered as commercial.

The Court agreed with the district court that the exemption in Sect. 1 FAA is not incorporated into the Convention Act. It reasoned that there is no incorporation by operation of Sect. 202, because Sect. 1 does not affect the statutory description of which relationships are considered as commercial: it merely states that the FAA does not apply to the employment contracts of seamen and other transportation workers, even though those contracts are commercial. Nor is the exemption in Sect. 1 FAA incorporated into the Convention Act by Sect. 208, which incorporates the provisions of Chapter 1 unless they are in conflict with either the Convention Act or the Convention. Here, the exemption would operate as an additional limitation to the Convention Act, “over and above Sect. 202” and is therefore in conflict with Chapter 2. As a consequence, it does not apply in a Convention context.

The Ninth Circuit then considered the plaintiffs’ argument based on Arguelles and on Sect. 10313, which contains various provisions guaranteeing wages to seafarers and provides that the courts “are available to the seamen for enforcement of this Section”. The Court noted that in Lobo (see below) the Eleventh Circuit recently extended its finding that the exemption clause of Sect. 1 FAA does not apply to the Convention Act to a claim for lost wages under Sect. 10313. (Earlier decisions in that and in the Fifth Circuit were rendered in cases that did not involve claims for lost wages under Sect. 10313.) The Court joined the Eleventh Circuit in concluding that the Convention Act overcomes any presumption deriving from Sect. 10313(i) that the courts shall remain open to foreign seafarers in a case in which a seafarer has signed an otherwise enforceable agreement to arbitrate a wage claim. Arguelles, which did not deal with the Convention Act and was decided just weeks after the Convention entered into force in the United States, did not require the Court to hold otherwise.

Finally the Court of Appeals affirmed the district court’s finding that the arbitration clause in the CBA was not null and void because it was unconscionable or in violation of public policy. This is the second decision reported below.
District Court, 25 January 2007


[2] Plaintiffs contend that the arbitration provision is unenforceable as a matter of law because the arbitration provisions are unreasonable, unconscionable, and contrary to public policy. Even if the arbitration provision were enforceable, Plaintiffs argue that the Convention does not apply because the Federal Arbitration Act (FAA) contains an exemption for seamen. Additionally, Plaintiffs assert that their claims are immunized from arbitration under U.S. Bulk Carriers v. Arguelles, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). For the reasons discussed below, the Convention Act compels the Court to enforce the arbitration agreement and therefore the Court grants Defendant’s motion to compel arbitration.”

1. DISCUSSION

[3] “In a motion to compel arbitration, ‘[t]he court’s role … is limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue’. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).”

1. Valid Agreement to Arbitrate


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presumption in favor of arbitration, a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity.’) (citing Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 906 (5th Cir. 2005)). However, ‘[i]n determining the validity of an agreement to arbitrate, federal courts “should apply ordinary state-law principles that govern the formation of contracts”’. Circuit City Stores v. Adams, 279 F.3d 889, 892 (9th Cir. 2002) (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). In analyzing whether a valid agreement to arbitrate exists, the Court looks to state-law contract principles of Florida law.

[5] “Plaintiffs initially disputed that they had signed employment agreements which incorporated the arbitration provision. However, at the hearing on 11 December 2006, Plaintiffs’ counsel agreed to stipulate that both Plaintiffs had signed employment contracts which incorporated the arbitration provision. Therefore, an agreement to arbitrate exists. The next issue to determine is whether the agreement is valid. Plaintiffs object to the agreement on the grounds that it is unreasonable, unconscionable, and contrary to public policy.”

a. Unconscionability


[7] “The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the
relative bargaining power of the parties and their ability to know and understand the disputed contract terms.’ Hughes, 2004 U.S. Dist. LEXIS 20705 at *9 (quoting Powertel. Inc., 743 So. 2d at 574); see also Sims v. Clarendon Nat’l Ins. Co., 336 F.Supp.2d 1311, 1322 (S.D. Fla. 2004) (same). This argument lacks merit because the CBA was the result of an arms-length bargaining process between the Plaintiffs’ union and Defendant. See Bautista, 286 F.Supp.2d at 1362-1363.5

[8] “Plaintiffs contend that the CBA is substantively unconscionable because the arbitration provision ‘is notably and unfairly sided in favor [of Defendant]’…. Substantive unconscionability ‘focuses on the agreement itself and it involves such issues as whether ‘the terms of the contract are unreasonable and unfair’.’

Hughes, 2004 U.S. Dist. LEXIS 20705 at *9-10 (quoting Powertel. Inc., 743 So. 2d at 574); see also Sims, 336 F.Supp.2d at 1321 (same).

[9] “First, Plaintiffs contend that the arbitration provision is unfair because the Union and Defendant appoint the arbitrators without any input from the crew members. This argument lacks merit because the Union represents the crew members’ interests when selecting an arbitrator. Moreover, Plaintiffs do not allege any other factors supporting the allegation of substantive unconscionability. For example, Plaintiffs do not allege that they tried to negotiate the terms of the employment agreement, Plaintiffs do not argue that they would suffer adverse consequences if forced to acquiesce to the arbitration provision, Plaintiffs do not argue that they were denied a fair opportunity to learn about the arbitration agreement, nor do Plaintiffs allege that they were unable to read or understand the terms of the arbitration agreement.

[10] “Second, Plaintiffs argue that the arbitration provision is unfair because ‘the procedure requires arbitration of issues involving federal maritime law to be resolved in distant fora based on the crew member’s citizenship, without relationship to where the crew member is residing, where the evidence is located, where the witnesses live, [or] where the alleged dispute arose’…. This argument lacks merit because it appears presumptively fair to the crew member to arbitrate a dispute in the crew member’s own country of citizenship. At the very least, Plaintiffs have failed to meet their burden of demonstrating that the contract provision is substantively unconscionable because crew members must return to their home country to arbitrate claims.”

b. Public policy

[11] “Finally, Plaintiffs argue that the agreement to arbitrate is unenforceable because it violates public policy. This argument falls flat in light of the abundant


‘According to the Supreme Court, when international companies commit themselves to arbitrate a dispute, they are in effect attempting to guarantee a forum for any disputes. Such agreements merit great deference, since they operate as both choice-of-forum and choice-of-law provisions, and offer stability and predictability regardless of the vagaries of local law.’

Republic of Nicaagua, 937 F.2d at 478.

[12] “Plaintiffs ignore the weight of these decisions emphasizing deference, instead selecting snippets of opinions discussing the federal courts’ historic protection of seamen. Defendant points out that the cases Plaintiffs rely on involve United States domestic policies designed to protect US seafarers. To the extent that these policies might apply to foreign seafarers, Congress made a clear policy decision in favor of arbitration when it subsequently enacted the Convention.

[13] “Plaintiffs also argue that the arbitration provision violates public policy because it deprives the Plaintiffs of their right to jury trial. Plaintiffs assert that they have a right to a jury trial to determine issues of arbitrability. However, 9 U.S.C. Sect. 4 provides that ‘(i)f no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue’…. Similarly, Plaintiffs’ argument that arbitration deprives Plaintiffs of the right to a jury trial clearly lacks merit. Therefore, the Court finds that the agreement to arbitrate is valid.”


7. “See e.g., Cooper v. MRM Inc. Co., 367 F.3d 493, 506 (6th Cir. 2004) (‘[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate …(citations) The Seventh Amendment confers not the right to a jury trial per se, but rather ‘only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes (citations).’)”

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2. **Dispute Falls Within Scope of Agreement**

[14] “The parties do not dispute that the dispute falls within the scope of the parties’ agreement to arbitrate. The arbitration agreement covers ‘all grievances and any other dispute whatsoever, whether in contract, regulatory, tort, or otherwise, including constitutional, statutory, common law, admiralty, intentional tort and equitable claims, relating to or in any way connected with seafarer’s service’…. Because the dispute at issue involve unpaid wage claims, the agreement to arbitrate clearly encompasses the dispute. See, e.g., *Republic of Nicaragua*, 937 F.2d at 479 (interpreting ‘any and all disputes’ broadly). “Finding that the agreement to arbitrate is valid and the agreement encompasses the dispute at issue, the Court must next analyze whether the Convention Act compels enforcement of the agreement.”

3. **Requirements for Referral to Arbitration under the 1958 New York Convention**


[16] “Assuming an arbitration agreement exists, Plaintiffs’ claims are clearly covered by the Convention Act which governs any ‘arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Sect. 2’.

[17] “To determine whether to enforce an arbitration provision, the court must determine that

‘(1) there is an agreement in writing within the meaning of the Convention;
(2) the agreement provides for arbitration in the territory of a signatory of the Convention;
(3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and
(4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Bautista, 396 F.3d at 1295 (citing Std. Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003)). A court must order arbitration if these four elements are satisfied. Bautista, 396 F.3d at 1295; Std. Bent Glass Corp., 333 F.3d at 449; Francisco v. STOLT ACHIEVEMENT MT, 293 F.3d 270, 273 (5th Cir. 2002). The Convention Act “generally establishes a strong presumption in favor of arbitration of international commercial disputes.” Bautista, 396 F.3d at 1295 (quoting Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1440 (11th Cir.1998)). All four elements are satisfied.

[18] “First, the agreement to arbitrate is in writing. The agreement to arbitrate is contained in the CBA, which is a written contract signed by Plaintiffs’ Union and Defendant....

[19] “Second, arbitration would take place in the territory of a signatory to the Convention. Art. 26 of the CBA provides that the place of arbitration shall be either ‘in the Seafarer’s country of citizenship or the Ship’s flag state, unless arbitration is unavailable under the convention in those countries, in which case only said arbitration shall take place in Miami, Florida’. Plaintiff Kar is a citizen of Turkey and Plaintiff Rogers is a citizen of Trinidad and Tobago. Therefore, arbitration would take place in the territory of a signatory because Turkey and Trinidad and Tobago are signatories to the Convention. See 9 U.S.C.A. Sect. 201.

[20] “Third, the agreement must arise out of a legal relationship ‘which is considered commercial’. Id. at 1296. The Ninth Circuit has never addressed whether seamen employment contracts are ‘commercial’ for the purposes of the Convention. However, the Fifth and Eleventh Circuits have addressed this issue...
and both concluded that seamen employment contracts and the arbitration provisions in such contracts are ‘commercial legal relationships within the meaning of the Convention Act’. Bautista, 396 F.3d at 1300; Stolt, 293 F.3d at 274. See also Lobo v. Celebrity Cruises, Inc., 426 F.Supp.2d 1296, 1298-1299 (S.D. Fla. 2006). Therefore, the Court finds that the agreement to arbitrate arises out of a commercial relationship.

[21] “Finally, neither Plaintiff is an American citizen. Therefore, all four elements are satisfied and the Court must compel arbitration.”

4. The FAA Seamen Exemption

[22] “Plaintiffs argue that the Convention does not apply because the Federal Arbitration Act (FAA) contains an exemption for seamen. While the Convention Act clearly covers the alleged arbitration agreement, 9 U.S.C. Sect. 1 provides that ‘contracts of employment of seamen’ are exempted from the general provisions of the FAA. 9 U.S.C. Sect. 202. The issue for the Court to determine is whether this seamen employment contract exemption, contained in the FAA, exempts an arbitration agreement otherwise covered by the Convention Act.

[23] “The Ninth Circuit has never addressed this issue. However, the Fifth and Eleventh Circuits have addressed this precise issue and both Circuits held that the FAA seamen exemption does not apply to arbitration agreements under the Convention Act. Bautista, 396 F.3d at 1292; Freudensprung v. Offshore Tech. Servs., Inc., 379 F.3d 327 (5th Cir. 2004); Francisco v. STOLT ACHIEVEMENT MT, 293 F.3d 270 (5th Cir. 2002). See also Acosta v. Norwegian Cruise Line, Ltd., 303 F.Supp.2d 1327 (S.D. Fla. 2003) (holding that seamen exemption does not apply); Adolfo v. Carnival Corp., 2003 U.S. Dist. LEXIS 24143, 2003 WL 23829352, (S.D. Fla. 11 Mar. 2003) (same); Amon v. Norwegian Cruise Lines, Ltd., 2002 U.S. Dist. LEXIS 27064 (S.D. Fla. 26 Sept. 2002) (same). Although this Court is not bound by Bautista, Freudensprung, or Francisco, the Court finds the reasoning of these Circuits compelling. Accordingly, the Court holds that the exemption for seamen does not apply to claims covered by the Convention Act.”

18. “Whether the seamen exemption contained in 9 U.S.C. Sect. 1 applies to the Convention Act contained in 9 U.S.C. Sects. 202-208 is an issue of statutory interpretation. There are two ways in which Title 9 addresses conflicts between the three acts comprising Title 9. First, provisions of
5. Impact of Supreme Court Decision in Arguelles

[24] “Plaintiffs assert that their claims are immunized from arbitration under U.S. Bulk Carriers v. Arguelles, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). Plaintiffs argue that under the holding in Arguelles, the arbitration clause in the CBA does not defeat an individual seaman’s right to bring a statutory wage claim pursuant to 46 U.S.C. Sect. 10313. In Arguelles, the Supreme Court held that Sect. 301 of the LMRA [Labor Management Relations Act], which enforces grievance and arbitration provisions of [Collective Bargaining Agreements], does not abrogate the statutory remedy of a seaman to sue for wages in federal court. Id. at 375.

[25] “Plaintiffs’ reliance on Arguelles is misplaced because its holding involves the Labor Management Relations Act rather than the Convention Act. The Supreme Court did not address whether the Convention Act abrogates the statutory remedy of a seaman to sue for remedies because Arguelles was decided before the Convention Act was implemented. Thus, the specific holding of Arguelles is limited to the LMRA.

[26] “The differing policy goals of the LMRA and the Convention Act support the conclusion that the holding in Arguelles should not be extended to the Convention Act. The Supreme Court’s decision in Arguelles was based on its determination that the main purpose of Sect. 301 of the LMRA was suits by unions rather than claims by individual workers and as a result Congress had not intended to restrict the traditional protections afforded to seamen in federal court:

‘Enforcement by or against labor unions was the main burden of Sect. 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. Since the emphasis was on suits by unions against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of Sect. 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act

the Convention Act and Inter-American Act directly incorporate certain sections of the FAA. Second, the Convention Act and Inter-American Act residually incorporate the provisions of the FAA to the extent that they do not conflict with the provisions of the Act. 9 U.S.C. Sects. 208, 307. Because the Convention Act does not apply directly or residually incorporate Sect. 1, the seamen exemption does not apply to arbitration covered by the Convention Act. See Francisco, 293 F.3d at 273-276 [reported in Yearbook XXVII (2002) pp. 600-612 (US no. 364)].”

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of 1947 that grievance procedures and arbitration procedures were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seaman since 1790.’

\[\text{Arguelles}, 400 \text{ U.S. at 355-356.} \]

As a result, the Court concluded that the federal courts’ historical protection of seamen was not abrogated by the LMRA.

\[\text{[27] "In contrast, the purpose of the Convention Act is ‘the recognition and enforcement of arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries’. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).’ In furtherance of this purpose, the Convention Act encompasses a broad range of agreements. See 9 U.S.C. Sect. 202 (‘An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.’) As the Eleventh Circuit has explained, this primary purpose of the Convention Act would be frustrated ‘if domestic courts were to inject their “parochial” values into the regime’. Bautista, 396 F.3d at 1300. If this Court were to extend \text{Arguelles} to the Convention Act and create an exemption for seamen, the Court would be frustrating the core purpose of the Convention Act.}\]

\[\text{[28] "Additionally, one of the justifications for the Supreme Court’s holding in \text{Arguelles} was that the Court could find no evidence that ‘grievance procedures and arbitration procedures (of the LMRA) were to take the place of the old shipping commissioners’. \text{Arguelles}, 400 \text{ U.S. at 356.} \] The Office of the U.S. Shipping Commissioner no longer exists and instead unions protect the interests of seamen through collective bargaining and grievance procedures. See 44 Fed. Reg. 70, 155 (6 Dec. 1979). As a result, it is reasonable to infer the Convention Act, which enforces arbitration provisions of collective bargaining agreements, was intended to replace the traditional protections of certain seamen.}\]

\[\text{[29] "As a result, the Court finds that it would be inconsistent with the Supreme Court’s interpretation of the Convention Act to extend the holding in \text{Arguelles} beyond the LMRA. This interpretation is consistent with the handful of other courts that have examined this and similar issues. In Lobo v. \text{Celebrity Cruises, Inc.}, 426 F.Supp.2d 1299-1301 (S.D. Fla. 2006) a district court confronted with this precise issue determined that a seaman’s federal wage claims were not exempt}\]

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from the Convention Act under Arguelles. See also Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898 (5th Cir. 2005) (rejecting Filipino seaman’s argument that arbitration had never been required in seamen’s wage litigation and enforcing arbitration under the Convention); Bautista, 396 F.3d at 1289 (‘In pursuing effective, unified arbitration standards, the Convention’s framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their “parochial” values into the regime: “In their discussion of [Art. II(1)), the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.”’) (quoting Scherk, 417 U.S. at 520 n. 15).

[30] “Therefore, the Court concludes that Arguelles does not preclude enforcement of the arbitration agreement under the Convention.”

II. CONCLUSION

[31] “For the foregoing reasons, the Court grants Defendant’s motion to compel arbitration and Plaintiff’s complaint is dismissed without prejudice.”

Court of Appeals, 6 November 2008

[32] “Michael Rogers and Hulya Kar appeal the district court’s order granting their employer’s motion to compel arbitration. They argue that federal statutes exempt their employment contracts from the scope of Title 9 of the United States Code. We conclude that their employment contracts are ‘considered as commercial’ under Title 9. Therefore, we hold that the arbitration provisions contained in their employment contracts are enforceable, and we affirm the judgment of the district court.

(....)

[33] “We review de novo the district court’s order granting the defendant’s motion to compel arbitration. Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981 (9th Cir. 2007); see also Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1267 (9th Cir. 2006) (‘The validity and scope of an arbitration clause are reviewed de novo. Whether a party has waived the right to sue by agreeing to arbitrate is reviewed de novo.’). We also review de novo the district court’s
interpretation of statutes, as well as its interpretation of treaties to which the United States is a party. Continental Ins. Co. v. Fed. Express Corp., 454 F.3d 951, 954 (9th Cir. 2006); Holder v. Holder, 305 F.3d 854, 863 (9th Cir. 2002). ‘The burden is on the party opposing arbitration … to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.’ Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).20

[34] “The question in this case is whether the employment agreement’s provision for exclusive and mandatory arbitration is enforceable. We hold that it is, and we therefore affirm the judgment of the district court.”

I. HISTORY OF STATUTORY PROTECTIONS FOR SEAFARERS’ WAGES


[36] “As the Supreme Court noted in 1932, ‘[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seafarers] as a favored class’. Bainbridge v. Merchants’ & Miners Transp. Co., 287 U.S. 278, 282, 53 S.Ct. 159, 77 L.Ed. 302 (1932). In U.S. Bulk Carriers, Inc. v. Arquelles, the Court observed:

‘Seamen from the start were wards of admiralty. In 1872 it was provided that the federal courts might appoint shipping commissioners to superintend the shipping and discharge of seamen in our merchant fleet. Commissioners indeed served as an administrative adjunct of the federal courts until 16 July 1946, when Sect. 104 of Reorganization Plan No. 3 of 1946 abolished them. No other administrative agency was substituted. The federal courts remained as the guardians of seamen, the agencies chosen by Congress, to enforce their rights – a guardian concept which, so far as wage claims are concerned, is not much different from what it was in the 18th century.’


[37] “In Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 243 (5th Cir. 1991), the Fifth Circuit explained the rationale for Congress’ decision to afford special statutory status to seafarers and their wage claims:

‘They enjoy this status because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment. To shield shipmen against unfair conduct by shipowners, Congress enacted special wage protection statutes.’

Those special wage protection statutes include the provisions now codified at 46 U.S.C. Sect. 10313.

[38] “Sub-sect. (f) of Sect. 10313 states that ‘at the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier’. Sub-sect. (g) states that ‘when payment is not made as provided under Sub-sect. (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days’ wages for each day payment is delayed’. Sub-sect. (i) states that ‘this section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.’

[39] “In interpreting an earlier version of these statutes, the Supreme Court explained the purpose of the provision making the courts ‘available to the seaman for the enforcement’ of the wage provisions (now 46 U.S.C. Sect. 10313(i)):

‘The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen for they had the right
independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.'

Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 354, 40 S.Ct. 350, 64 L.Ed. 607 (1920)."

II. THE 1958 NEW YORK CONVENTION


[41] “Sect. 1 of the FAA includes a special carve-out for ‘contracts of employment of seamen’. 9 U.S.C. Sect. 1. Sect. 1 is entitled “Maritime transactions” and “commerce” defined; exceptions to operation of title’. It states:

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.’


[42] “For purposes of our analysis, we refer to the italicized language in Sect. 1 as the ‘exemption clause’. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112,
121 S.Ct. 1302, 149 L.Ed.2d 234 (2001).\textsuperscript{21} The Supreme Court has interpreted the language of the exemption clause narrowly. In Circuit City Stores, Inc. \textit{v.} Adams, the Court held that the Sect. 1 exemption from the FAA extends only to ‘contracts of employment of transportation workers’. 532 U.S. at 119.

\textsuperscript{43} “The [1958 New York Convention] entered into force for the United States on 29 December 1970. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (New York Convention). Art. II(1) of the Convention provides that ‘[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration’. Para. 3 of Art. I of the Convention allows – but does not require – a Contracting State to ‘declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are \textit{considered as commercial} under the national law of the State making such declaration’. Id. Art. I(3) (emphasis added).

\textsuperscript{44} “In accordance with para. 3, the United States declared in the Convention Act that it would apply the Convention only to ‘legal relationships ... considered as commercial’. Sect. 202 of the Convention Act provides that ‘[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention’. 9 U.S.C. Sect. 202. Sect. 2 of the FAA, referenced in Sect. 202, provides:

‘A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’


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“Sect. 206 of the Convention Act states that ‘[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States’. 9 U.S.C. Sect. 206. The Convention Act includes a general provision incorporating the FAA. Sect. 208 of the Act states that ‘Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.’ 9 U.S.C. Sect. 208.”

III. ANALYSIS

1. The Exemption Clause of the FAA

“We must decide whether the exemption clause in Sect. 1 of the FAA applies to arbitration agreements that would, in the absence of the exemption clause, be covered by the Convention Act. We hold that it does not.

“As noted above, the Convention Act applies to arbitration agreements arising out of legal relationships that are ‘considered as commercial’. 9 U.S.C. Sect. 202. The Convention Act states that such agreements include, but are not limited to, agreements described in Sect. 2 of the FAA. Sect. 2 describes provisions in contracts ‘evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract’. 9 U.S.C. Sect. 2. The Supreme Court has concluded that contracts ‘evidencing a transaction involving … commerce’ include employment contracts. Circuit City Stores, 532 U.S. at 113.

“The Supreme Court considered the scope of Sect. 2 in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). The Court had previously concluded that the FAA preempts state law, and in Allied-Bruce it considered the breadth of the FAA’s reach, as set forth in Sect. 2. Id. at 272-273. The Court examined the phrase ‘a contract evidencing a transaction involving commerce’ in two steps. First, the Court noted that the words ‘involving commerce’ … are broader than the often-found words of art ‘in commerce’. Id. at 273. The Court held that the phrase ‘involving commerce’ is ‘the functional equivalent of’ the phrase ‘affecting commerce’, which ‘normally signals Congress’ intent to exercise its Commerce Clause powers to the full’. Id. at 273-274. Second, the Court considered the language ‘evidencing a transaction’ involving commerce. Id. at 277. The Court read this phrase broadly, holding that the transaction must involve interstate commerce, but that the parties to the
transaction need not have contemplated that the transaction had an interstate commerce connection. Id. at 281.


513 U.S. at 274; see 9 U.S.C. Sect. 1 (‘“[C]ommerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation[.]’). The Court made no reference to the exemption clause when it noted the definition of commerce in Sect. 1.

[50] “The exemption clause in Sect. 1 is neither part of the definition of commerce in Sect. 1, nor a limitation on which relationships are ‘considered as commercial’ pursuant to Sect. 2. Rather, it operates as an exemption. In other words, the exemption clause does not state that transportation workers are *not* engaged in commerce or that their employment contracts are not ‘considered as commercial’. Instead, it states that *even though* such workers are engaged in commerce and *even though* their employment contracts are considered as commercial, the FAA does not apply to them.

[51] “Because the exemption clause does not affect the definition of ‘commerce’ or the statutory description of which relationships are ‘considered as commercial’, the exemption is not incorporated into the Convention Act by virtue of Sect. 202. The only limitation placed on the scope of the Convention Act, other than the language of the Convention itself, is the limitation in Sect. 202 that ‘[a]n arbitration agreement … arising out of a legal relationship … which is considered as commercial, including a transaction, contract, or agreement described in Sect. 2 of this title, falls under the convention’. 9 U.S.C. Sect. 202. The employment contracts of seafarers ‘arise[ ] out of legal relationship[s] … which are considered as commercial’, and therefore those contracts ‘fall … under the [C]onvention’.

[52] “The exemption clause is also not incorporated into the Convention Act by Sect. 208. That Section incorporates the provisions of the FAA unless they are ‘in conflict with’ either the Convention Act or the Convention. See 9 U.S.C. Sect. 208 (‘Chapter 1 [i.e., the FAA] applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.’). The only mechanism the Convention provides for limiting applicability of the Convention is the opportunity for Contracting States to declare that the Convention applies ‘only to differences arising out of legal relationships … which are considered as
commercial under the national law of the State making such declaration’. New York Convention Art. I(3). Congress’ declaration to that effect, as codified in Sect. 202 of the Convention Act, did not include the exemption clause. The Convention Act does not allow the exemption clause to operate as an additional limitation, over and above Sect. 202, on the applicability of the Convention. Nor, indeed, does the exemption clause purport to be such an additional limitation, for it does not narrow the definition of ‘commercial’. Rather, as emphasized above, the exemption clause specifies that the FAA does not apply to contracts within the scope of the clause even though such contracts are commercial.”

2. 46 U.S.C. Sect. 10313

[53] “Rogers and Kar argue that U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971), prohibits arbitration agreements from divesting courts of jurisdiction over seafarer wage disputes brought under 46 U.S.C. Sect. 10313. Sect. 10313 contains various provisions guaranteeing wages to seafarers. Sect. 10313(i) specifically provides that ‘[t]he courts are available to the seamen for enforcement of this Section’. The Fifth and Eleventh Circuits have previously held, as we do today, that the exemption clause of Sect. 1 does not apply to the Convention Act, but those cases did not involve claims for lost wages under Sect. 10313. See Bautista v. Star Cruises, 396 F.3d 1289, 1298-1300 (11th Cir. 2005); Francisco v. STOLT ACHIEVEMENT MT, 293 F.3d 270, 274-276 (5th Cir. 2002). However, in Lobo v. Celebrity Cruises, Inc., 488 F.3d 891, 896 (11th Cir. 2007), the Eleventh Circuit has recently extended its holding in Bautista to a claim for lost wages under Sect. 10313. Id. at 896.

[54] “We join the Eleventh Circuit in concluding that the Convention Act overcomes any presumption deriving from Sect. 10313(i) that the courts shall remain open to foreign seafarers in a case in which a seafarer has signed an otherwise enforceable agreement to arbitrate a wage claim.”

22 “Sect. 10317 renders void any stipulation in an agreement purporting to deprive a seafarer of a remedy to which the seafarer otherwise would be entitled. 46 U.S.C. Sect. 10317 (‘A... seaman by any agreement... may not... be deprived of a remedy to which the... seaman otherwise would be entitled for the recovery of wages. A stipulation in an agreement inconsistent with this chapter... is void.’). Because Rogers and Kar have not been deprived of any statutory remedy, we do not reach the question of whether Art. V(1)(a) of the Convention would allow our courts to refuse to recognize and enforce an arbitral award effectuating such a deprivation. See New York Convention Art. V(1)(a) (‘Recognition and enforcement of the [arbitral] award may be refused... if... the said agreement is not valid under the law to which the parties have subjected it.’).”

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“We do not believe that the Supreme Court’s decision in *Arguelles* requires us to hold otherwise. In *Arguelles*, the Court considered whether Sect. 301 of the Labor Management Relations Act (LMRA) abrogated the federal court jurisdiction authorized by the predecessor to 46 U.S.C. Sect. 10313. The Court held that it did not. The Court’s decision was published just weeks after the Convention entered into force in the United States, and there is no indication that the Court considered the effect of the Convention on Sect. 10313. Nonetheless, the Court’s analysis is instructive.

Sect. 301 of the LMRA provides that federal courts have subject matter jurisdiction over ‘actions and proceedings by or against labor organizations’. 29 U.S.C. Sect. 185(c). It further provides that ‘[s]uits for violation of contracts between an employer and a labor organization ... or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties’. Id. Sect. 185(a). The question before the Court was whether an arbitration provision in a collective bargaining agreement took precedence over the predecessor to Sect. 10313.

Despite the fact that the Court had previously held that Sect. 301 of the LMRA gave it the authority to develop a federal common law of collective bargaining agreements, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), the Court in *Arguelles* deferred to Congress’ statutory resolution of the question. After observing that federal courts remain ‘the guardians of seamen’, particularly with respect to wage claims, the Court wrote that it could ‘find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790’. *Arguelles*, 400 U.S. at 355-356. The Court wrote:

‘We do not hold that [Sect. 10313] is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interest usually will be best served through Sect. 301 rather than through [Sect. 10313].’

The literal conflict between this ancient seaman’s statute and the relatively new grievance procedure is one which we think Congress rather than this Court should resolve. We do not sit as a legislative committee of revision. We know that this employee has a justiciable claim. We know it is the kind of claim that is grist for the judicial mill. We know that in [Sect. 10313] Congress allowed it to be recoverable when made to a court. We
know that this District Court has the case properly before it under the head of maritime jurisdiction. We hesitate to route this claimant through the relatively new administrative remedy of the collective agreement and shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class.

(...) The chronology of the two statutes – Sect. 10313 and Sect. 301 – makes clear that the judicial remedy was made explicit in Sect. 10313 and was not clearly taken away by Sect. 301. What Congress has plainly granted we hesitate to deny. Since the history of Sect. 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that Sect. 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U.S.C. Sect. 10313.’

Id. at 356-358 (emphasis added).

[58] “As the Eleventh Circuit concluded in Lobo, Congress has provided ‘much more’ in the text of the Convention Act than it provided in Sect. 301 of the LMRA. 488 F.3d at 895. As that court explained:

‘The Court’s rationale [in Arguelles] was clear: the LMRA simply addressed restrictions on the activities of labor unions; since the history of the LMRA “is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them”. [400 U.S.] at 357. The Court concluded that it “would require much more to hold that Sect. 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U.S.C. Sect. [10313]”. Id. at 357-358.

In contrast, in ratifying the Convention, Congress explicitly agreed to “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen … between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”. Convention, Art. II(1). Indeed, the Convention compels federal courts to direct qualifying disputes to arbitration, while the Supreme Court found the LMRA to be silent on this matter.’

Lobo, 488 F.3d at 895.
“We agree with the analysis of the Eleventh Circuit. The Convention Act specifically and expressly compels federal courts to enforce arbitration agreements. Therefore, Arguelles does not alter our conclusion that the exemption clause does not apply to the Convention Act.”

3. Arbitration Agreements “Null and Void” (No)

“The Convention allows a party to avoid arbitration if the agreement to arbitrate is ‘null and void’. New York Convention Art. II(3). Rogers and Kar argue that even if the exemption clause does not apply to the Convention Act, and even if the Convention Act applies to seafarers’ wage claims despite Sect. 10313, the arbitration provisions in the Collective Bargaining Agreement are unenforceable under the Convention because they are unconscionable and contrary to public policy. We address these arguments in turn.”

a. Unconscionability

“Even assuming that unconscionability renders an agreement ‘null and void’ under the Convention, see Bautista, 396 F.3d at 1301, Rogers and Kar have not carried their burden of establishing that the arbitration clause at issue in this case is unconscionable. See Paulson v. Dean Witter Reynolds, Inc., 905 F.2d 1251, 1255 (9th Cir. 1990). The Collective Bargaining Agreement provides that the agreement is governed by ‘the laws of the State of Florida, United States of America’. Florida law recognizes ‘a two-pronged approach’ to unconscionability: procedural unconscionability and substantive unconscionability. Belcher v. Kier, 558 So. 2d 1039, 1040 (Fla. Dist. Ct. App. 1990). Procedural unconscionability is present where one party to an agreement has no meaningful choice but to accept the agreement. See id. at 1042. Substantive unconscionability is present where the terms of the agreement are not merely unreasonable, but shock the judicial conscience. Id. at 1043-1044.

“Rogers and Kar have not met their burden of establishing procedural unconscionability. The Collective Bargaining Agreement, including the arbitration provision, was the product of negotiations between Royal Caribbean and the union that represents Rogers and Kar. Rogers and Kar have presented no evidence that their union lacked any meaningful choice but to accept the arbitral provision. They have also presented no evidence that they themselves lacked any meaningful choice but to accept the employment agreement that incorporated the Collective Bargaining Agreement.

“Rogers and Kar have not met their burden of establishing substantive unconscionability. First, they argue that the arbitration provision does not allow
the employees to participate in selecting the arbitrators. However, the Union participates in the selection process and can represent the interests of its members. Second, they argue that the arbitration provisions are substantively unconscionable because they require employees to travel to ‘distant fora’ to resolve their disputes. However, the default location for arbitration is the country of citizenship of the employee. Rogers and Kar have not shown that either term is substantively unconscionable.”

b. Public Policy

[64] “Rogers and Kar further argue that the arbitration provision is invalid because it is contrary to public policy and therefore null and void. See New York Convention Art. II(3). They argue that because seafarers are ‘wards of admiralty’, Arguelles, 400 U.S. at 355, public policy requires that the courts remain open to seafarers for the enforcement of their wage claims.

[65] “This argument is insufficient to warrant rendering the arbitration provisions void. Congress has expressly directed courts to ensure that arbitration agreements are enforced. 9 U.S.C. Sects. 3, 206. The Supreme Court has recognized ‘the emphatic federal policy in favor of arbitral dispute resolution’, a policy which ‘applies with special force in the field of international commerce’. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). We have recognized ‘the strong public policy favoring arbitration’, including international arbitration. Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 726 (9th Cir. 2007); Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992).21 Rogers and Kar have not shown that any public policy favoring seafarers is sufficient to overcome the public policy favoring international arbitration, particularly in the absence of any evidence that international arbitration would nullify any of the statutory rights Congress has conferred on seafarers.”

IV. CONCLUSION

[66] “For the foregoing reasons, we conclude that the arbitration agreement between Royal Caribbean and the Norwegian Seafarers’ Union is enforceable under the Convention....”

654. United States District Court, Northern District of California, 23 May 2008

Parties: Plaintiff: Anthony N. LaPine (US)  
Defendant: Kyocera Corporation (Japan)

Published in: Available online at <www.kluwerarbitration.com>  
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Articles: I(1); I(3); V; V(1)(b); V(1)(c); V(2)(b)

Subject matters:  
– petition to vacate and cross-petition to enforce both examined under 1958 New York Convention  
– non-domestic award  
– grounds for refusal of enforcement are exhaustive  
– domestic law also applies to setting aside (vacatur) of 1958 New York Convention award  
– summary adjudication in arbitration proceedings  
– excess of authority of arbitrators (no)  
– due process  
– manifest disregard of the law  
– review of merits of award (no)


Facts

The facts of this case are also reported in Yearbook XXIII (1998) at pp. 210-218. In the 1980s, Anthony N. LaPine formed a California disk-drive company called LaPine Technology Corporation (LTC). In 1985, Kyocera Corporation (Kyocera) and LaPine, along with Prudential Bache Trade Services, Inc. (Prudential), formed a three-way business relationship to manufacture, finance and market LTC’s disk drives. Subsequently, in 1986, Prudential, Kyocera and LaPine entered into an agreement (the Definitive Agreement) under which
Prudential and Kyocera would acquire LTC and reorganize it. The Definitive Agreement was governed by California substantive law; it also contained an ICC arbitration clause.


In 1990, LaPine commenced ICC arbitration against Kyocera and Prudential, claiming that they destroyed the value of LTC. The same panel as the one in the Prudential arbitration was appointed, also with seat in the United States. The arbitrators granted a stay pending issuance of a decision in the Prudential arbitration. The LaPine arbitration proceedings resumed in 2005.

On 18 August 2006, the parties jointly submitted a procedural schedule to the tribunal, calling for the arbitrators to address a summary adjudication motion filed by Kyocera in respect of certain issues in a threshold summary adjudication phase. The parties also agreed to Terms of Reference which stated that the ICC Rules were the applicable rules of procedure and that California law governed the merits of any dispute. On 11 April 2007, the tribunal advised the parties of the summary judgment standards it would apply and offered the parties a further opportunity to submit any additional evidence in support of their respective positions. LaPine then filed a brief asking for thirty-four additional documents from Kyocera; on 22 June 2007, Kyocera submitted copies of twenty-eight of those documents, with a declaration that the remaining six documents either never existed or could not be located. LaPine did not respond and the tribunal declared the arbitral proceedings closed on 17 July 2007.

On 29 August 2007, the ICC arbitrators issued a unanimous award. They declined to dismiss LaPine’s claims for his delay of prosecution. Though they acknowledged that California procedural rules favor dismissal in such circumstances, the arbitrators held that California law governed the dispute on the merits but did not control procedural matters, and applied the ICC Rules instead, which do not provide for dismissal of cases for delayed prosecution. On the merits, the arbitrators dismissed all of LaPine’s claims. LaPine sought to have the award vacated in the United States District Court for the Northern District of California under the Federal Arbitration Act (FAA) and Art. V of the 1958 New York Convention; Kyocera cross-moved to confirm.

The district court, per Marilyn Hall Patel, US DJ, denied LaPine’s request to set aside the ICC award and granted Kyocera’s cross-motion to confirm it. The court noted at the outset that the 1958 New York Convention applied because
the award, though rendered in the United States, was not a domestic award since
one of the parties, Kyocera, was not a US citizen.

The court then reasoned that it could vacate the ICC award under the seven
grounds listed in the New York Convention. It then examined whether it should
also take into account the grounds set forth in the “domestic” part of the FAA
(Chapter 1) because the award was made in the United States, as held by the
Second Circuit and other circuits. The court noted that the Ninth Circuit had not
addressed this question, although it did state in a 1987 decision that an award
falling under the New York Convention can be vacated only on the grounds
specified in the Convention. However, the award at issue there was rendered
abroad under foreign law. “In the absence of further guidance from the Ninth
Circuit”, the district court concluded that vacatur of a Convention award is
possible under both the seven Convention grounds and the grounds set forth in
Chapter 1 of the FAA. It added that, ultimately, the answer to this question was
academic in the present case because the outcome — denial of vacatur — was the
same under both sets of grounds.

The district court then dealt with LaPine’s arguments in support of his motion
to vacate the award. It noted first that in the Ninth Circuit “excess of authority”
in the domestic portion of the FAA covers cases when arbitrators “rule on a
matter not submitted to them, or act outside the scope of the parties’ contractual
agreement” but is also co-extensive with “manifest disregard of the law” other
than for decisions that are completely irrational. It therefore examined LaPine’s
arguments under the joint excess of powers/manifest disregard of the law rubric.

LaPine alleged that the arbitral tribunal (1) violated due process under Art.
V(1)(b) Convention) and (2) exceeded its authority in the sense of Art. V(1)(c)
Convention; it also (3) “exceeded its powers” and (4) manifestly disregarded the
law in the sense of the Chapter 1 of the FAA. The court noted that LaPine’s
Convention arguments merely incorporated by reference the arguments made
regarding violations of the domestic FAA; it therefore rejected the Convention
arguments by referring to its reasons for rejecting LaPine’s domestic law
arguments.

LaPine claimed in particular that the arbitrators erred in respect of summary
adjudication, arguing that lack of legal precedent on this procedure in an
international arbitration automatically means that the tribunal exceeded its
powers, and that the tribunal also exceed its powers by applying the ICC Rules
rather than California procedural law. The court disagreed. It held in respect of
the first contention that lack of legal precedent is merely another manner in
which to characterize an issue of first impression — the arbitrators could not have
manifestly disregarded the law if there was no law to follow in the first place. In
fact, the use of summary adjudication was jointly agreed to by the parties. As to the second argument, the court reasoned that the ICC Rules provide that arbitrators must select procedures where the Rules are silent. Hence, the tribunal’s decision to apply the ICC Rules rather than California law to the summary adjudication procedure “was, at best, a correct interpretation of how the ICC gap-filler provisions work and at worst ... an incorrect interpretation” of that provision, that is, an incorrect interpretation or application of the governing law, which does not amount to manifest disregard of the law.

The court finally dismissed LaPine’s claim that the arbitrators made errors of law, stating that the very limited review of the arbitral tribunal’s decision does not include a review of the award’s merits.

Excerpt

I. AWARD NOT CONSIDERED AS DOMESTIC


[2] “An arbitration agreement or arbitral award ‘falls under’ the Convention if it ‘aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial’, provided that if the relationship is entirely between US citizens, it must involve property or performance abroad or have some other reasonable relation with a foreign country. 9 U.S.C. Sect. 202. A corporation is a citizen of the United States for purposes of Chapter II of the FAA if it is incorporated or has its principal place of business in the United States. Id.; see

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3. "Here, the arbitration agreement and arbitral award fall under the Convention. The Definitive Agreement embodies a legal relationship the subject of which – the reorganization of LaPine Technology Corporation and the buyout of its shareholders – is commercial in nature. Respondent Kyocera is not a citizen of the United States because it is a corporation organized and existing under the laws of Japan and has its principal place of business in Kyoto, Japan. The arbitration, therefore, was not entirely between citizens of the United States.

4. "Accordingly, the arbitration agreement and arbitral award fall under the Convention pursuant to 9 U.S.C. Sect. 202, and the court has jurisdiction over the award pursuant to 9 U.S.C. Sect. 203. 5 That the arbitral award was made in the United States under American law does not change the court’s conclusion. See Indus. Risk. Ins., 141 F.3d at 1441 (arbitral award made in the United States, under American law, fell under Convention because one party was a German corporation); Landor Co., Inc. v. MMP Investments, Inc., 107 F.3d 476 (7th Cir. 1997) 6 (arbitral award made in the United States between two domestic corporations involving distribution of shampoo in Poland fell under Convention); Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983) 7 (arbitral award made in the United States between two foreign entities fell under Convention).

5. "The court pauses here to note that the Ninth Circuit has indicated that in order to fall under the Convention, an ‘additional’ requirement must be met, namely the award ‘must be made in the territory of another Contracting State’. Gould, 887 F.2d at 1362. In its declaration of accession, the United States as well as many other signatories announced that, pursuant to Art. I(3) of the Convention, the United States would ‘apply the Convention, on the basis of

5. "U.S.C. Sect. 203 vests subject matter jurisdiction in the federal district courts over ‘an action or proceeding falling under the Convention’, without regard to the amount in controversy. Venue is proper pursuant to 9 U.S.C. Sect. 204 (stating that venue is proper in the district court which ‘embraces the place designated in the agreement as the place of arbitration if such place is within the United States’) and Sect. 8.10(c) of the parties’ Definitive Agreement (stating that ‘[t]he arbitration shall be held in the City and County of San Francisco’)."
reciprocity, to the recognition and enforcement of only those awards made in the
territory of another Contracting State’. 21 U.S.T. 2517; see also notes following
9 U.S.C.A. Sect. 201. The Ninth Circuit in Gould grafted this declaration of
at 1362.

[6] “This court does not find the Ninth Circuit’s statement in Gould to be
controlling authority. The question of whether the Convention encompasses
arbitral awards made in the United States was not squarely before the court in
Gould. There, the arbitral award was made in the Netherlands. Gould, 887 F.2d
at 1362. Moreover, other Circuits that have considered the relevance of the
declaration of accession have rejected the proposition that the declaration
precludes applicability of the Convention to awards rendered in this country. See
Lander, 107 F.3d at 481-482; Bergesen, 710 F.2d at 932-933.

[7] “In sum, the court concludes that the arbitral award made in the
United States under American law falls under the Convention as defined in 9 U.S.C.
Sect. 202 because one of the parties to the arbitration, Kyocera, is not a citizen
of the United States.”

II. DOMESTIC GROUNDS FOR REFUSING ENFORCEMENT ALSO APPLICABLE

[8] “Having found that the arbitration agreement and award fall under the
Convention, and having found proper jurisdiction to confirm the award, the
court now turns to the heart of the parties’ dispute: Under what standards should
this court review the arbitral award? Because the award falls under the
Convention, there is no doubt that Art. V of the Convention, implemented in the
United States under Chapter II of the FAA, governs the court’s review. The
parties’ primary dispute is whether the grounds for review enumerated in the
Convention are exclusive, or whether as LaPine argues, the award may also be
reviewed under the standards set forth in Chapter I of the FAA, 9 U.S.C. Sects.
9-11.

8. "Given the Ninth Circuit’s decision in Kyocera Corp., 341 F.3d 987 [reported in Yearbook XXIII
(1998) pp. 210-218] and the Supreme Court’s recent decision in Hall Street, 128 S.Ct. 1396, both
holding that parties may not by private agreement expand or contract the grounds on which a
federal court reviews an arbitral award, LaPine no longer argues for review under Sects. 8.10(d)(ii)
and (iii) of the parties’ Definitive Agreement. Those contractual provisions call for what LaPine has
termed ‘expanded judicial review’, allowing a court to vacate, modify, or correct any award where
‘the arbitrators’ findings of facts are not supported by substantial evidence’ or where ‘the
arbitrators’ conclusions of law are erroneous’.”
When an arbitral award falls under the Convention, a party has three years from the date of the award to apply to a court for an order confirming the award. 9 U.S.C. Sect. 207. "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." Id. Art. V of the Convention sets forth seven grounds upon which a court may refuse an award. See 21 U.S.T. 2517, reprinted at notes following 9 U.S.C.A. Sect. 201. [Quotation of Art. V Convention omitted.] Together, the five grounds in Art. V(1) and the two grounds in Art. V(2) are the only grounds for refusal explicitly provided under the Convention. 9 U.S.C. Sect. 10(a).

Whether, in addition to the grounds specified in Art. V of the Convention, the 'domestic' standards embodied in Chapter I of the FAA apply to review of an arbitral award falling under the Convention and made in the United States under American law is an open question in the Ninth Circuit. "The Second Circuit has squarely addressed the question and has answered it in the affirmative. In Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997), the Second Circuit held that 'the Convention mandates very different regimes for review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought'. Relying on Art. V(1)(e) of the Convention, the Second Circuit stated that 'the Convention specifically contemplates that the state in which, or under the law of which the award is made, will be free to set aside or modify an award in accordance with its
domestic arbitral law and its full panoply of express and implied grounds for relief'....

[13] “Moreover, the Second Circuit stated that ‘the Convention is also clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Art. V of the Convention’....

[14] “Other circuits have adopted the Second Circuit’s holding. See Jacada, 401 F.3d at 709 (Sixth Circuit cited Toys “R” Us approvingly and stated, ‘[b]ecause this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award’). However, some circuits appear to be in conflict with Toys “R” Us. See Indus. Risk Ins., 141 F.3d at 1441 1443 (arbitral award falling under Convention and made in Tampa, Florida under Florida law was reviewed by Eleventh Circuit under Art. V, without regard to standards set forth in Chapter I of the FAA or any grounds not specified in the Convention).

[15] “The Ninth Circuit has stated in reviewing an award that fell under the Convention that ‘under the Convention, an arbiter’s award can be vacated only on the grounds specified in the Convention’. Mgmt. & Technical Consultants S.A. v. Parsons Jurden Int’l Corp., 820 F.2d 1531, 1533-1534.10 However, the award under review in Parsons Jurden was rendered outside the United States, in Bermuda under Bermuda law. Id. at 1533. The parties in Parsons Jurden sought recognition and enforcement in the United States of an arbitral award rendered in a foreign jurisdiction. Accordingly, Parsons Jurden is consistent with the portion of Toys “R” Us holding that where a party seeks recognition and enforcement of an award rendered in a foreign jurisdiction, Art. V of the Convention provides the exclusive grounds for relief.

[16] “Ultimately, as defendant Kyocera notes, the answer to the question presented is perhaps academic because as shall be seen below, the outcome is the same regardless of whether the court applies the standards set forth under Art. V of the Convention or the standards set forth in Chapter I of the FAA under 9 U.S.C. Sect. 10. In the absence of further guidance from the Ninth Circuit, the court concludes that the appropriate standard of review is under both Art. V and 9 U.S.C. Sect. 10.”

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11. “Since the court finds that both the Convention and the FAA apply, the court does not reach LaPine’s argument that the Definitive Agreement must be invalidated if only the Convention applied.”
III. GROUNDS FOR VACATUR

[17] “The Ninth Circuit has interpreted the domestic portion of the FAA, 9 U.S.C. Sect. 10(a)(4), to clarify when arbitrators ‘exceeded their powers’. Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 830 (9th Cir. 1995). The court held that ‘[w]hen arbitrators rule on a matter not submitted to them, or act outside the scope of the parties’ contractual agreement, the award may be overturned because the arbitrators exceeded the scope of their authority’. Id. (citing 9 U.S.C. Sect. 10(a)(4)). In ensuing years, the Ninth Circuit has held that under 9 U.S.C. Sect. 10(a), arbitrators ‘exceed their powers’ ‘not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational or exhibits a manifest disregard of the law’. Kyocera Corp., 341 F.3d at 997 (internal quotations and citations omitted). This implies that manifest disregard of the law is co-extensive with ‘exceed their powers’ other than for decisions that are completely irrational. The court held that ‘[t]hese grounds afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures’. Id. at 998. Thus, this court ‘may not reverse an arbitration award even in the face of an erroneous interpretation of the law. Rather, to demonstrate manifest disregard, the moving party must show that the arbitrator understood and correctly stated the law, but proceeded to disregard the same.’ Collins v. D.R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007) (internal quotations and citations omitted).

[18] “This standard is echoed by the Second Circuit. In Toys "R" Us, Inc. the court did not explicitly discuss the ‘exceeded their powers’ language, but found that an award may be vacated under 9 U.S.C. Sect. 10 for manifest disregard of the terms of the agreement or of the law. Specifically:

‘Mere error in the law or failure on the part of the arbitrator to understand or apply the law is not sufficient to establish manifest disregard of the law. For an award to be in “manifest disregard of the law”, the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term “disregard” implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.’

13. "The applicability of this standard has been called into question by the Second Circuit but has not been overruled. In Westerbeke Corp. v. Diahatsu Motor Co., Ltd., 304 F.3d 200, 221 22 (2d Cir. 2002), the court questioned whether ‘manifest disregard’ may be allowed as ‘an additional non statutory ground for vacatur, given that the FAA embodies a strong public policy favoring arbitration as an alternative means of dispute resolution’.”


126 F.3d at 23 24 (internal quotations and citations omitted). It then applied the same standard with respect to manifest disregard of the terms of the agreement.

[19] “Each of LaPine’s allegations of error pertain to one of the following: (1) violation of Art. V(1)(b) of the Convention; (2) violation of Art. V(1)(c) of the Convention; (3) the arbitral panel ‘exceeded its powers’; or (4) the arbitral panel ‘manifestly disregarded’ the law. In light of the foregoing discussion, the court analyzes both ‘exceeded its powers’ and ‘manifestly disregarded’ under the same rubric when discussing LaPine’s allegations.”

1. Art. V(1)(b) Convention

[20] “Art. V(1)(b) of the Convention allows this court to vacate the arbitral award if the losing party ‘was otherwise unable to present his case’. LaPine argues, without objection, that this prong ‘essentially sanctions the application of the forum state’s standards of due process’. Iran Aircraft Indus. v. Avco Corp., 980 F.3d 141, 145-146 (2d Cir. 1992) (quotation and citation omitted). LaPine claims the following offended due process: (1) the summary adjudication proceedings precluded discovery; (2) Kyocera never produced requested documents; and (3) the panel ignored certain declarations submitted by LaPine. Each of these contentions are also made elsewhere and are discussed below. None of them offend due process.”

2. Art. V(1)(c) Convention

[21] “Art. V(1)(c) of the Convention allows this court to vacate the arbitral award if it was ‘not in accordance with the agreement of the parties’. LaPine merely incorporates by reference the arguments he makes regarding violations of FAA Sect. 10(a)(4). Consequently, the court rejects the arguments, incorporating by reference its rationale below for rejecting LaPine’s arguments regarding violations of FAA Sect. 10(a)(4).”
UNITED STATES NO. 654

3. **Excess of Authority / Manifest Disregard of the Law**

    a. **Lack of legal precedent**

[22] “LaPine claims that the lack of legal precedent regarding summary adjudication in an international arbitration automatically means that the panel exceeded its powers. However, the lack of legal precedent is merely another manner in which to characterize an issue of first impression.

[23] “When an adjudicatory body decides an issue of first impression, it does not automatically exceed its powers. Indeed, the panel could not have manifestly disregarded the law if there was no law to follow in the first instance. Thus, this argument is frivolous.

[24] “Furthermore, the use of summary adjudication was jointly agreed to by the parties…. Indeed, the parties stipulated to a hearing on the motion before any document exchange or discovery was to take place. Id. The court finds no due process violations in this arbitration context – where discovery is not guaranteed15 – when parties stipulate to a particular schedule.

[25] “LaPine also argues that the panel resolved disputed facts. He does not, however, state what disputed facts were decided by the panel. To the extent that LaPine’s argument is based on the panel making credibility determinations, it is discussed below.”

    b. **Applicable law of arbitration**

[26] “Sect. 8.10 of the Definitive Agreement directs that ‘[t]he arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) and the Federal Arbitration Act’…. Further, the parties agreed, in the [Terms of Reference], that the 1988 Rules of Conciliation and Arbitration of the ICC would govern procedural matters and substantive California law would govern adjudication of the merits. The 1988 Rules of Conciliation and Arbitration provide that the panel must select procedures where ICC Rules are silent:

[15] “The full panoply of rights associated with judicial proceedings are not available during arbitration. See, e.g., Barton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) (‘When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements [sic] is the right to pre-trial discovery.’ (internal citations omitted)); Paladino v. Avnet Computer Techs., 134 F.3d 1054, 1062 (11th Cir. 1998) (‘Arbitral litigants often lack discovery, evidentiary rules, a jury, and any meaningful right to further review. In light of a strong federal policy favoring arbitration, these inherent weaknesses should not make an arbitration clause unenforceable.’).”

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‘The rules governing the proceedings before the arbitrator shall be those rules resulting from these Rules and, where these Rules are silent, any rules which the parties (or failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.’


[27] “On 11 April 2007 the panel notified the parties that ‘the Arbitral Tribunal is left with the impression of a possible misunderstanding on the standards for considering the Application, which are not provided in the ICC Arbitration Rules’.... The panel then set forth the standards it intended to apply, which were based on federal law, as gap fillers and asked the parties to submit further briefing. Both parties submitted briefs that discussed the appropriate standards to be applied.... In its final opinion, the panel affirmed the standard it had set forth earlier.... It went on to state that

‘providing for the summary disposal on the merits of claims when the conditions to do so are met is fully compatible with both the letter and spirit of the ICC Rules....’

[28] “LaPine’s first argument claims California procedural law, instead of the standards adopted by the panel, was intended to govern the procedural standards applicable to the summary judgment proceedings.

[29] “The panel’s decision regarding procedure was, at best, a correct interpretation of how the ICC gap filler provisions work and at worst, is an incorrect interpretation of how the ICC gap filler provisions apply in this situation. Thus, at worst, the panel merely interpreted or applied the governing law incorrectly. There is no evidence that the award is completely irrational or exhibits a manifest disregard of the law. Indeed, the panel requested further briefing on the issue of summary judgment standards to be used. There is no evidence that the panel neglected to read these submissions. In light of a lack of evidence to the contrary, it appears that the panel considered LaPine’s arguments and rejected them. For example, the panel stated:

[T]his award is international in nature, and although venued in California, is not subject to Californian procedural law not standing for core Californian public policy. For this reason, the Arbitral Tribunal does not
deem itself bound by California statutes or caselaw regarding summary judgment disposal on the merits of the case.’

.... Moreover, the court does not find that due process has been offended. Using the forum’s procedural law while concurrently using the substantive law of a different jurisdiction is common and pervasive in federal courts. Here, the panel used federal procedural law and California substantive law. This does not offend due process.

[30] “For the same reasons, LaPine’s argument that the application of federal procedural laws as lex arbitri exceeds the panel’s powers is also unpersuasive. Specifically, the panel invoked the doctrine of lex arbitri – law where the arbitration is to take place – to decide that Federal Rule of Civil Procedure 56 governed this action. Again, at worst, this is an incorrect interpretation of the law of the place where the arbitration is to take place. The arbitration took place in San Francisco, which is located both in California and the United States. A decision to use federal procedural law when presented with two competing procedural standards is not completely irrational nor does it exhibit a complete disregard of ICC Rules. Indeed, the arbitrators are the best qualified to determine what the ICC Rules require, and they specifically affirmed, in their final opinion, the decision to use this particular summary judgment standard. They stated:

’[P]recisely because of their international nature, the lex arbitri governing these arbitral proceedings is primarily the US Federal Arbitration Act. Should the Arbitral Tribunal seek guidance in the lex arbitri to determine standards regarding summary judgment, it would naturally look to the Federal Rules of Procedure (Rule 56).’

....

[31] “Second, LaPine contends the panel failed to apply California standards regarding unknown facts during summary judgment when it made a decision without reviewing six documents identified by LaPine. Kyocera submitted a sworn declaration, which stated that it was unable to locate the remaining six documents and it appeared that three of those documents did not exist.... LaPine relies on California Code of Civil Procedure Sect. 437c(h), which states:

‘If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be
presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.’

[32] “This statute explicitly allows the panel to make any other order as may be just. Here, the panel found that LaPine had not made a showing as to ‘where or under whose control [the missing] documents – if at all existing – could or would be’…. The panel went further to note that ‘such circumstances eloquently reveal once more the daunting evidentiary difficulties to be met if this case were tried on the merits after having been dormant for over twenty years and the absence of even a prima facie record permitting that to happen’…. Consequently, the panel’s reasoned decision not to wait for these documents, which was well within their powers under the California statute, does not offend due process nor is it a manifest disregard of the law.

[33] “Third, LaPine contends the panel erroneously made credibility determinations on summary judgment. LaPine presented no evidence other than self serving and conclusory statements to the panel in order to create a genuine issue of material fact to defeat summary judgment. However, mere allegations or denials do not defeat a moving party’s allegations on summary judgment. Fed.R.Civ.P. 56(e)(2); Gasaway v. Nw. Mut. Life Ins. Co., 26 F.3d 957, 959-960 (9th Cir. 1994). Consequently, the panel did not exceed its powers even if it did resolve issues confronted by directly contradictory declarations. This same rationale applies to LaPine’s argument that a genuine issue of material fact was created by his declaration that he did not receive a letter dated 22 December 1986.”

c. Failure to consider evidence

[34] “LaPine claims that documents he submitted that demonstrate fraudulent misconduct, such as proxy statements and trading agreements, were disregarded by the panel. Para. 90 of the panel’s opinion, however, specifically discusses the evidence submitted by LaPine…. The subsequent paragraphs discuss the panel’s reasoning. Similarly, LaPine claims the panel did not ‘accept’ his declaration in response to the panel’s 11 April 2007 letter. However, the panel specifically refers to his declaration in its opinion…. To the extent that LaPine contends his declaration creates a genuine issue of material fact, that argument has been rejected above. Since the panel did not ignore this evidence, no due process violations or manifest disregard can be found.”
d. Errors of law

[35] “LaPine lost at the arbitration stage and now attempts a review of the panel’s decision by attempting to re-litigate the merits by advancing errors of law made by the panel. These errors include allegations that: (1) the panel ignored LaPine’s good faith and fair dealing claim;16 (2) LaPine’s updated request for arbitration created a genuine issue of material fact regarding fraud;17 (3) the panel’s holding regarding the twenty-eight documents that Kyocera submitted upon LaPine’s request for further discovery was in error;18 (4) the panel should not have dismissed certain claims for a lack of standing; (5) the panel should have tolled the statute of limitations regarding certain claims; and (6) the panel erroneously held that certain claims were barred by waiver and estoppel.

[36] “LaPine has skillfully attempted to re-argue the case in this forum; however, this court conducts a very limited review of the arbitral panel’s decision. It is irrelevant that a mistake was made or that this court would decide the case differently. See T Mobile USA, Inc. v. Quest Comm’ns Corp., 2007 WL 3171428, at *3 *4 (W.D. Wash. 26 Oct. 2007). LaPine’s arguments, based on errors of law, do not demonstrate that any of the panel’s decisions offend due process, are completely irrational or exhibit a manifest disregard of the law. Indeed, there is no showing that the arbitrators recognized the applicable law and ignored it. The arbitrators merely ruled against LaPine. There is no redress in this court for the pure errors of law claimed by LaPine.”

16. “LaPine did not have standing to pursue his contractual claims.... Since the covenant of good faith and fair dealing is effectively an invisible covenant in the contract, LaPine may not sue on that cause of action without standing to sue on the contract.”

17. “Even if the panel erred by requiring prima facie evidence of certain causes of action, the panel’s decision must nevertheless be affirmed for claims dismissed alternatively on statute of limitations grounds. Parties had agreed that the defense of delay would be subject to the summary adjudication proceedings.”

18. “There is no merit to LaPine’s claim that he was denied the opportunity to ‘comment on’ the documents that Kyocera submitted to the panel. After the summary judgment motion had been briefed, argued and post-hearing submissions had been filed, LaPine asserted in May 2007 – for the first time – that he wanted thirty-four additional documents. The fact that he did not get an opportunity to ‘comment on’ documents submitted in response to that request does not rise to the level of a due process violation. Moreover, the panel explicitly found these documents to be immaterial....”

655. United States District Court, Southern District of New York, 16 September 2008, 08 Civ. 1109 (DLC)

Parties:  
Petitioner: Gas Natural Aprovisionamientos, Sdg, S.A.  
(nationality not indicated)  
Respondent: Atlantic LNG Company of Trinidad and Tobago (Trinidad and Tobago)

Published in:  
2008 U.S. Dist. LEXIS 69632

Articles:  
III; V; V(1)(b); V(1)(c); V(2)(b)

Subject matters:  
– grounds for refusal of enforcement are exhaustive  
– excess of authority of arbitrators (no)  
– manifest disregard of the law  
– review of merits of award (no)  
– due process and prior disclosure of terms of award

Commentary Cases:  

Facts

In July 1995, Atlantic LNG Company of Trinidad and Tobago (Atlantic) entered into a contract with the predecessor of Gas Natural Aprovisionamientos, Sdg, S.A. (GNA) for the supply of the liquefied natural gas (LNG) produced by Atlantic at a facility in the Caribbean (the Train 1 LNG), for a period of twenty years between 1999 and 2009. GNA was allowed under the contract to transport the LNG to its receiving facilities in either Spain or New England, though the parties expected that the Train 1 LNG would be consumed in Spain and therefore tied the pricing formula in the contract to the European energy market. The formula consisted of a base price and a multiplier indexed quarterly to the European prices for certain substitute petroleum products. The contract also included a “price reopener” provision, whereby either party could request a revision of the pricing formula if it established that certain preconditions were
met (Art. 8.5(a), see below). If the parties were unable to agree upon a new pricing formula within six months, the contract permitted either party to refer the matter to arbitration in New York City in accordance with the UNCITRAL Arbitration Rules.

After 1995, Spain’s natural gas market was substantially liberalized. As Spanish gas prices decreased, the New England market became more attractive and GNA entered into a long-term agreement to resell all of its Train 1 LNG deliveries at its New England receiving facilities. On 21 April 2005, citing these circumstances, Atlantic notified GNA that it was seeking a revision of the contract price. The parties were unable to agree on a new formula. On 21 October 2005, Atlantic demanded arbitration, requesting an upward revision of the contract price to reflect the value of natural gas in the New England market.

A three-person arbitral tribunal was formed in New York City. On 17 January 2008, the tribunal issued a unanimous Final Award determining that the requirements for a price reopener had been met and that the contract price needed to include a New England Market Adjustment factor because the Train 1 LNG was being sold in New England on a sustained basis. The tribunal then instituted a two-part pricing scheme, preserving the original formula contained in the contract but revising its base-price component and adding a “New England Market Adjustment” for quarters in which more than a named percentage of the Train 1 LNG was resold for delivery to the New England receiving facilities. As a result of this revised pricing scheme, Atlantic owed GNA over US$ 70 million. GNA sought enforcement of the award in the United States.

The United States District Court for the Southern District of New York, per Denise Cote, US DJ, confirmed the award, denying Atlantic’s argument that enforcement should be denied because the arbitrators acted in excess of their authority, acted against public policy and violated Atlantic’s due process rights.

The court stated at the outset that it would consider the seven exclusive grounds for refusing enforcement set out in the 1958 New York Convention, as well as the relevant provisions of the Federal Arbitration Act (FAA) governing domestic awards, because the arbitration took place in the United States. It also noted that the “severely limited” review of awards by the enforcement court does not allow for a review of the award’s merits.

Atlantic argued that the arbitral tribunal’s statement in the award that the requirements for a price reopener were met was belied by its analysis of the parties’ contentions on this issue. Thus, having in fact found that the contractual conditions precedent for revising the contract price had not been met, the arbitrators exceeded their authority by revising the pricing formula. They further exceeded their powers by imposing an impermissible dual-price scheme.
The court held that Atlantic’s arguments “quibble[d] with the reasoning in the Tribunal’s decision” and were impermissible. Nor had the arbitral tribunal manifestly disregarded the law and violated public policy, as alleged by Atlantic. Even if the doctrine of manifest disregard of the law “could be said to have survived the Supreme Court’s recent decision in Hall Street Associates” (see below), the arbitrators did not ignore or refuse to apply the preconditions set forth in the contract.

The district court also dismissed Atlantic’s argument that the arbitral tribunal violated due process by failing to disclose the terms of the dual pricing scheme prior to issuing the award, so that Atlantic was unable to present evidence or argument regarding that scheme. The court noted that it appeared from the record that the parties were invited to provide post-hearing briefing on the possibility of including two different prices based on two different markets. Having requested these supplemental submissions and conducted extensive hearings, the tribunal was in the court’s opinion under no obligation to reveal its decision to the parties and accept additional comments before issuing the award.

Excerpt

[1] “Atlantic contends that the Final Award must be vacated because the Tribunal violated the Federal Arbitration Act (FAA), 9 U.S.C. Sect. 10(a)(3) and (4), and the [1958 New York Convention], Art. V, when it acted in excess of its authority, acted against public policy, and violated Atlantic’s due process rights.

[2] “[I]t is well-settled that the FAA does not confer subject matter jurisdiction on the federal courts even though it creates federal substantive law.’ Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 25 (2d Cir. 2000). Rather, ‘[t]here must be an independent basis of jurisdiction before a district court may entertain petitions under the [FAA]’. Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 136 (2d Cir. 2002) (citation omitted); see also Greenberg, 220 F.3d at 25. Jurisdiction over the petition in this action exists pursuant to the New York Convention, implemented by 9 U.S.C. Sects. 201-208, because the Final Award involves foreign commerce and non-US parties. See id. Sect. 202; Yasuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997). (The parties agree that the enforcement provisions of the New York Convention apply to this confirmation proceeding.)


[4] “Of these grounds, Atlantic relies principally on Sect. 10(a)(4) of the FAA, which permits vacatur ‘where the arbitrators exceeded their powers’. 9 U.S.C. Sect. 10(a)(4). It relies, as well, on the public policy provision of the New York Convention, Art. V(2)(b) (permitting courts to refuse recognition of an award that ‘would be contrary to the public policy of that country’), and on the due process provisions of the FAA, 9 U.S.C. Sect. 10(a)(3) (providing for vacatur ‘where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced’), and the New York Convention, Art. V(1)(b) (allowing courts to refuse recognition where ‘[t]he party against whom the award is invoked was ... unable to present his case’).

[5] “Normally, confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court, and the court must grant the award unless the award is vacated, modified, or corrected.” *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (citation omitted). A court’s review of an arbitration award is ‘severely limited’ so as not unduly to frustrate the goals of arbitration, namely to settle disputes efficiently and avoid long and expensive litigation. *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (citation omitted). Arbitration awards are not reviewed for errors made in law or fact. *Id.* Moreover, ‘[t]he arbitrator’s rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator’s decision can be inferred from the facts of the case’. *D.H. Blair & Co.*, 462 F.3d at 110 (citation omitted). ‘Only a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award.’ *Id.* (citation omitted). Thus, ‘the

5. “In the introductory pages of its brief, Atlantic also cites to Art. V(1)(c) and (d) of the New York Convention, apparently as additional bases for the excess of powers argument it makes. Atlantic does not, however, specifically rely on these subsections in its legal analysis.”

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showing required to avoid confirmation is very high’, id. (citation omitted), and a party moving to vacate an arbitration award bears ‘the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law’. *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003).”

I. EXCESS OF AUTHORITY

[6] “The FAA allows for vacatur of an arbitration award ‘where the arbitrators exceeded their powers’. 9 U.S.C. Sect. 10(a)(4).6 The Second Circuit has ‘consistently accorded the narrowest of readings to the Arbitration Act’s authorization to vacate awards pursuant to Sect. 10(a)(4)’. *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir. 2002) (citation omitted). A court’s ‘inquiry under Sect. 10(a)(4) thus focuses on whether the arbitrators had the power, based on the parties’ submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue’. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997). ‘[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.’ *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); accord *Local 1199, Drug, Hosp. & Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992). Thus, while an ‘arbitrator may not ignore the plain language of the contract ... a court should not reject an award on the ground that the arbitrator misread the contract’. *United Paperworkers*, 484 U.S. at 38.

[7] “Atlantic describes two ways in which the Tribunal exceeded its authority. It asserts first that the Tribunal revised the contract price despite finding that the contractual conditions precedent had not been met. Second, Atlantic contends that, having decided to alter the contract price, the Tribunal impermissibly imposed a dual price scheme. In neither instance has Atlantic carried its heavy

6. “Art. V(1)(c) of the New York Convention, as implemented by 9 U.S.C. Sect. 207, similarly provides that a court may refuse to enforce an arbitration award if it ‘deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration’. This defense ‘tracks in more detailed form’ the excess of powers provision of the FAA, 9 U.S.C. Sect. 10(a)(4), and should likewise ‘be construed narrowly’. *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) reported in Yearbook I (1976) p. 205 (US no. 7). ‘Both provisions basically allow a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration.’ Id.”
burden of showing that the Tribunal exceeded its powers. Each of these theories is analyzed in turn.

1. Contractual Conditions Precedent

[8] “Although the Tribunal explicitly stated in the Final Award that ‘[t]he requirements for a price reopener under Art. 8.5(a) have been met’,7 Atlantic argues that the Tribunal’s assertion is belied by its analysis of the parties’ contentions on this issue. Specifically, Atlantic had argued that the liberalization of the Spanish natural gas market constituted an unexpected changed circumstance in Spain and thus satisfied the first precondition of Art. 8.5(a). But in explaining the Final Award, the Tribunal stated that ‘[a]lthough the liberalized market was foreseen by both sides, the real test is whether those developments significantly disrupted the expected relationship between the Contract Price and the value of natural gas’. Focusing on this statement, Atlantic argues that the Tribunal conflated the first precondition of Art. 8.5(a) with the second, relying solely on a divergence between the contract price and the value of natural gas without first finding any unexpected changed circumstance in Spain that precipitated that discrepancy.

[9] “Atlantic’s argument quibbles with the reasoning in the Tribunal’s decision and does not suggest any abuse of power by the Tribunal. It is undisputed that the Tribunal had the power to decide whether the requirements for a price reopener had been met; indeed, the Tribunal was specifically assigned this responsibility. Atlantic has conceded this point since it was Atlantic that initiated the price reopener and arbitration and argued strenuously before the Tribunal for a new

7. Art. 8.5(a) of the contract provided:

“If at any time either Party considers that economic circumstances in Spain beyond the control of the Parties, while exercising due diligence, have substantially changed as compared to what it reasonably expected when entering into this Contract or, after the first Contract Price revision under this Article 8.5, at the time of the latest Contract Price revision under this Article 8.5, and the Contract Price resulting from application of the formula set forth in Article 8.1 does not reflect the value of Natural Gas in the Buyer’s end user market, then such Party may, by notifying the other Party in writing and giving with such notice information supporting its belief, request that the Parties should forthwith enter into negotiations to determine whether or not such changed circumstances exist and justify a revision of the Contract Price provisions and, if so, to seek agreement on a fair and equitable revision of the above-mentioned Contract Price provisions in accordance with the remaining provisions of this Article 8.5.”
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price formula. That it now finds fault with the explanation given by the Tribunal in agreeing with Atlantic is irrelevant under Sect. 10(a)(4).

[10] “Atlantic’s additional arguments concerning the contractual conditions precedent – made in footnotes – that the Tribunal manifestly disregarded the law and violated public policy are similarly unavailing. Even if the doctrine of ‘manifest disregard of the law’ could be said to have survived the Supreme Court’s recent decision in Hall Street Associates, 128 S.Ct. at 1403-1404, and thus remain available as an avenue to attack an arbitration award, the Tribunal did not – as Atlantic contends – ignore or refuse to apply the preconditions set forth in the contract. See Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126, 129 (2d Cir. 2003). To the contrary, the Final Award explicitly describes the requirements of Art. 8.5(a), and it then applies them in a separate section labeled ‘Application of Contract Provisions to the Issues Raised in this Proceeding’.

[11] “Similarly, Atlantic asserts that, by effectively merging the two conditions of Art. 8.5(a), the Tribunal contravened the ‘fundamental and well established public policy’ in the United States ‘that a contract be applied and enforced as written’. ‘[C]ourts may refuse to enforce arbitral awards only in those rare cases when enforcement of the award would be directly at odds with a well defined and dominant public policy.’ Saint Mary Home, Inc. v. Serv. Employees Int’l Union, Dist. 1199, 116 F.3d 41, 46 (2d Cir. 1997); see also United Paperworkers, 484 U.S. at 43 (‘At the very least, an alleged public policy must be properly framed ... and the violation of such a policy must be clearly shown if an award is not to be enforced.’). The Tribunal’s decision is plainly grounded in its reading of the parties’ contract and thus not at odds with any public policy identified by Atlantic.”

8. “Although Atlantic’s attack on the Tribunal’s Award could not succeed even if Atlantic were able to show that the Tribunal had misread the contract, it should be noted that Atlantic has not identified a flaw in the Tribunal’s reasoning. Art. 8.5(a) sets out two preconditions for revising the contract price. The first is an unexpected change in ‘economic circumstances in Spain’. Atlantic argues that the Tribunal could not have found this first condition satisfied since its opinion notes that the parties foresaw the deregulation of the Spanish LNG market. These two findings, one implicit and the other explicit, are not necessarily inconsistent. Even if deregulation was foreseen, other changes in the market for LNG could be unexpected ones. Indeed, Atlantic itself had argued to the Tribunal that the impact of US prices on the Spanish market price of LNG was unexpected and satisfied the first precondition of Art. 8.5(a).”

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2. **Pricing Scheme**

[12] “Atlantic next argues that the Tribunal exceeded its powers by imposing a pricing scheme that – in Atlantic’s view – skewed the original bargain between the parties and effectively rewrote their contract. Specifically, the new ‘dual price structure’, which provides one price when more than the Percentage of the Train 1 LNG is delivered to the New England Receiving Facilities, and another price otherwise, gives GNA the unbargained-for ability to determine which of two quarterly prices will apply to all shipments merely by shifting its Train 1 LNG deliveries.

[13] “This contention is also insufficient to permit vacatur of the Tribunal’s decision. It is undisputed that the Tribunal was specifically charged with the duty to revise the pricing scheme once it determined that the contractual preconditions were met. The Tribunal having made that determination, Art. 8.5(a) required it to reach ‘a fair and equitable revision’ of the contract price. Neither this standard nor any other contractual provision set a structural limitation on permissible price revisions. Indeed, Atlantic’s submissions to the Tribunal acknowledged the Tribunal’s broad authority in this regard. In them Atlantic opined that the relevant contractual terms ‘do not appear to expressly limit this Tribunal’s award to the imposition of a single pricing formula’. Atlantic’s argument concerning the dual pricing formula is better understood as a challenge to the merits of the Tribunal’s decision. Such a challenge is unavailing since the Court does not review arbitration awards for legal or factual errors.

[14] “Finally, Atlantic emphasizes the parties’ purportedly shared belief, expressed to the Tribunal during its proceedings, that a dual price structure would be improper. In light of this agreement between the parties, Atlantic argues, the Tribunal did not have the authority to impose a two-price formula. Even though ‘[p]arties to an arbitration may stipulate the issues they want determined and increase or limit the arbitrator’s contractual authority by their express submission’, *Hill v. Staten Island Zoological Soc’y, Inc.*, 147 F.3d 209, 214 (2d Cir. 1998), the parties may not add grounds to vacate or modify an arbitration award. *Hall Street Assocs.*, 128 S.Ct. at 1405. Thus, to vacate the award Atlantic must show that the Tribunal was not acting within the scope of its authority. *United Paperworkers*, 484 U.S. at 38.

[15] “Atlantic has not shown that the parties reached any agreement that limited the Tribunal’s authority to impose a dual price structure. It is true that when the Tribunal requested post-hearing briefing from the parties as to ‘[w]hether it is possible to have two different prices based on two different markets’, both parties argued against such a scheme. GNA argued in favor of a single Spanish
price for all deliveries; Atlantic contended that a single price based on the New England market should apply to all deliveries.9

[16] “These arguments over the wisdom of a dual pricing scheme, however, cannot be reasonably construed as an agreement to restrict the Tribunal’s authority to adopt that scheme. Indeed, in opposing the Tribunal’s suggestion of a two-price system, Atlantic limited its analysis to ‘the present facts’, while accepting that under certain circumstances ‘it might, in theory, be possible to “have two different prices based on two different markets”’. Thus, Atlantic foresaw that a dual scheme would be permissible, and it points to no stipulation by the parties depriving the Tribunal of the power to fashion such a price revision.”

II. DUE PROCESS

[17] “Atlantic argues briefly that the Tribunal violated Atlantic’s due process rights.10 The FAA provides for vacatur ‘where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced’. 9 U.S.C. Sect. 10(a)(3). Similarly, the New York Convention, Art. V(1)(b), permits courts to reject arbitration awards where ‘the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case’. The Second Circuit has explained that these provisions protect ‘the fundamental requirement of due process’, which is ‘the opportunity to be heard at a meaningful time and in a meaningful manner’. Iran Aircraft Indus. v. Arco Corp., 980 F.2d 141, 146 (2d Cir. 1992)11 (citation omitted).

[18] “Atlantic was not denied the opportunity to be heard in a timely and meaningful manner. The arbitration involved substantial amounts of briefing, as well as twelve days of hearings and two days of post-hearing argument. Atlantic’s only complaint is that, because ‘[t]he Tribunal never disclosed any terms of the dual pricing scheme prior to issuing the Final Award … Atlantic was unable to present evidence or argument regarding that scheme’. As noted above, however,
the parties were invited to provide post-hearing briefing on the possibility of including ‘two different prices based on two different markets’. Having requested these supplemental submissions and conducted extensive hearings, the Tribunal was under no obligation to reveal its decision to the parties and accept additional comments before issuing the Final Award. Its failure to do so in these circumstances does not constitute a violation of due process.”

III. ATTORNEY’S FEES

[19] “Finally, GNA seeks attorney’s fees for the confirmation proceeding. It does not point to any statutory or contractual authority for such legal fees, instead relying on the Court’s inherent equitable powers.

‘Pursuant to its inherent equitable powers … a court may award attorney’s fees when the opposing counsel acts in bad faith, vexatiously, wantonly, or for oppressive reasons. As applied to suits for the confirmation and enforcement of arbitration awards … when a challenger refuses to abide by an arbitrator’s decision without justification, attorney’s fees and costs may properly be awarded.’

Int’l Chem. Workers Union (AFL-CIO), Local No. 227 v. BASF Wyandotte Corp., 774 F.2d 43, 47 (2d Cir. 1985) (citation omitted).

[20] “Atlantic’s motion to vacate the arbitration award does not present any argument of merit. On the other hand, Atlantic has complied with the Tribunal’s decision pending the outcome of this confirmation action: It paid the retroactive deficiency due under the amended version of the Final Award on 16 April 2008, which was within the ninety-day period set by the Tribunal. It has also invoiced Train 1 LNG in accordance with the new contract price since 17 January 2008, the date the Final Award was issued. In light of these facts, this Court does not find that it is appropriate to award attorney’s fees.”

IV. CONCLUSION

[21] “The 4 February 2008 petition to confirm the arbitration award is granted. The 16 April 2008 motion to vacate is denied. Petitioner’s request for attorney’s fees and costs is denied…. “
656. United States District Court, Eastern District of Wisconsin, 24 September 2008

Parties: Plaintiff: Slinger Mfg. Co., Inc. (US)
Defendants: (1) Nemak, S.A. (Mexico)
(2) Nemak of Canada Corp. (Canada)
(3) Nemak Alumino de Mexico, S.A. de C.V. (Mexico)
(4) Henan Zhongyuan Engine Fittings Stock Co., Ltd. (PR China)

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Articles: II(1); II(3)

Subject matters: – ambiguous wording of arbitration clause
– scope of arbitration clause and tort claim
– discretion to stay court proceedings
– availability of pre-arbitration injunctive relief
– personal jurisdiction over foreign defendant


Facts

Slinger Manufacturing Company, Inc. (Slinger) and Henan Zhongyuan Engine Fittings Stock Co., Ltd. (ZYNP) – respectively, Tier 2 and Tier 3 suppliers of automotive parts to Original Equipment Manufacturers (OEMs) and higher-tiered suppliers – entered into a contract under which ZYNP would supply Slinger with 100 percent of Slinger’s requirements of certain engine cylinder liners manufactured by ZYNP (the ZYNP contract). Slinger also entered into supply contracts with Nemak, S.A., Nemak of Canada Corporation and Nemak Alumino de Mexico (collectively, Nemak) – Tier 1 suppliers – under
which Slinger would supply the liners to Nemak which would then incorporate them into the aluminum engine blocks they supplied to the OEMs (the Nemak contracts). The ZYNP contract and at least Slinger’s contract with one of the Nemak entities, Nemak, S.A., contained an arbitration clause.

A dispute arose between the parties when ZYNP sought to terminate the ZYNP contract and, shortly thereafter, Slinger received a letter from Nemak requesting confirmation that Slinger would comply with its supply obligations. ZYNP was the only company in the world that manufactured the parts at issue.

Slinger filed suit in the United States District Court for the Eastern District of Wisconsin, alleging that Nemak and ZYNP conspired together to drive Slinger out of the automotive parts market. It claimed tortious interference by both Nemak and ZYNP, breach of contract by ZYNP and breach of covenant of good faith and fair dealing by Nemak; it also sought injunctive relief. ZYNP and Nemak moved to compel arbitration.

The district court, per Rudolph T. Randa, Chief Judge, granted the motion to compel arbitration and stayed proceedings. It first examined Slinger’s argument that the arbitration clause in the ZYNP contract was ambiguous and thus invalid under Chinese law because it provided (in the English version) that disputes be arbitrated in Singapore “in accordance with the then prevailing Rules of the International Arbitration”. The court noted that the Chinese version of the contract, which was equally authentic, stated that arbitration would be conducted “at the Singapore International Arbitration Institution”. The court read this to mean the “well-known arbitration organization known as the Singapore International Arbitration Centre”. Hence, the reference to the arbitral institution was not ambiguous and the arbitration clause was valid.

The district court then considered whether Slinger’s tort claims against ZYNP and Nemak were arbitrable – it was not disputed that the breach of contract claim against ZYNP fell within the scope of the arbitration clause in the ZYNP contract. The court reasoned that the arbitration clause in both the ZYNP contract and Slinger’s contract with Nemak, S.A. was particularly broad, encompassing disputes “arising out of, or in relation to, or in connection with” the contract. It added that doubts concerning the scope of an arbitration provision must be resolved in favor of arbitration.

Against this background, the court noted that Slinger alleged (1) that ZYNP interfered with Slinger’s relationship with Nemak “in violation of” the ZYNP contract and (2) that Nemak interfered with Slinger’s relationship with ZYNP “by attempting to or agreeing to purchase Parts directly from ZYNP”. In the court’s opinion, the former allegation suggested that the claim arose from the ZYNP contract, and the latter allegation at least implied that Nemak’s attempt
to purchase the liners directly from ZYNP was wrongful under the contractual relationships between Slinger and Nemak.

The court therefore concluded that Slinger’s tort claims against ZYNP and, at least, Nemak, S.A. were arbitrable, and referred all claims to arbitration.

The court decided however to stay rather than dismiss the action pending arbitration, reasoning that while there was no doubt that Slinger’s contract claim against ZYNP was arbitrable, there were “decent arguments to be made against the arbitrability of the various tort claims against both ZYNP and Nemak”. When confronted with a (possible) mix of arbitrable and non-arbitrable issues, a court has discretion to order a stay.

The district court finally denied Slinger’s request for injunctive relief. It noted that in the Seventh Circuit, preliminary injunction proceedings may go forward when other judicial proceedings have been stayed pending arbitration, “in order to preserve the status quo and prevent irreparable harm”. Here, the only way to preserve the status quo would have been to order specific performance – that is, the supply of the liners – under the ZYNP contract, but the court lacked jurisdiction to order specific performance because both ZYNP and the action lacked minimum contacts with the forum.

Excerpt

(…..)


[3] “Under the FAA, if one party to a contract containing an arbitration clause attempts to avoid arbitration and files suit in the district court, the other party may move to stay or dismiss the action on the ground that the FAA requires the
I. CLAIMS AGAINST ZYNP

[4] “The English version of the Contract between Slinger and ZYNP provides for the arbitration of any ‘disputes, controversies or claims arising from this Agreement’ to take place in ‘Singapore in accordance with the then prevailing Rules of the International Arbitration’. Art. 16. The Chinese version of this clause is slightly different, as it provides that ‘arbitration shall be conducted at the Singapore International Arbitration Institution’…. Art. 17(a) of the Contract provides that it is ‘written in both English and Chinese languages. Both versions shall be equally authentic.’

[5] “As an initial matter, the parties are in apparent agreement that Slinger’s breach of contract claim is an arbitrable claim, as it clearly ‘arises from’ the Contract itself. Slinger’s breach of contract claim encompasses its request for injunctive relief, declaratory relief, and specific performance under and pursuant to the Contract at issue. Slinger’s WFDL claim is also subject to arbitration. See Good(E) Bus. Sys., Inc. v. Raytheon Co., 614 F.Supp. 428, 430-31 (W.D. Wis. 1985) (distribution agreement which provided for arbitration of disputes ‘arising in connection with’ the agreement broad enough to cover dealership claim).

[6] “Less clear is whether Slinger’s claim for tortious interference is an arbitrable claim. Slinger alleges that ZYNP ‘wrongfully and intentionally interfered with these relationships [with Nemak] by attempting to or arranging to sell the parts to Nemak, in violation of the contract between ZYNP and Slinger’…. This allegation at least suggests that the tortious interference claim in some way ‘arises from’ the Contract between ZYNP and Slinger. Given that doubts should be resolved in favor of arbitration, the Court concludes that this is also an arbitrable claim. See Welborn Clinic v. MedQuist, Inc., 301 F.3d 634, 639 (7th Cir. 2002) (standard arbitration clause using phrase ‘arising out of’ or ‘relating to’ the contract is ‘admittedly expansive’, encompassing ‘all manner of claims tangentially related to the agreement, including claims of fraud, misrepresentation, and other torts’).
3. "The words used in the Chinese language for 'center' and 'institution' are often used interchangeably...."


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[7] “More generally, Slinger argues that the arbitration clause itself is unenforceable under Chinese law.’In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.’Fed.R.Civ.P. 44.1.

[8] “According to Slinger, Sect. 18 of the Arbitration Law of the People’s Republic of China (PRC) states:

‘[i]f an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.’

Under the ‘Interpretation of the Supreme People’s Court’, arbitration clauses that contain ambiguous references to arbitration institutions are unenforceable. Therefore, Slinger argues that the arbitration clause is unenforceable because it does not refer to a particular arbitration commission or panel.

[9] “Slinger’s argument ignores the Chinese language version of its Agreement with ZYNP. As noted above, the Chinese version refers to the Singapore International Arbitration Institution. There is a well-known arbitration organization known as the Singapore International Arbitration Centre (SIAC).

General PRC contract law allows a contract to be conducted in multiple languages, and when ‘it is agreed that all versions are equally authentic, the words and sentences in each version are construed to have the same meaning. In case of any discrepancy in the words or sentences used in the different language versions, they shall be interpreted in the light of the purpose of the contract.’

[10] “In this context, the purpose of the contract is clearly in favor of arbitration. Moreover, while the Chinese version of the Agreement uses the term ‘Institution’ instead of ‘Centre’, the reference to SIAC is not ambiguous.3 Under Chinese law, the arbitration clause is enforceable. See, e.g., Apple & Eve, LLC v. Yantai North Andre Juice Co Ltd., 499 F.Supp.2d 245, 248-253 (E.D.N.Y. 2007)4 (granting motion to compel arbitration in China, even though the arbitration agreement failed to designate a specific arbitration commission as required by Chinese law).”

3. "The words used in the Chinese language for ‘center’ and ‘institution’ are often used interchangeably...."

II. CLAIMS AGAINST NEMAK

[11] “Slinger’s contract with Nemak S.A. provides that any ‘dispute, controversy or claim arising out of, or in relation to, or in connection with the Agreement’ shall be ‘resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce’. Slinger’s contract with Nemak of Canada provides that ‘[a]ll matters in dispute under this agreement shall be referred to the arbitration of a single arbitrator …’.5

[12] “Slinger’s claims against Nemak are tort claims: Count III (tortious interference), and Count VII (breach of covenant of good faith and fair dealing). Slinger argues that these are not arbitrable claims because they have nothing to do with Slinger’s contracts with Nemak – in other words, they do not ‘arise out of’ or fall ‘under’ those agreements. However, the language in the Nemak S.A. contract encompasses claims ‘arising out of, or in relation to, or in connection with the Agreement’. The language ‘in relation to’ is particularly broad, and courts have noted that such language has a broader reach than the phrase ‘arising out of’. See Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907, 909 (7th Cir. 1999) (phrase “arising out of or relating to” … characterized as extremely broad and capable of an expansive reach’).

[13] “Focusing on the phrase ‘relating to’, it is clear that Slinger’s tort claims against Nemak (at least those against Nemak S.A.) are in some way related to Slinger’s contractual relationship with Nemak. For example, Slinger alleges that Nemak ‘wrongfully and intentionally interfered with [Slinger’s relationship with ZYNP] by attempting to or agreeing to purchase Parts directly from ZYNP’…. By purchasing parts directly from ZYNP, there is at least the implication that such action is wrongful under the contractual relationships between Slinger and Nemak.

[14] “Given the traditional presumption in favor of arbitration, and the particularly broad language in the Nemak S.A. agreement, the Court concludes that Slinger’s tort claims against Nemak are arbitrable claims. See, e.g., Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Intern., Ltd., 1 F.3d 639, 643 (7th Cir. 1993) (party may not avoid a contractual arbitration clause merely by ‘casting its complaint in tort’).”

5. “Slinger claims that it never entered into a contract with the third Nemak entity, Nemak Alumino, but that its contract is with Nemak Alumino’s predecessor in interest, Teksid Alumino de Mexico, S.A. The Court need not resolve this dispute at this time, as it is not germane to the Court’s analysis and ultimate conclusion.”
III. STAY OF PROCEEDINGS

[15] “As demonstrated by the foregoing discussion, at a minimum this action presents a mix of arbitrable and non-arbitrable claims. While there are decent arguments to be made against the arbitrability of the various tort claims against both ZYNP and Nemak, there is no doubt that Slinger’s contract claim against ZYNP must be submitted to arbitration.

[16] “When the Court is confronted with a mix of arbitrable and non-arbitrable issues, ‘the FAA does not give courts express guidance on how to proceed’. Volkswagen of America, Inc. v. Sud’s of Peoria, Inc., 474 F.3d 966, 971 (7th Cir. 2007). In this instance, courts have discretion to stay non-arbitrable claims pending the outcome of an arbitration proceeding. See id. (quoting McCarthy v. Azure, 22 F.3d 351, 361 n. 15 (1st Cir. 1994)). Arbitration is very likely to resolve issues material to this lawsuit, or at least shed light on any issues that may, as it turns out, be considered non-arbitrable. See id. at 972.

[17] “Therefore, instead of dismissing this action in its entirety, the Court will enter a stay accompanied by an order to engage in arbitration. See, e.g., State of Wisconsin v. Ho-Chunk Nation, 564 F.Supp.2d 856, 863 (W.D. Wis. 2008) (‘Although it may be overly optimistic to predict that arbitration will dispose of all issues … that possibility suggests the proper procedural course is to close the case administratively, subject to immediate reopening if all issues are not resolved in arbitration’).”

IV. INJUNCTIVE RELIEF

[18] “Despite the fact that this matter must be stayed pending arbitration, Slinger presses its request for injunctive relief. In the Seventh Circuit, preliminary injunction proceedings may go forward, even while all other judicial proceedings have been stayed pending arbitration, in order to preserve the status quo and prevent irreparable harm. See IDS Life Ins. Co. v. Sun America, Inc., 103 F.3d 524, 527 (7th Cir. 1996). Injunctive relief may be granted ‘in order to prevent arbitration from being rendered futile by the conduct of the other party, the injunction to last just long enough to allow a request for injunctive relief to be referred to the arbitral tribunal’. Id. (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 215 (7th Cir. 1993)).”

[19] “However, for the reasons set forth in the next section, the Court lacks jurisdiction over Slinger’s breach of contract claim against ZYNP. Therefore, the Court will not allow the injunction proceedings to go forward because it lacks
jurisdiction to enter the injunction sought by Slinger. Without jurisdiction to
order specific performance under the Slinger-ZYNP contract, the Court is unable
to issue an order maintaining the status quo pending arbitration.”

[20] In the last section of its decision, the court held that ZYNP lacked the
“minimum contacts” with the forum allowing the court to exercise personal
jurisdiction against it, either on grounds of general jurisdiction (which requires
“continuous and systematic general business contacts” with the forum) or on
grounds of specific jurisdiction. Specific jurisdiction is asserted when the causal
connection between the litigation and the defendants’ contacts with the forum
state is “close enough to comport with fair play and substantial justice”. This was
not the case for Slinger’s breach of contract claims. The court continued:

[21] “As for the tort claims, it is more reasonable to conclude that ZYNP (and
Nemak) could be haled into Wisconsin court under what is referred to as the
‘effects doctrine’, which is liberally construed in the Seventh Circuit. See, e.g.,
Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) (applying effects
document to tortious interference with prospective economic advantage claim and
holding ‘the state in which the injury (and therefore the tort) occurs may require
the wrongdoer to answer for its deeds even if events were put into train outside
its borders’).

[22] “Assuming, without deciding, that the effects doctrine would ensnare
Slinger’s tort claims against ZYNP and Nemak, the Court still may not proceed
to the merits of Slinger’s request for injunctive relief. The only way to maintain
the status quo in the instant case is to order specific performance under Slinger’s
contract with ZYNP. That is how the supply chain from ZYNP (tier 3) to Slinger
(tier 2) to Nemak (tier 1) will be restored. Even though Slinger alleges
irreparable harm with respect to its various tort claims, the exercise of
jurisdiction over those claims would not authorize the Court to restore the
supply chain. An order enjoining Nemak from buying the Parts directly from
ZYNP (or an order requiring that Nemak purchase the Parts directly from
Slinger) would not maintain the status quo unless ZYNP was also forced to
continue supplying Parts to Slinger.⁶

[23] “Even though the Court may have jurisdiction over ZYNP and Nemak with
respect to Slinger’s tort claims, the Court will not exercise ‘pendent personal
jurisdiction’ over Slinger’s breach of contract claim against ZYNP. ‘Under the

⁶  “For example, Slinger requests an order ‘prohibiting Nemak from purchasing the Parts directly or
indirectly from ZYNP ... unless those parts are supplied by Slinger’... This request clearly
contemplates Slinger’s re-insertion into the supply chain. Unless ZYNP is ordered to continue
supplying the Parts to Slinger, Slinger’s entire basis for injunctive relief collapses.”

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doctrine of pendent personal jurisdiction, a court may exercise its discretion to
hear claims as to which personal jurisdiction may otherwise be lacking if those
claims arise out of a common nucleus of facts with claims as to which personal
jurisdiction exists.’ Banwell v. Illinois College of Optometry, 981 F. Supp. 1137, 1141
n. 4 (N.D. Ill. 1997).
[24] “The doctrine of pendent personal jurisdiction ‘is a confusing and
complicated one which courts sometimes overlook’. Beveridge v. Mid-West
Management, Inc., 78 F. Supp. 2d 739, 745 n. 3 (N.D. Ill. 1999). As noted by a
leading commentator, in the diversity of citizenship context, a ‘pendent personal
jurisdiction policy in a state whose long-arm statute extends to the fullest
permissible limits … would either be redundant or unconstitutional’, Wright &
Miller, Federal Practice and Procedure 3d Sect. 1069.7. It would be redundant if it
‘only captured claims that might have been captured by the state’s long-arm
statute’. Id. It would be unconstitutional if it captured claims that ‘fall outside of
the Fourteenth Amendment’s due process limits on the state’s long-arm statute’.
Id.
[25] “Wisconsin’s long-arm statute reaches to the full extent allowed by due
process, see Pebble Beach Co. v. Northern Bay LLC, 405 F. Supp. 2d 1019, 1023
(W. D. Wis. 2005), and the Court already determined that the exercise of
jurisdiction over the contract claim violates due process. Therefore, pendent
personal jurisdiction should not be applied because all of the claims are grounded
349, 357 (E. D. Pa. 1988); Stelax Industries, Ltd. v. Donahue, No. 3:03-CV-923-M,
2004 WL 733844 at *9 (N. D. Tex.).”
[26] “Even if the Court could exercise pendent personal jurisdiction over
Slinger’s breach of contract claim against ZYNP without running afoul of due
process, the Court would decline to do so. In its discretion, the Court may
decline to address pendent claims ‘where considerations of judicial economy,
convenience and fairness to litigants so dictate’. Oetiker v. Werke, 556 F. 2d 1, 5
(D. C. Cir. 1977). It would be unfair to require litigation in Wisconsin when the
contracting parties contemplated litigation before an arbitration panel in a foreign
country.”

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7. “The doctrine is more typically and appropriately invoked in cases where ‘one or more federal
claims for which there is nationwide personal jurisdiction are combined in the same suit with one
or more state or federal claims for which there is not nationwide personal jurisdiction’. Action
Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F. 3d 1174, 1180-1181 (9th Cir. 2004)…”

V. CONCLUSION

[27] “Many, if not all, of the claims in this matter are arbitrable claims. The Court also lacks jurisdiction over Slinger’s claim for specific performance and injunctive relief pursuant to its contract with ZYNP.”
657. United States Court of Appeals, Fifth Circuit, 29 September 2008, Case No. 06-30262

Parties: Plaintiff/Appellee: Safety National Casualty Corporation (nationality not indicated)
Intervenor Plaintiff/Appellee: Louisiana Safety Association of Timbermen-Self Insurers Fund (US)
Defendant/Appellant: Certain Underwriters at Lloyd’s, London (nationality not indicated) et al.

Plaintiff/Appellant: Certain Underwriters at Lloyd’s, London (nationality not indicated)
Defendants/Appellees: (1) Safety National Casualty Corporation (nationality not indicated)
(2) Louisiana Safety Association of Timbermen (US)

Published in: 543 Federal Reporter, Third Series (5th Cir.) p. 744; 2008 U.S. App. LEXIS 20917

Articles: II(3)

Subject matters: – invalidity of arbitration clause because of violation of state law on insurance
– 1958 New York Convention not reverse preempted by state law on insurance

Commentary Cases: ¶ 223; [27] = ¶ 214

Facts

Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT), a self-insurance fund, provided workers’ compensation insurance for its members. Certain Underwriters at Lloyd’s, London (the Underwriters) provided excess insurance to LSAT by reinsuring claims for occupational-injury occurrences that exceeded the amount of LSAT’s self-insurance retention. Each reinsurance agreement contained an arbitration clause.

LSAT allegedly assigned its rights under the reinsurance agreements to Safety
National Casualty Corporation (Safety National). The Underwriters refused to recognize the assignment, contending that LSAT’s obligations were strictly personal and therefore non-assignable. Safety National sued the Underwriters in the United States District Court for the Middle District of Louisiana. The Underwriters filed a motion to stay proceedings and compel arbitration. The district court granted the motion and stayed the lawsuit.

The Underwriters then initiated arbitration against Safety National and LSAT. When the parties could not agree upon the manner of selection of the arbitrators, the Underwriters filed a motion in the district court to lift the stay in order to join LSAT as a party and to compel arbitration to resolve the dispute about how to compose the arbitral tribunal. In response, LSAT moved to intervene, lift the stay and quash arbitration, arguing that the arbitration agreements in the reinsurance agreements were unenforceable under Louisiana law.

The district court reconsidered its initial decision and granted LSAT’s motion to quash arbitration, holding that although the 1958 New York Convention would otherwise require arbitration, a Louisiana statute that has been interpreted to prohibit arbitration agreements in insurance contracts was controlling.

The United States Court of Appeals for the Fifth Circuit, before King, DeMoss and Owen, CJJ, in an opinion by Priscilla R. Owen, reversed the lower court’s decision.

The Court noted that under the McCarran-Ferguson Act, insurance regulation is a matter of public interest and no “Act of Congress” shall be construed to supersede any state law regulating the business of insurance.

The Court held however that the New York Convention is not an Act of Congress within the meaning of the McCarran-Ferguson Act. Even if it is not self-executing and requires enabling legislation passed by Congress, an international treaty “remains something more than an act of Congress”. Also, there was no indication in the McCarran-Ferguson Act that Congress intended any future treaty implemented by an act of Congress to be abrogated to the extent that treaty conflicts with a state law regulating insurance. Hence, the Court of Appeals concluded that the McCarran-Ferguson Act does not cause the Louisiana statute at issue – LA. REV. STAT. ANN. Sect. 22:629 – to reverse-preempt the Convention.
Excerpt

[1] “The basis for this interlocutory appeal pursuant to 28 U.S.C. Sect. 1292(b) is the district court’s denial of a motion to compel arbitration of a contractual dispute among three insurers. The district court concluded that because of the McCarran-Ferguson Act,1 the [1958 New York Convention]2 and federal legislation providing that the Convention shall be enforced in United States courts, found in 9 U.S.C. Sects. 201-208, are reverse preempted by LA. REV. STAT. ANN. Sect. 22:629. We disagree.

(....)

[2] “The Louisiana statute at issue provides:

‘A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state … shall contain any condition, stipulation, or agreement:

....

(2) Depriving the courts of this state of the jurisdiction of action against the insurer.

....

C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.’3

Although it is not clear from this provision’s text that arbitration agreements are voided, Louisiana courts have held that such agreements are unenforceable because of this statute.4

[3] “The McCarran-Ferguson Act provides that


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‘Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.’

The Act further provides,

‘[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance ...’.

[4] “The Convention does not specifically relate to the business of insurance. Nor do Underwriters challenge the district court’s conclusion that LA. REV. STAT. ANN. Sect. 22:629, when applied to disputes arising under reinsurance agreements between insurers, regulates the business of insurance within the meaning of the McCarran-Ferguson Act. Accordingly, we will assume, without deciding, that the Louisiana statute does regulate the business of insurance, although the matter is not entirely free from doubt. One of the criteria for determining whether a law regulates the business of insurance is whether it has the effect of spreading or transferring a policyholder’s risk.

[5] “The Supreme Court has emphasized that arbitration agreements are forum-selection provisions and do not displace substantive rights afforded by a
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statute or other substantive law. An argument could be made that at least in theory, resolving claims in an arbitration rather than in a court before a jury does not substantially affect the risk pooling arrangement between the insurer and the insured. However, this court has held in American Bankers Insurance Co. of Florida v. Inman that the Federal Arbitration Act was reverse preempted by the McCarran-Ferguson Act in the context of a dispute between an injured insured and his insurer regarding underinsured-motorist coverage governed by Mississippi law. Therefore, this issue is foreclosed in this circuit and in any event is not before us.

[6] “The Underwriters set forth three issues: whether (1) the [1958 New York Convention] is an ‘Act of Congress’ within the meaning of the McCarran-Ferguson Act, (2) the McCarran-Ferguson Act applies to international commercial transactions, and (3) the Convention takes precedence over the McCarran-Ferguson Act even if the latter applies to international transactions. For the reasons we consider below, we are persuaded that Congress did not intend to include treaties within the scope of an ‘Act of Congress’ when it used those words in the McCarran-Ferguson Act, and we therefore do not reach other issues pressed by the Underwriters.

[7] LSAT contends that treaties stand on equal footing with acts of Congress, the Convention was not self-executing and could only have effect in the courts of this country when Congress passed enabling legislation, and therefore, the Convention’s enabling legislation is the equivalent of an ‘Act of Congress’ within the meaning of the McCarran-Ferguson Act.

[8] LSAT is correct that an act of Congress is on full parity with a treaty.


11. "See 436 F.3d 490, 494 (5th Cir. 2006) (holding that a state law prohibiting ‘required arbitration of disputes stemming from the uninsured motorist coverage provisions ... regulates risk by subjecting all [such] policy disputes ... to the possibility of a jury trial’)."

12. "15 U.S.C. Sect. 1012(b) (‘No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance....’)."

13. "Reid v. Covert, 354 U.S. 1, 18, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion) (‘[An Act of Congress is] on a full parity with a treaty....’); Bearden v. Greene, 523 U.S. 371, 376, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (per curiam) (same) (quoting Reid, 354 U.S. at 18); see also Egle v. Egle, 715 F.2d 999, 1013 (5th Cir. 1983) (‘Under our Constitution, treaties and statutes are equal in dignity. If a treaty and a statute are inconsistent, “the one last in date will control the
“[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”14

[9] “The Underwriters maintain that the Convention was ratified after the McCarran-Ferguson Act was enacted and that in any event the Convention is self-executing, which means that it did not require an act of Congress to have effect in United States courts. The Underwriters assert that a ‘later-in-time self-executing treaty supersedes a federal statute if there is a conflict’.15 The Convention is not an act of Congress, the Underwriters alternatively contend, even if the Convention was not self-executing, because a treaty is more than an act of Congress.

[10] “It is unclear whether the Convention is self-executing. The Supreme Court’s recent decision in Medellin v. Texas instructs that ‘[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text’. Id. at 1357. In Medellin, the Court examined the Vienna Convention on Consular Relations16 and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention17 to determine whether a judgment of the International Court of Justice (ICJ) was ‘directly enforceable as domestic law in a state court in the United States’.18 The United States had agreed to submit disputes arising out of the Vienna Convention to the ICJ, but the Supreme Court recognized that ‘submitting to jurisdiction and agreeing to be bound are two different things’. Id. at 1358. The Court observed that the Optional Protocol ‘says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment’. Id. The Court went on to consider any obligations imposed by Art. 94 of the United Nations Charter, finding that it also ‘does not provide that the United States ‘shall’ or ‘must’ comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts’. Id. By contrast, the [1958 New York

18. “Medellin, 128 S.Ct. at 1353.”
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Constitution] express states that courts ‘shall’ compel arbitration when requested by a party to an international arbitration agreement [quotation of Art. II(3) Convention omitted].

[11] “The Convention additionally sets forth at least some procedures to be followed in obtaining enforcement of an arbitration award.” However, the Supreme Court indicated in dicta in Medellin that at least the provisions of the Convention pertaining to the enforcement of judgments of international arbitration tribunals are not self-executing. This reference in Medellin could be read to imply that the Convention in its entirety is not self-executing, although such a conclusion cannot be drawn with any certainty from the brief discussion in the Court’s opinion.

[12] “But even if the Convention required legislation to implement it in United States courts, that does not mean that Congress intended an ‘Act of Congress’, as that phrase is used in the McCarran-Ferguson Act, to include a treaty. Implementing legislation does not replace or displace a treaty. A treaty remains something more than an act of Congress. It is an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not Congress. The fact that a treaty stands on equal footing with legislation when implemented by Congress does not mean that it ceases to be a treaty and becomes an ‘Act of Congress’.

[13] “The Supreme Court has indicated that the preemptive reach of the McCarran-Ferguson Act was not intended to extend to the conduct of foreign affairs. The Supreme Court considered in American Insurance Ass’n v. Garamendi whether a state law, aimed at aiding Holocaust victims by requiring insurers to disclose information about insurance policies sold in Europe before and during World War II, interfered with the Federal Government’s conduct of foreign affairs.

20. “See id. Arts. III, IV.”
21. “See Medellin, 128 S.Ct. at 1366 (‘Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. [citing 9 U.S.C. Sects. 201-208] ... Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.’ (citation omitted)); see also Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) [reported in Yearbook 1 (1976) pp. 203-204 (US no. 4)] (observing, although not in the context of whether the Convention was self-executing, ‘Congress passed Chapter 2 of the United States Arbitration Act in order to implement the Convention’ (citation omitted)).
22. “See U.S. CONST. Art. II Sect. 2 (‘[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ...’).”

23. The President of the United States had entered into an executive agreement with Germany’s chancellor in which the United States agreed that whenever a German company was sued in an American court regarding a Holocaust-era claim, the United States government would submit a statement that ‘it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II’. This and other executive agreements regarding Holocaust claims had not been ratified as treaties by the United States Senate but were instead acts solely of the Executive Branch.

The Supreme Court observed that ‘[g]enerally, ... valid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like [California’s law], the issue would be straightforward’. The Court ultimately concluded that the state law conflicted with Presidential foreign policy as expressed in executive agreements with foreign nations and was preempted. In addressing California’s argument that in the McCarran-Ferguson Act ‘Congress authorized state laws of [the] sort [California had enacted]’, the Court said,

‘As the text itself makes clear, the point of McCarran-Ferguson’s legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised…. [A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.’

We think it unlikely that when Congress crafted the McCarran-Ferguson Act, it intended any future treaty implemented by an act of Congress to be abrogated to the extent that treaty conflicted in some way with a state law regulating the business of insurance if Congress’s implementing legislation did not expressly save the treaty from reverse preemption by state law. If this had been Congress’s intent, it seems probable that Congress would have included ‘or any treaty requiring congressional implementation’ or similar language following
‘Act of Congress’ and ‘such Act’ when it said, ‘[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance … unless such Act specifically relates to the business of insurance’. 28 There is no indication in the McCarran-Ferguson Act that Congress intended, through the preemption provision and the use of the term ‘Act of Congress’, to restrict the United States’ ability to negotiate and implement a treaty that might affect some aspect of international insurance agreements in the same way that other international agreements would be affected by the terms of the treaty. If that were Congress’s intent, it would seem, as we have said, that Congress would have more clearly articulated its design.

[16] “Most importantly, there is no apparent reason why Congress would have chosen to distinguish in the McCarran-Ferguson Act between treaties that are self-executing and those that are not. It is undisputed that if the provisions in the Convention directing courts to enforce international arbitration agreements were self-executing, then the McCarran-Ferguson Act would have no preemptive effect because self-executing treaties are not an ‘Act of Congress’. No rationale has been offered by anyone as to why Congress would have intended to include a treaty that requires implementation by Congress within the reach of the McCarran-Ferguson Act’s reverse preemption provisions but not self-executing treaties.

[17] “We are aware that the Second Circuit has held that ‘the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation’. 29 As a consequence, the Second Circuit held Congress’s ‘implementing legislation [did] not preempt’ 30 a Kentucky statute that ‘subordinated’ all ‘choice of law or arbitration provisions’ in a contract to which an insolvent insurer in liquidation proceedings was a party. 31 The court reasoned that ‘when the terms of [a treaty] import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court’ . 32 The court then quoted the ‘[n]o Act of Congress’ provision in the McCarran-Ferguson Act and said, ‘[a]ccordingly, the

30. “Id.,”
31. “Id. at 43.,”
32. “Id. at 45.”
implementing legislation does not preempt the Kentucky Liquidation Act ...'. 33
[18] “We agree, of course, that when provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress. But, we submit, this does not answer the question of what Congress intended when it used the terms ‘in no Act of Congress’ and ‘such Act’ in 1945 or why Congress would have addressed only treaties that required implementation by Congress. The text of the McCarran-Ferguson Act does not support the inclusion by implication of ‘a treaty implemented by an Act of Congress’. Because we give the phrases ‘Act of Congress’ and ‘such Act’ their usual, commonly understood meaning, we conclude that treaties, self-executing or not, are not reverse preempted by the McCarran-Ferguson Act.

[19] “The Supreme Court’s decision in Missouri v. Holland 34 reflects that a treaty followed by implementing legislation, may accomplish more than either treaty or an Act of Congress, standing alone. The United States had consummated a treaty with Great Britain to protect migratory birds, and the treaty stated that ‘the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out’. 35 Accordingly, the treaty was not self-executing. An act was passed giving effect to the Convention, directing the Secretary of Agriculture to promulgate regulations and prohibiting the killing of migratory birds except as permitted by regulations compatible with the treaty. 36 The State of Missouri sought to prohibit the enforcement of the Migratory Bird Treaty Act and the Secretary’s regulations, arguing that the statute interfered with rights reserved to the States by the Tenth Amendment. 37

[20] “The Supreme Court recognized a difference between acts of Congress and ‘a treaty followed by such an act’. 38 It observed that ‘[a]n earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad ...’ 39 The Court said, ‘[w]hether the two cases cited [holding the prior Acts of Congress “bad”] were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority

33. “Id.”
34. “252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, 18 Ohio L. Rep. 61 (1920).”
35. “Id. at 431.”
36. “Id. at 431-432.”
37. “Id. at 430-431.”
38. “Id. at 433.”
39. “Id. at 432.”
of the United States."40 The Court continued, '[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could....'41 The Supreme Court ultimately concluded 'that the treaty and statute must be upheld'.42

[21] "In the present case, as in Holland, the treaty followed by the implementing legislation, must be considered as the sum of its parts, not piecemeal, in determining what Congress meant when it used the words 'Act of Congress' and 'such Act' in the McCarran-Ferguson Act.

[22] "Our focus on congressional intent and the conclusion that referral to arbitration is required in this case is reinforced by the Supreme Court’s analysis in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,43 although the McCarran-Ferguson Act was not implicated in that case. The question was the ‘arbitrability, pursuant to the Federal Arbitration Act and the [Convention], of claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction’.44 The Court held such claims were arbitrable.45 But in the process, the Supreme Court explained that ‘not ... all controversies implicating statutory rights are suitable for arbitration’.46 In determining which are not, the Court said ‘[j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable’.47 Importantly, the Court said, '[w]e must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history'.48

[23] "Later in the Mitsubishi decision, the Supreme Court observed that '[t]he
Convention reserves to each signatory country the right to refuse enforcement of an award where the “recognition or enforcement of the award would be contrary to the public policy of that country.” 49 The Court also noted that ‘Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve “subject matter capable of settlement by arbitration”, contemplates exceptions to arbitrability grounded in domestic law’. 50 ‘Yet in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope.’ 51

‘Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation’s obligations under the Convention.’ 52 But the Court ‘decline[d] to subvert the spirit of the United States’ accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.’ 53

[24] “The question, then, is whether the use of ‘no Act of Congress’ and ‘such Act’ in the McCarran-Ferguson Act is an express direction by Congress that a treaty such as the Convention is preempted to the extent it ‘invalidate[s], impair[s], or supersede[s]’ a state law that renders arbitration clauses unenforceable. For the reasons considered above, the text and context of the McCarran-Ferguson Act compel us to conclude that it contains no such express congressional direction.

[25] “The McCarran-Ferguson Act embodies a strong policy that the states have an interest in the regulation of the business of insurance. A reinsurance contract that has the potential to affect policyholders within a state unquestionably relates to the business of insurance. But concerns that a state’s regulatory policies regarding such contracts may not be recognized in an international arbitration are ameliorated by provisions in the Convention and are not a basis for refusing to require that an arbitration go forward. The Supreme Court explained in Mitsubishi, in the context of federal antitrust law, that

‘[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to

50. “Id. at 639 n. 21 (‘And it appears that before acceding to the Convention the Senate was advised by a State Department memorandum that the Convention provided for such exceptions.’).”
51. “Id.”
52. “Id.”
53. “Id. (emphasis added).”
Courts decisions on the New York Convention 1958

Ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.\textsuperscript{55}

As already noted, the Court recognized,

‘[t]he Convention reserves to each signatory country the right to refuse enforcement of an award where the “recognition or enforcement of the award would be contrary to the public policy of that country”’.\textsuperscript{56}

The Court observed

‘[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them’.\textsuperscript{57}

The same is true of any Louisiana laws that apply to the reinsurance agreements presently at issue.

\textsuperscript{26} “The Supreme Court emphasized in \textit{Mitsubishi} that ‘[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade’.\textsuperscript{58} The Court admonished:

‘If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration”, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.’\textsuperscript{59}

\textsuperscript{27} “We note that as ratified by the United States, the Convention applies ‘only to differences arising out of legal relationships ... which are considered as

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\textsuperscript{55} “\textit{Mitsubishi}, 473 U.S. at 638.”
\textsuperscript{57} “Id.”
\textsuperscript{58} “Id.”
\textsuperscript{59} “Id. at 638-639 (quoting \textit{Kalakundis Shipping Co. v. Amtorg Trading Corp.}, 126 F.2d 978, 985 (2d Cir. 1942)).”

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commercial under the national law of the State’ ratifying or acceding to the Convention’. There is no doubt that the present dispute among three insurers arises out of legal relationships that are commercial. We are not called upon to explore the outer bounds of what ‘commercial’ legal relationships may encompass.

[28] “In sum, the McCarran-Ferguson Act does not cause LA. REV. STAT. ANN. Sect. 22:629 to reverse preempt the Convention with regard to the dispute before us.” (....)

60. “Art. I(3), 21 U.S.T., at 2561 n. 3.”
Parties:
Petitioner: EDF International S.A. (nationality not indicated)
Respondent: YPF S.A. (nationality not indicated)

Published in:
20 November 2008: U.S. Dist. LEXIS 95378
13 August 2009: U.S. Dist. LEXIS 72696

Articles:
I(1); III; V(1)(e); VI

Subject matters:
– award suspended by competent authority v. suspended by statute
– suspension of enforcement in country of origin
– stay v. dismissal of court proceedings
– three-year period of limitation to request enforcement of foreign award (Sect. 207 Federal Arbitration Act (FAA))
– stay of enforcement proceedings pending annulment action

Commentary Cases:

Facts

By a sale and purchase agreement of 30 March 2001, EDF International S.A. (EDFI) purchased the shares of two Argentinian companies from, inter alia, the predecessor of YPF S.A. (YPF). The agreement provided for arbitration of disputes by three arbitrators in Buenos Aires, Argentina, with application of Argentinian substantive law. The arbitration clause further provided that the award was not subject to appeal.

Also on 30 May 2001, and on 31 May 2001, the parties executed two supplements to the initial agreement, contemplating modification of the purchase price based on two contingencies: an agreement providing for a change of the purchase price based on a tariff revision scheduled for 31 August 2001 and an...
agreement providing for a modification of the purchase price if the *desvinculación* (de-linking) of the Argentinian peso with respect to the US dollar took place before 31 December 2001.

In July 2002, EDFI filed a request for arbitration against YPF, alleging that it was entitled to additional payment pursuant to the *desvinculación* contingency. YPF counterclaimed, alleging that it too was entitled to additional payment, but pursuant to the tariff revision contingency. In October 2007, an arbitral tribunal in Argentina awarded US$ 40 million to EDFI and US$ 11,066,150 to YPF, the net result being an award of US$ 28,933,850 to EDFI.

Both parties sought annulment of the award before the court of appeals in Buenos Aires. On 18 March 2008, YPF petitioned the Buenos Aires court for a declaration that its challenge to the arbitral award effected a stay of the award’s terms; it also made a “precautionary” request for an injunction enjoining foreign enforcement of the award. One week later, EDFI sought enforcement of the award in the United States District Court for the District of Delaware. Before the hearing in the district court took place, the Buenos Aires court of appeals declared that the appeal had a staying effect on the award and held that an injunction against foreign enforcement was “unnecessary”.

By the first decision reported below, on 20 November 2008, the district court, per Joseph J. Farnan, Jr., US DJ, dismissed the action, holding that enforcement of the Argentinian award was not possible under Art. V(1)(e) of the 1958 New York Convention because, as argued by YPF, the award had been suspended by the decision of the court in Buenos Aires.

EDFI pointed to a 2005 case of the Northern District of Illinois, *Alto Mar Girassol* (see below), where the court granted enforcement even if the award had been automatically suspended pending appeal by operation of French law. The court agreed that the facts of this case were similar. However, the award was not suspended here pursuant to a statute but pursuant to a decision of a competent authority, the Buenos Aires court. The issue of whether the suspension was or was not ordered by a competent authority, noted the district court, was critical to the *Alto Mar Girassol* court in light of the New York Convention’s requirement that the award be suspended by “a competent authority” for the court to even consider declining enforcement.

The court denied EDFI’s argument that the present case was nonetheless similar because proceedings are almost always stayed in Argentina when an appeal is pending, so that the stay here was, like the stay in *Alto Mar Girassol*, “automatic”. The district court disagreed, noting that the Buenos Aires court discussed the issue at length and ultimately concluded in favor of staying
execution mostly based on the fact that both parties had filed challenges to the arbitral award. Hence, the stay was not automatic as argued by EDFI.

EDFI also contended that the Argentinean court dismissed YPF’s precautionary request to enjoin foreign enforcement of the award, thus allegedly countenancing foreign enforcement. The district court held that this interpretation of the decision of the Buenos Aires court was incorrect, since that court in fact decided that it was “unnecessary” to render an opinion on YPF’s request, in light of its decision that the parties’ appeals had staying effects. This is the first decision reported below.

By the second decision reported below, rendered on 13 August 2009, the district court, again per Joseph J. Farnan, granted EDFI’s motion to amend the 20 November 2008 order and stay, rather than dismiss, the action pending the annulment proceedings against the award in Argentina. EDFI argued that if the Argentinean annulment action took longer than three years, EDFI would be precluded from requesting enforcement because Chapter 2 of the Federal Arbitration Act (FAA) provides that enforcement of a Convention award must be sought within three years after the award “is made” (Sect. 207 FAA). EDFI referred to a 1993 Second Circuit decision in Seetransport (see below), where that Court refused to interpret the word “made” as meaning “became final” and deemed that an enforcement action filed two years after the French Supreme Court finally denied the defendant’s request to annul the award, but more than four years after the original arbitration decision, was time-barred.

The district court agreed that the decision in Seetransport strongly suggested that EDFI may be barred from seeking enforcement if the Argentinean annulment proceedings took longer then three years and concluded that a stay was “more appropriate than outright dismissal”. This is the second decision reported below.

Excerpt

Decision of 20 November 2008

[1] “By its petition, EDFI requests the Court to confirm the arbitral award and enter judgment in EDFI’s favor in the amount of [US]$ 28,933,850.00 plus interest…. EDFI brought the petition pursuant to the [1958 New York Convention], 9 U.S.C. Sect. 202 et seq.

[2] “In response, by way of its motion to dismiss the award, YPF contends that the Court should deny EDFI’s petition pursuant to Art. V(1)(e) of the New York Convention, which gives this Court discretion to refuse to confirm an arbitral
award if it ‘has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made’....

In this regard, YPF points to the 22 April 2008 order of the Court of Appeals in Buenos Aires holding that the parties’ dual appeals of the award ‘must be declared to be suspensive in nature’....

YPF further contends that it would be ‘incongruous’ to permit EDFI to enforce portions of the award here while at the same time complaining in an Argentinean court that other aspects of the award are ‘completely arbitrary and unreasonable’, ‘tortuous and contradictory’ and filled with ‘inconsistencies and fallacies’....

[3] “In response to YPF’s motion to dismiss, EDFI points to the Northern District of Illinois decision Alto Mar Girassol v. Lumbermens Mut. Cas. Co., No. 04-C-7731, 2005 U.S. Dist. LEXIS 7479 (N.D. Ill. 12 Apr. 2005).” In Alto Mar Girassol, the court considered whether it should declare to refuse a French arbitral award where a French statute required execution of the award to be stayed pending appeal. Alto Mar Girassol, 2005 U.S Dist. LEXIS 7479 at *8-*9. The court chose not to decline enforcement on the basis of the statutory stay, explaining that Art. V(1)(e) of the New York Convention required a ‘competent authority’ to suspend the award, not just a statutory stay. The court further noted that failing to enforce the award would be inconsistent with the New York Convention’s purpose of facilitating enforcement of arbitral awards. Id. at *10-*11. Nevertheless, the court in Alto Mar Girassol chose to stay its own proceedings pending review of the appeal, explaining that this would reduce the complexity and cost of the case and promote international comity. Id. at *11-*12.

[4] “Sect. 201 of Title 9 of the United States Code states that ‘the New York Convention] shall be enforced in United States Courts in accordance with this chapter’. Art. I of the Convention states that it ‘shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between people, whether physical or legal’.

1. "If the Court were to decide not to dismiss EDFI’s petition outright, YPF asks that we stay these proceedings pending completion of the Argentinean appeal. Given the Court’s decision to dismiss the petition outright, the Court need not address YPF’s alternate request."

2. “The parties rely on different translations of the Argentine Appeals Court’s order. EDFI’s translation of the order is that the ‘challenge filed has staying effects’.... Thus, YPF contends that the Order of the Appeals Court was ‘suspensive’, while EDFI contends that the order had ‘staying effect’. In its reply brief, EDFI does not contend that there is a meaningful distinction between the two translations, and the Court will not interpret the two translations as being substantively different.”

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Convention applies to the present arbitral award since it was awarded in Argentina and EDFI seeks to enforce the award in the United States.

[5] “Federal law requires that United States courts confirm foreign arbitral awards falling under the Convention except in very limited circumstances. Sect. 207 of Title 9 of the United States Code states that:

‘Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.’

Because EDFI moved for confirmation within three years of receiving its arbitral award, this Court is required to confirm the arbitral award unless YPF can prove a ground for refusal as set out in the Convention.

[6] “The 1958 Convention shifted the burden of proof in an enforcement action to the party opposing enforcement and limited its defenses to the seven set forth in Art. V. See Parsons & Whittemore Overseas Co. v. Société Generale de l’Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974). Art. V of the Convention states that ‘[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if the party furnishes to the competent authority where the recognition and enforcement is sought, proof that [one of the exceptions to recognition applies]’ [quotation of Art. V(1) omitted].

[7] “After reviewing the parties’ arguments in light of the requirements of the New York Convention, the Court declines to confirm the arbitral award.

[8] “The Court cannot locate and the parties have not identified any cases having facts well matched to those of the instant dispute. YPF directs the Court to three cases in which a foreign court completed its review of an arbitral award and then chose to set it aside completely.5 However, in the instant case, the

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arbitral award has not yet been set aside. It has merely been suspended pending review by the Argentinean courts.

[9] “In this respect, the facts of this case more closely parallel Alto Mar Girassol. However, there are key differences between Alto Mar Girassol and the instant dispute, and these differences are more illuminating than the similarities. Specifically, unlike as in Alto Mar Girassol, the suspension of the award here was not done pursuant to statute, an issue that was critical to the Alto Mar Girassol court in light of the New York Convention’s requirement that the award be suspended by ‘a competent authority’ for the court to even consider declining enforcement. See Alto Mar Girassol, 2005 U.S. Dist. LEXIS 7479 at *10-*11. Rather, it was the Buenos Aires Court of Appeals that declared that the appeal would stay the execution of the arbitral award. EDFI argues that this case is nonetheless like Alto Mar Girassol because the Argentine court analogized the situation to the appeal of an Argentinean judgment, where proceedings are almost always stayed pending appeal. In this respect, EDFI contends, the stay at issue here is, like the stay in Alto Mar Girassol, ‘automatic’.

[10] “However, the opinion of the Argentine Appeals Court does not reflect the same sort of ‘automatic’ statutory stay at issue in Alto Mar Girassol. Indeed, the Appeals Court explained that the ‘law is silent’ as to whether the general rule applicable to the appeal of an Argentinean judgment was also applicable, ‘either by analogy or implication’, to the situation presented. Thus, the Appeals Court relied on an ‘indicator’ in a treatise suggesting that staying execution of the award pending appeal would be ‘compatible’ with the annulment proceedings. Far from a decisive stay order, this language and reasoning reflects some uncertainty on the part of the Appeals Court. Indeed, the mere fact that the Argentine Appeals Court saw fit to prepare a reasoned opinion on the issue demonstrates that a stay of the award’s execution was not a preordained formality.

[11] “Furthermore, although the analogy to the appeal of an Argentinean judgment was no doubt important to the Appeals Court, what proved ultimately ‘conclusive’ was the fact that both parties had filed challenges to the arbitral award. That the Argentinean Appeals Court considered this fact so critical in concluding a stay was necessary demonstrates that the matter did not, as EDFI contends, turn exclusively on the fact that appeals of Argentinean judgments generally result in a stay. Accordingly, the Court concludes that, unlike as in Alto Mar...
Mar Girassol, this is a case where a ‘competent authority’ exercised its power to suspend execution of the arbitral award.

[12] “As a secondary argument, EDFI contends that the Argentinean Appeals Court specifically considered YPF’s ‘precautionary’ request to enjoin foreign enforcement of the arbitral award, but chose not to do so, leading to the conclusion that the Appeals Court countenanced foreign enforcement....

[13] “The Court disagrees with this assessment of the Appeals Court opinion. According to EDFI’s translation of the Appeals Court opinion, the Appeals Court concluded that it was ‘unnecessary’ to render an opinion on YPF’s ‘precautionary’ request that foreign enforcement be enjoined specifically in light of its decision that the parties’ appeals had staying effects.... Thus, the Argentine Appeal Court was ostensibly of the opinion that its stay would actually moot foreign enforcement proceedings, such that an additional order was ‘unnecessary’.

[14] “Notably, although the court in Alto Mar Girassol rejected the notion that a statutory suspension of arbitral awards precluded foreign enforcement of arbitral awards, it nevertheless declined to immediately enforce an award that was subject to a statutory suspension. Alto Mar Girassol, 2005 U.S. Dist. LEXIS 7479 at *11-*12. Instead, the court chose to stay its own proceedings pending review of the award in French courts. Id. In so doing, the court explained that a stay would reduce the overall complexity and cost of the litigation and comport with international comity. Id.

[15] “The Court agrees with this reasoning. However, given that a competent authority (i.e., the Buenos Aires Appeals Court) has in fact suspended the award, the Court will deny EDFI’s petition outright rather than simply stay the proceedings. Where both parties have (1) ignored the fact that their arbitration agreement calls for the results of arbitration to not be ‘subject to appeal’, and (2) challenged the award as being contrary to law, arbitrary, and in violation of public policy, the Court will not preserve an action to enforce the results of arbitration.

[16] “For the foregoing reasons the Court will deny EDFI’s petition and grant YPF’s motion to dismiss.”

(....)

Decision of 13 August 2009

[17] “A motion pursuant to Rule 59(e) may be granted only if the Court is presented with: (1) an intervening change in the controlling law; (2) the
availability of new evidence; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. Max’s Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citations omitted).

[18] “A motion for reconsideration is not properly grounded on a request that a court rethink a decision already made. See Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993). Motions for reargument or reconsideration may not be used ‘as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided’. Brambles USA, Inc. v. Blocker, 735 F.Supp. 1239, 1240 (D. Del. 1990). Reargument, however, may be appropriate where ‘the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension’. Brambles USA, 735 F.Supp. at 1241 (D. Del. 1990) (citations omitted); see also D. Del. LR 7.1.5.

[19] “The [1958 New York Convention] provides that ‘[w]ithin three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award ...’. 9 U.S.C. Sect. 207 (emphasis added). Pointing to the Second Circuit decision Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572 (2d Cir. 1993), a EDFI contends that the Court’s decision to dismiss this action outright may, if the Argentinean appeals process takes longer than three years, preclude it from enforcing the arbitration award....

[20] “In Seetransport, the arbitrators rendered a decision in France on 27 March 1984. Seetransport, 989 F.2d at 574. The defendants appealed the award to French Courts, and the French Courts dismissed the appeal on 4 March 1986. Id. at 576. However, the plaintiff did not seek to confirm the arbitral award until 28 March 1998, more than four years after the original arbitration decision. Id. In reviewing the district court’s decision that plaintiff’s claim for confirmation of the arbitral award was not time barred, the Second Circuit noted that the [1958 New York Convention] provides that the three-year statute of limitations on confirmation of arbitral awards begins to run when the arbitration award is first ‘made’. Notwithstanding the fact that only two years had passed since the appeals court completed its review of the arbitration decision, the Second Circuit held that allowing plaintiff to enforce the arbitral award four years after the arbitral panel first issued its decision would require the court to incorrectly interpret the word ‘made’ in Sect. 207 as ‘became final’. Id. at 581. Declining to alter the
statutory language in this manner, the Second Circuit held that plaintiff’s claim for confirmation of the arbitral award should be dismissed as time-barred under the three-year statute of limitations. Id.

[21] “The Court agrees that the Second Circuit decision in Seetransport strongly suggests that EDFI may be barred from enforcing the arbitration award if the Argentinean appeals process takes longer than three years. Although EDFI neither mentioned this possibility nor directed the Court to the Seetransport case in briefing its Motion to confirm the arbitral award, the Court concludes that this omission is excusable. Indeed, it would, in the Court’s view, have been unreasonable to require EDFI to prophylactically request a stay of this action in the event that the Court chooses not to enforce the arbitral award. In this respect, the Court’s decision to dismiss this action outright was perhaps not wholly within the spirit of the adversarial issues presented by the parties.

[22] “The Court further notes that in opposing EDFI’s Motion for confirmation of the arbitral award, YPF itself suggested that as an alternative to dismissing EDFI’s Motion outright, the Court stay confirmation of the arbitral award pending resolution of the Argentine appeal proceedings…. In these circumstances, the Court is unable to conclude that YPF would be significantly prejudiced should the Court stay this action rather than dismiss it. Indeed, in opposing the instant Motion, YPF does not identify any such prejudice…. Thus, having considered Seetransport, the Court concludes that stay is more appropriate than outright dismissal.

[23] “For the reasons discussed, the Court will grant EDFI’s Motion. An appropriate order will be entered.”

(....)
Facts

Ioannis Skordilis, at the time a Greek citizen, entered into an employment contract with Celebrity Cruises, Inc. (Celebrity). The contract, which was written in Greek, included a collective bargaining agreement (CBA) that provided for the application of Greek law and arbitration of disputes in Greece. Skordilis allegedly suffered two injuries while working aboard one of Celebrity’s cruise ships. He filed suit in Dade County Circuit Court claiming that Celebrity was negligent after his eye was splashed with cleaning fluid and that Celebrity’s negligence caused him to slip on a puddle of liquid soap in a stairwell on the vessel. Trial of the case was set for 10 November 2008.

In late October 2008, Celebrity removed the case to the United States District Court for the Southern District of Florida, Miami Division, under the 1958 New York Convention and then moved to compel arbitration and to stay the court proceedings pending the arbitration’s outcome. Although Skordilis did not respond to the motion, he filed a motion to remand the case to state court,
therefore tacitly opposing Celebrity’s motion. The district court first granted
Celebrity’s motion to compel arbitration.

Upon Skordilis’s motion for reconsideration, the court, per Federico A.
Moreno, US DJ, vacated the earlier holding. It reasoned at the outset that
referral to arbitration is mandatory unless four jurisdictional prerequisites are not
met or one of the affirmative defenses under the Convention applies. The four
prerequisites are that (1) there is an agreement in writing within the meaning of
the Convention; (2) the agreement provides for arbitration in the territory of a
signatory of the Convention; (3) the agreement arises out of a commercial legal
relationship and (4) a party to the agreement is not an American citizen, or the
commercial relationship relates to a foreign state.

Skordilis argued in his motion to remand that he became a US citizen on 11
April 2008, so that the fourth prerequisite – non-citizenship – was not met. The
court noted however that Skordilis was a Greek citizen when he entered into the
employment contract and when he commenced the present action, and that
Skordilis could cite to no case in favor of his argument.

The district court added that in any event the fourth prerequisite was still met
because the commercial relationship between the parties related to a foreign
state, Greece, as the employment contract was written in Greek and called for
the application of Greek law and arbitration in Greece, and Skordilis was a Greek
citizen when he signed it.

The court then granted Skordilis’s argument that Celebrity waived its right to
arbitration because it persisted in litigating the suit in state court for fifteen
months, up to a few weeks before trial.

Excerpt

[1] “Sect. 205 of the New York Convention states that ‘[w]here the subject
matter of an action or proceeding in State court relates to an arbitration
agreement or award falling under the Convention, the defendant … may, at any
time before trial thereof, remove such action …’. 9 U.S.C. Sect. 205. In its
order … compelling arbitration and denying remand, the Court misread this
language to mean that the defendant may invoke the right to arbitrate the dispute
at any time before trial. Accordingly, the Court must reconsider Defendant’s
motion to compel arbitration. For the reasons stated below, the Court vacates
and strikes its previous order and denies Defendant’s motion to compel
arbitration.

In ruling on Defendant’s motion to compel arbitration pursuant to the New York Convention, the Court conducts a ‘very limited inquiry’. Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005). The Court ‘must order arbitration unless four jurisdictional prerequisites are not met ... or one of the Convention’s affirmative defenses applies’. Id. at 1294-1295. The Court must initially find that: (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen, or that the commercial relationship relates to a foreign state. Id. at 1295, n. 7.

While Plaintiff did not directly respond to Defendant’s motion to compel arbitration, Plaintiff’s motion for remand takes issue with the fourth prerequisite because Plaintiff allegedly became a US citizen after signing the employment contract, and after the commencement of this suit. Plaintiff also asserts the affirmative defense that Defendant waived its right to arbitration.

The fourth jurisdictional prerequisite requires that, either, a party to the agreement is not a US citizen, or that the commercial relationship relates to a foreign state. Plaintiff was a Greek citizen in 2006 when he entered into the employment contract with Defendant. It was only after the filing of this lawsuit that Plaintiff received US citizenship, on 11 April 2008. Plaintiff cites to no case, nor could the Court find any precedent, for the proposition that the non-citizenship prerequisite is not met where a party to the agreement later becomes a US citizen. At the time of the contract’s formation, the time of plaintiff’s
injury, and even at the commencement of this lawsuit in the 11th Circuit Court of Miami-Dade County, Plaintiff was not a US citizen. Despite Plaintiff’s urging, the Court declines to take this step with Plaintiff, for fear of slipping itself.

[6] “Even assuming arguendo that the Court must classify Plaintiff as an American citizen for the purpose of weighing the fourth jurisdictional prerequisite, the arbitration clause is still enforceable if the commercial relationship between the parties relates to a foreign state. Here, the employment contract was written in Greek and called for the application of Greek law, arbitration was to take place in Greece, and Plaintiff himself was a Greek citizen. Based on these facts, the Court finds that the commercial relationship relates sufficiently to Greece, satisfying the fourth jurisdictional prerequisite. Accordingly, the Court must compel arbitration absent any affirmative defenses raised by Plaintiff. See Bautista, at 1294-1295.

[7] “Indeed, Plaintiff raises the ‘domestic’ affirmative defense that Defendant waived its right to arbitration. See Id. at 1302 (noting that the Convention provides for the standard breach of contract defenses of fraud, mistake, duress, and waiver, any of which would render an arbitration clause ‘null and void’). Plaintiff alleges that Defendant’s persistence in litigating this suit in state court up to a few weeks before trial constitutes a waiver of its right to enforce the arbitration agreement. After reconsideration, the Court agrees that Defendant’s conduct in state court constitutes a waiver of its right to arbitration.

[8] “A waiver of the right to arbitration is appropriate where the Court finds, after reviewing the ‘totality of the circumstances’ that a party ‘has acted inconsistently with the arbitration right’. S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc., 906 F.2d 1507, 1514 (11th Cir. 1990) (internal quotations omitted); see also Morewitz v. West of England Ship Owners Mut. Prot. & Indemn. Assoc., 62 F.3d 1356, 1366 (11th Cir. 1995) (finding that a party waives the right to arbitration when it participates in a litigation ‘to a point inconsistent with an intent to arbitrate’ such that the other side is prejudiced); Inverrary Gardens Condo. I Assoc., Inc. v. Spender, 939 So.2d 1159, 1161 (Fla. 4th DCA 2006) (accord). In S & H Contractors, the Eleventh Circuit found that party may waive its right to arbitration after it ‘substantially invokes the litigation machinery prior to demanding arbitration …’. Id. After litigating for eight months after the filing of the complaint, the court found that the plaintiff in S & H Contractors had waived its right to arbitration. Id.

[9] “Here, the parties litigated this case in state court for fifteen months. Only on the eve of trial did Defendant abruptly enact its right to remove the case under Sect. 205 of the New York Convention, and subsequently move to compel arbitration. Allowing Defendant to continue this course would result in severe
prejudice to Plaintiff. The Court therefore agrees with Plaintiff that Defendant has waived its right to arbitration. See *S & H Contractors*, at 1514; see also *Triplecheck, Inc. v. Creole Yacht Charters Ltd.*, No. 05-21182-CIV-TORRES, 2006 U.S. Dist. LEXIS 87915, 2006 WL 3507971, at *1 (S.D. Fla. 5 Dec. 2006) (finding that Plaintiff waived right to arbitration after litigating case for over a year).

[10] “Upon reconsideration, the Court’s previous order … is hereby vacated and stricken. The Court finds that Defendant’s motion to compel arbitration is denied. The Court will separately rule on Plaintiff’s motion for remand.”
660. United States District Court, Northern District of California, San Jose Division, 23 January 2009, Case No. C 05-1887

Parties: Plaintiffs: (1) Polimaster Ltd. (Belarus); (2) Na&Se Trading Co. Ltd. (Cyprus)
Defendant: RAE Systems, Inc. (US)

Published in: 2008 U.S. Dist. LEXIS 107059

Articles: I(1); III; V; V(1)(d); V(2)(b)

Subject matters: – grounds for refusal of enforcement are exhaustive and strict
– domestic law applies to setting aside (vacatur) of 1958 New York Convention award
– excess of authority of arbitrators (no)
– irregularities in arbitration (counterclaim allowed)
– manifest disregard of the law
– entry-of-judgment clause (Sect. 9 Federal Arbitration Act (FAA))


Facts

On 15 January 2003, Polimaster Ltd. (Polimaster) and RAE Systems, Inc. (RAE) entered into a Nonexclusive License for Proprietary Information Usage Agreement (the License Agreement) enabling RAE to manufacture and distribute four Polimaster radiation monitor instruments in the United States and China. Na&Se Trading Co., Limited (Na&Se) – a corporation engaged in the business of licensing the rights to proprietary information and industrial intellectual property to be used in foreign countries – was also a party to the License Agreement and was to receive a royalty from RAE on each sale of a licensed
product. Also on 15 January 2003, Polimaster and RAE entered into a Product and Component Buy/Sell Agreement (the Buy/Sell Agreement) under which RAE was to buy from Polimaster components necessary for the manufacture of instruments, complete the instruments’ manufacture and/or subassembly and sell the finished products to Polimaster. The Buy/Sell Agreement contained a confidentiality clause. Both the License Agreement and the Buy/Sell Agreement contained an arbitration clause. The License Agreement specifically provided that disputes that could not be settled by good-faith negotiation were to be settled by arbitration “at the defendant’s site”.

In 2003 and 2004, disputes arose between Polimaster and RAE regarding RAE’s exclusive right under the License Agreement to manufacture instruments as well as RAE’s duties under the confidentiality clause. Polimaster and Na&Se filed a joint request for arbitration at RAE’s site in California. A sole arbitrator was appointed. The parties agreed to use JAMS (The Resolution Experts) Comprehensive Arbitration Rules & Procedures.

On 7 August 2006, RAE filed an answer which also asserted counterclaims; Polimaster argued that the sole arbitrator did not have jurisdiction over the counterclaims because, under the terms of the License Agreement, claims must be brought at the defendant’s location and because RAE failed to negotiate in good faith prior to bringing its claims. The parties could not agree on the proper body of procedural law to apply in settling this dispute: Polimaster argued that the Federal Rules of Procedure should apply, and RAE argued that the arbitrator should follow California law and/or JAMS Comprehensive Arbitration Rules. Finding that the contract was silent on the issue of whether counterclaims could be brought at the defendant’s location, the sole arbitrator analyzed the question under California law, the Federal Rules and the relevant JAMS provisions and denied Polimaster’s request to dismiss RAE’s counterclaims.

Hearings took place in March 2007. The parties agreed to a post-hearing briefing schedule that allowed each party to file two simultaneous briefs. However, the sole arbitrator subsequently allowed RAE to submit a third brief to address arguments pertaining to the counterclaims raised for the first time in Polimaster’s reply brief. On 5 July 2007, the arbitrator issued an interim award; on 20 September 2007, he issued a final award in favor of RAE. On 5 October 2007, RAE filed a motion to confirm the award in the United States District Court for the Northern District of California, San Jose Division. Polimaster and Na&Se opposed this motion and moved to vacate the award.

The district court, per Jeremy Fogel, US DJ, granted the motion to enforce the award and denied the motion to vacate it. The court reasoned at the outset that it could deny enforcement or vacate the award on the seven grounds listed
in the 1958 New York Convention as well as on the four grounds set out in Chapter 1 of the Federal Arbitration Act (FAA), which applies to domestic arbitration awards and agreements.

The court first denied Polimaster’s and Na&Se’s argument that the award should be vacated because the sole arbitrator exceeded his authority by allowing RAE to assert counterclaims at its own site despite the requirement in the arbitration clause that claims be brought at the defendant’s location. The court reasoned that under Chapter 1 of the FAA arbitrators exceed their powers only when their award is completely irrational, not when they merely interpret or apply the governing law incorrectly. Here, the License Agreement did not specifically address counterclaims and the arbitrator’s conclusion that the contract was silent on this issue was “arguably correct”. Because there was no agreement among the parties, it was also appropriate for the arbitrator to analyze the issue under the JAMS Rules as well as state and federal law, and “his legal analyses were sound”.

Nor did the sole arbitrator fail to act in accordance with the agreement of the parties in the sense of Art. V(1)(d) of the New York Convention, since the parties’ agreement did not address the procedural question at hand.

The court then held that Polimaster did not satisfy its burden to prove its allegation that the sole arbitrator manifestly disregarded the law because there was no legal basis for holding Polimaster liable for a breach of the Licensing Agreement. Polimaster did not indicate where the arbitrator allegedly erred and in fact the question of Polimaster’s liability under the License Agreement involved a finding of fact rather than a conclusion of law.

The district court also dismissed the contention that the arbitrator exceeded his authority by allowing the counterclaims to be arbitrated despite the fact that RAE had not made an adequate effort to settle them and allowed RAE to file a supplemented brief. The court held that there is a presumption that courts should not decide procedural questions relating to an arbitration agreement.

Finally, the court held that the provision in Chapter 1 FAA that enforcement can be granted only if the contract between the parties contained, along with the arbitration clause, an entry-of-judgment clause – under which the parties agree that an award can be confirmed by a court – does not apply in respect of non-domestic awards such as the present one. The court reasoned that the consent requirement is not included in Chapter 2 FAA, which implements the New York Convention, and that Chapter 1 applies to the enforcement of foreign arbitration awards and agreement only if it does not conflict with Chapter 2 or the Convention.
“Under 9 U.S.C. Sect. 207, a party to a foreign arbitration may apply to federal district court ‘for an order confirming the award as against any other party to the arbitration’. ‘The district court has little discretion: the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the New York Convention.’ *Ministry of Def. Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992). The grounds for vacating an award under the New York Convention are as follows.… [Quotation of Art. V Convention omitted.] These provisions are construed narrowly ‘[b]ecause a general pro-enforcement bias informed the convention’. Id.

‘Sect. 10(a) of the Federal Arbitration Act sets forth four grounds on which an arbitration award may be vacated:

‘(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.’

‘These Grounds afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures.’ *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 998 (9th Cir. 2003).”
1. DISCUSSION

1. Excess of Authority by Arbitrators

[3] “Polimaster and Na&Se argue that pursuant to the FAA, the award should be vacated because the Arbitrator exceeded his authority by allowing RAE to assert counterclaims at its own site despite the requirement in the arbitration agreements that claims be brought at the responding party’s location. ‘[A]rbitrators exceed their powers … not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational.’
Kyocera, 341 F.3d at 997 (internal quotation omitted). When a court reviews an arbitration award on this ground:

‘[t]he rule is, though the arbitrators’ view of the law might be open to serious question, an award which is one within the terms of the submission, will not be set aside by a court for error either in law or fact if the award contains the honest decision of the arbitrators, after a full and fair hearing of the parties’.

Coast Trading Co., Inc. v. Pac. Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982).

[4] “Where the party seeking to vacate the award has argued that the arbitrator exceeded his authority by deciding issues outside of the scope of the agreement, the Ninth Circuit has explained that the court ‘will not disturb an arbitration order so long as the arbitrator even arguably construed or applied the contract and acted within the scope of his authority’. Entm’t Publ’ns, Inc. v. Ravet, 7 Fed. Appx. 807, 808 (9th Cir. 2001).

[5] “Polimaster and Na&Se cite several cases for the proposition that courts must give effect to clearly drafted forum selection clauses. See Snyder v. Smith, 736 F.2d 409, 418 (7th Cir.); Felzen v. Andreas, 134 F.3d 873 (7th Cir.); KKW Entertainment, Inc. v. Gloria Jean’s [Gourmet] Coffees Franchising Corp., 184 F.3d 42, 48-50 (1st Cir. 1999); Nat’l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 330 (5th Cir. 1987). These cases are inapposite. While each of the cases cited by Polimaster and Na&Se involves a well-defined forum selection clause, the License Agreement does not address counterclaims. Accordingly, the Arbitrator’s conclusion that the contract was silent on this issue meets the ‘arguably correct’ standard. Because there was no clear agreement among the parties, it was appropriate for the Arbitrator to analyze the issue under the JAMS rules as well.

as state and federal law, and his legal analyses were sound. This Court thus concludes that the Arbitrator did not exceed his authority under the FAA.3

[6] “This Court also concludes that the award may be confirmed in accordance with Art. V(1)(d) of the New York Convention, which requires that courts refuse to confirm an arbitration award when ‘the arbitral procedure was not in accordance with the agreement of the parties’.

[7] “The case of China Nat’l Metal Prods. v. Apex Digital, Inc., 379 F.3d 796, 799 (9th Cir. 2004), is particularly instructive. China National involved an arbitration clause that was ‘indeterminate’ as to whether separate proceedings should be required to address both parties’ claims. After Apex commenced arbitration against China National in Shanghai, China National commenced a separate arbitration against Apex in Beijing. The arbitration panel, using its own rules to interpret arbitration agreements which were silent on the subject of counterclaims, held that it lacked authority to force China National to prosecute its claims as counterclaims in Shanghai and allowed the two separate arbitrations to proceed. In affirming the arbitration panel’s decision, the Ninth Circuit held that the arbitration panel ‘did not trump specific terms of the parties’ purchase orders by turning to its own rules because the arbitral clause did not resolve the parties dispute itself’. Id. at 801.

[8] “Although China National affirmed the propriety of two separate proceedings and the arbitration in the instant case upheld a single proceeding, the principle is the same: when the parties’ agreement does not address the procedural question at hand, the arbitrator’s recourse to relevant procedural rules does not create a defense to enforcement under Art. V(1)(d) of the New York Convention.”

2. Manifest Disregard of the Law

[9] “Polimaster also contends that the award should be vacated because there is no legal basis for holding Polimaster liable for a breach of the Licensing Agreement. However, ‘[the arbitrator’s] interpretation of the contract binds the court asked to enforce the award or set it aside. The court substitute even if convinced that the arbitrator’s interpretation was not only wrong, but plainly wrong.’ Kyocera Corp., 341 F.3d at 999. The Ninth Circuit has explained that

3. “At oral argument Polimaster and Na&Se argued that under Cyprus law counterclaims would not be regarded as part of the original dispute. While this argument perhaps suggest that there was not a meeting of the minds between parties, it was well within the Arbitrator’s discretion to base his decision on this country’s Federal Rules.”

judicial review of the merits of an arbitration award is limited to situations in which there has been a ‘manifest disregard of the law’:

‘The manifest disregard exception requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law. Accordingly, we may not reverse an arbitration award even in the face of an erroneous interpretation of the law. Rather, to demonstrate manifest disregard, the moving party must show that the arbitrator understood and correctly stated the law, but proceeded to disregard the same.’

Collins v. D.R. Horton, Inc., 505 F.3d 874, 2007 WL 2756956 at *3 (9th Cir. 2007).

[10] “Polimaster does not identify any legal reasoning in the arbitrator’s written opinion as the basis for its argument. In fact, the question of Polimaster’s liability under the license agreement involved a finding of fact rather than a conclusion of law. The Arbitrator found as follows:

‘Polimaster claims that it was not a party to the License Agreement (which Polimaster signed) but that is contradicted by Polimaster’s judicial admissions in the Complaint it filed in the District Court and its Demand for Arbitration. The hearing testimony demonstrated that Polimaster was a party to the License Agreement.’ (Emphasis added)

[11] “Because Polimaster has not satisfied its burden of proving a manifest disregard for the law, the arbitration award will not be vacated on this ground.”

3. Procedural Issues

[12] “Polimaster and Na&Se further contend that the Arbitrator exceeded his authority by allowing the counterclaims to be arbitrated despite the fact that RAE had not made an adequate effort to settle them and allowed RAE to file a supplemented brief. The Supreme Court has held that where arbitrability is contested on procedural grounds, federal courts should compel arbitration and refer consideration of procedural issues to the arbitrator. See, e.g., Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S.Ct. 588, 154

L.Ed.2d 491 (2002)" (finding that a dispute over the applicable time limit on a party’s power to invoke arbitration should be adjudicated by an arbitrator); Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (emphasizing that it is preferable for an arbitrator to decide issues such as ‘waiver, delay, or a like defense to arbitrability’); John Wiley & Sons v. [Livingston], 376 U.S. 543, 556-567, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) (holding that an arbitrator, not a judge, should determine the procedural prerequisites to arbitration).

[13] “Courts in this jurisdiction have read this line of cases as indicating that ‘[certain] types of disputes are generally beyond the purview of the judiciary. Generally speaking, there is a presumption that courts should not decide procedural questions relating to an arbitration agreement.’ Barragan v. Washington Mut. Bank, No. 06-1646, 2006 U.S. Dist. LEXIS 64269, 2006 WL 2479125 at *3 (N.D. Cal. 28 Aug. 2006).

‘Numerous courts have noted a distinction between questions of procedure and questions of substantive arbitrability. Arbitrators generally decide questions of procedure such as waiver, notice, and other conditions precedent to an obligation to arbitrate. In contrast courts generally decide substantive arbitrability questions, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to particular dispute.’


[14] “Accordingly, this Court will not substitute its own assessment of the adequacy of RAE’s efforts to settle the counterclaims for the Arbitrator’s determination. Nor will the Court decide independently whether it was appropriate for the Arbitrator to allow RAE to file a third post-hearing brief.”

4. Entry-of-Judgment Clause

[15] “Finally, Polimaster and Na&Se contend that the award may not be confirmed because the License Agreement did not contain any consent to the arbitration award being confirmed by a Court. The two provisions of the FAA that provide courts with authority to confirm arbitration awards contain

conflicting consent requirements. 9 U.S.C. Sect. 207 instructs that ‘within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration’. 9 U.S.C. Sect. 9 is more restrictive:

‘If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award.’


[17] “The Ninth Circuit has not addressed this issue. However, the Court finds the Second Circuit’s analysis to be persuasive. As that court Second Circuit has explained:

‘Congress implemented the Convention twelve years later by enacting Chapter 2 of the FAA, now codified at 9 U.S.C. Sects. 201-208. The Convention’s purpose was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which the recognition and enforcement of commercial arbitration agreements to arbitrate awards are enforced in the signatory countries. Pursuant to 9 U.S.C. Sect. 208, the pre-Convention provisions of the FAA – that is, the provisions of Chapter 1, 9 U.S.C. Sect. 1-16 – continue to apply to the enforcement of foreign arbitration awards except to the extent that chapter 1 conflicts with the Convention or Chapter 2.’

Aktiengesellschaft, 391 F.3d at 435. Applying this reasoning, the court held that 207 preempts Sect. 9. In keeping with Aktiengesellschaft, this Court also holds that there is no consent requirement.’

661. United States District Court, Eastern District of Virginia, Alexandria Division, 5 February 2009, Case No. 1:04cv784 (GBL)

Parties:

Plaintiff: RZS Holdings AVV (US)
Defendant: PDVSA Petroleos S.A. (Venezuela) et al.

Published in:


Articles:

I(1); V(1); V(2) (all by implication)

Subject matters:

– 1975 Panama Convention applies
– nondomestic award
– domestic law does not apply to setting aside (vacatur) of 1958 New York Convention and 1975 Panama Convention award
– relationship Chapters 1 (domestic arbitration), 2 (1958 New York Convention) and 3 (1975 Panama Convention) of Federal Arbitration Act (FAA)
– petition to enforce and cross-petition to vacate both examined under 1975 Panama Convention
– grounds for refusal of enforcement are exhaustive
– corruption/bribery (no)
– bias of arbitrator (no)

Commentary Cases:

¶ 501 + ¶ 704(A); [6]-[7] = ¶ 102; [14]-[19] = ¶ 524 (corruption)

Facts

RZS Holdings AVV (RZS Holdings) and PDVSA Petroleos S.A. (PDVSA) entered into a contract for the sale of unleaded gasoline. The contract provided for the application of English law. It also contained a clause for ICC arbitration of disputes.

A dispute arose between the parties when PDVSA terminated the contract. Court proceedings ensued that were eventually stayed pending arbitration. ICC arbitration proceedings commenced in the United States in 2004. By an award
of 9 February 2006, the arbitral tribunal found in favor of PDVSA. During the course of the arbitration, RZS Holdings unsuccessfully sought to challenge one of the arbitrators because of his alleged contacts with an attorney employed by PDVSA, though not involved in the arbitration, at a professional meeting. At the close of the arbitration proceedings, however, both parties confirmed to the arbitrators that they were satisfied with the manner in which the proceedings had been conducted and believed that the proceedings had been fair.

In the time between the conclusion of the arbitration proceedings and the issuance of the award, RZS Holdings came into possession of a draft copy of the award and complained to the ICC that the premature release reflected corruption. It refused, however, to disclose the name of its source. The ICC investigated RZS Holdings’ accusation and concluded that it was without merit. The final award closely approximated the draft received by RZS Holdings in advance. PDVSA then sought to enforce the award in the United States District Court for the Eastern District of Virginia; RZS Holdings cross-moved to vacate on grounds of arbitrator corruption, bias and misconduct.

The district court, per Gerald Bruce Lee, US DJ, granted enforcement and denied RZS Holdings’ cross-motion to vacate the ICC award. The court first held that the award, though rendered in the United States, was non-domestic because it was made “within the legal framework of another country” – that is, under English law and the Rules of the ICC, which is located in France – and PDVSA was a foreign company. As a consequence, Chapter One of the Federal Arbitration Act (FAA), which governs domestic arbitration, did not apply; rather, the award fell under either the 1958 New York Convention (Chapter Two of the FAA) or the 1975 Inter-American (Panama) Convention (Chapter Three of the FAA), which govern international awards. Since the parties were citizens of Contracting States to the Panama Convention, the United States and Venezuela, the Panama Convention applied.

The district court recognized that Chapter Three of the FAA provides that the provisions of Chapter One apply to the extent that they are not in conflict with Chapter Three. Lacking precedent from the Fourth Circuit, the court followed the line of case law from the Sixth, Seventh and Eleventh Circuits holding that such a conflict exists in respect of the grounds on which international awards may be refused enforcement or vacated. This case law is based on a reading of Sect. 207 FAA – a Chapter Two provision that is incorporated by reference into Chapter Three – indicating that the Conventions provide the exclusive list of such grounds.

The district court distinguished the Second Circuit’s holding in "Toys "R" Us (see below), where that Court held that Art. V(1)(e) of the New York Convention
(which is identical to Art. V(1)(e) Panama Convention) allows a court in the country under whose law the arbitration was conducted to apply domestic arbitration law – here, the FAA – to a motion to set aside or vacate the award. The court declined to follow this reasoning, noting that in any event the holding in Toys “R” Us would likely be inapplicable because the arbitration at issue here was governed by English law. Further, this precedent was not binding on the court, several other circuits declined to follow it and its holding was even called into question by the Second Circuit itself in later decisions.

The court then granted enforcement and denied the motion to vacate the award, finding that none of RZS Holdings’ claims constituted one of the seven grounds for refusal of enforcement or vacatur exhaustively listed in the Panama Convention. The court noted that counsel for RZS Holdings “unwisely elected to proceed exclusively under the grounds for vacatur” provided in Chapter One of the FAA, but it proceeded nevertheless to examine those grounds as they related to the Panama Convention. It concluded that RZS Holdings failed to prove how and to what extent the release of the draft award or an arbitrator’s alleged interaction with a PDVSA attorney would justify annulment of the award, or that PDVSA’s payment of the full cost of the arbitration influenced the arbitrators or in some other way constituted a reason for vacatur.

Excerpt

[1] “This matter is before the Court on Defendant PDVSA S.A.’s Motion to Confirm and Plaintiff RZS’ Motion to Vacate the Final Arbitral Award rendered by the Arbitral Tribunal in this matter. This case concerns Plaintiff RZS Holdings’ allegations that arbitrator corruption, bias, and misconduct prohibit this Court from confirming the Final Arbitration Award entered on 9 February 2006. The issues before the Court are whether: (1) confirmation of this Arbitration Award is governed by the Inter-American Convention on International Commercial Arbitration or the Federal Arbitration Act; and (2) under the applicable standard, whether RZS has provided sufficient justification for this Court to refrain from confirming the Final Arbitration Award.

[2] “The Court holds that: (1) confirmation of this Arbitration Award is governed by the Inter-American Convention on International Commercial Arbitration because the award at issue is non-domestic, the parties are citizens of signatory nations of the Inter-American Convention, and the relevant provisions of the Federal Arbitration Act are in conflict with the relevant provisions of the Inter-American Convention; and (2) an examination of the
extensive record that exists in this matter, along with the pleadings and oral arguments provided by RZS does not justify denial of confirmation of the Final Arbitration Award because none of RZS’ allegations may be categorized as any of the enumerated reasons to deny confirmation under the Inter-American Convention. Finally, after affording RZS discovery to support its bellicose claims that the arbitration process was tainted with arbitrator corruption, bias, and misconduct, discovery has shown the claims to be hollow and unfounded.

(...)

[3] “An arbitration award that is not vacated or modified, may be confirmed by a court. ‘The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.’ Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984). Under the Inter-American Convention, a district court’s role in reviewing an arbitral award is strictly limited. The court is required to confirm the award ‘unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [Inter-American] Convention’. 9 U.S.C. Sect. 302 (incorporating 9 U.S.C. Sect. 207); see also Employers Ins. of Wausau v. Banco De Seguros Del Estado, 199 F.3d 937, 942 (7th Cir. 1999)."

[4] “The Court holds that the terms and provisions of the Inter-American Convention on International Commercial Arbitration (the Inter-American Convention or Chapter Three) govern this arbitral award, and not Chapter One of the Federal Arbitration Act (FAA or Chapter One) because this is an international arbitration, the parties are citizens of countries that are signatories of the Convention, and there is a conflict between the provisions of the Chapter One and Chapter Three and in the event of such a conflict, the terms of Chapter Three govern.

[5] “International arbitral awards are governed by 9 U.S.C. Sects. 201-208 (the New York Convention or Chapter Two) and 9 U.S.C. Sects. 301-307 (the Inter-American Convention or Chapter Three). When the requirements for the application of both Conventions are met, ‘[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention, and are member States of the Organization of American States, the Inter-American Convention shall apply’. 9 U.S.C. Sect. 305(1). Sects. 202, 203, 204, 205 and 207 of Title IX are incorporated into the Inter-American Convention by reference. 9 U.S.C. Sect. 302. Chapter One is incorporated into Chapter Three to the extent that its provisions are not in conflict with those announced in Chapter Three. 9 U.S.C. Sect. 307.

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2. “The Court recognizes that the Fourth Circuit has not addressed this issue, and is inclined to follow the definition set out by the Eleventh Circuit. The Court notes that the Eleventh Circuit in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte*, 141 F.3d 1434, 1441 (11th Cir. 1998) [reported in Yearbook XXIV (1999) pp. 819-831 (US no. 276)]. PDVSA’s representation that the arbitration at issue here ‘was conducted in conformity with the Rules of the International Chamber of Commerce International Court of Arbitration located in Paris, France … and was governed by English law’ is uncontradicted. Furthermore PDVSA has its principal place of business in Venezuela. Therefore this arbitration must be designated as international, not domestic, and subjected to the terms of either the New York or Inter-American Convention. As mentioned previously, when the parties to an arbitration are citizens of countries that are signatories of the Inter-American Convention, the terms of the Inter-American Convention govern. RZS was established in the Commonwealth of Virginia, and has its principal place of business therein. As previously noted, PDVSA is established under the laws of Venezuela and has its principal place of business therein. Therefore, for purposes of this analysis, the Court finds RZS to be a citizen of the United States, and PDVSA a citizen of Venezuela. Both countries are signatories of the Inter-American Convention, and therefore it provides the governing framework for this analysis.

[7] “Awards are considered non-domestic and thus governed by one of the Conventions when they are ‘made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction’. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte*, 141 F.3d 1434, 1441 (11th Cir. 1998) [reported in Yearbook XXIV (1999) pp. 819-831 (US no. 276)].

[8] “The Court recognizes that under 9 U.S.C. Sect. 307, the provisions of Chapter One apply to the extent that they are not in conflict with Chapter Three. On this score the Court follows the line of case law from the Sixth, Seventh and Eleventh Circuits holding that such a conflict does in fact exist, based on a reading of the language of 9 U.S.C. Sect. 207 that indicates that the reasons...
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4. "In accordance with 9 U.S.C. Sect. 302, 9 U.S.C. Sect. 207 is incorporated by reference into Chapter Three, 'except that for the purposes of this chapter, "the Convention" shall mean the Inter-American Convention’. 9 U.S.C. Sect. 307. Courts have construed the word 'shall' in 9 U.S.C. Sect. 207 to indicate that the enumerated list in Art. V is the exclusive grounds for vacatur, and because the reasons for vacatur provided in Chapter One are distinguishable from if not contrary to the reasons provided in Art. V, a conflict must be found to exist. See Industrial Risk, 141 F.3d at 1446; M&C Corp. v. Erwin Behr, 87 F.3d 844, 851 (6th Cir. 1996) [reported in Yearbook XXII (1997) pp. 993-1000 (US no. 229)]; Employers Ins. of Wausau, 199 F.3d at 942."


7. "See Westerbeke Corp. v. Daishitu Motor Co. Ltd., 304 F.3d 200, 222 (2d Cir. 2002) (questioning the sagacity of conflating the requirements for confirmation of an arbitration award under the FAA with those imposed by other statutes and the continued application of Toys "R" Us in light of subsequent Second Circuit cases emphasizing the importance of acknowledging the distinct requirements of different arbitration statutes); see also China Minmetals Materials Import & Export Co. Ltd. v. Chi Mei Corp., 334 F.3d 274, 284 (3d Cir. 2003) [reported in Yearbook XXIX (2004) pp. 1003-1025 (US no. 459)]."

simultaneously noting that in the alternative, even if its holding where considered, it would be unlikely to result in a different outcome under this set of facts.


[12] “RZS has presented three occurrences that it believes warrant vacating the award.8 Namely, RZS argues that the award should be vacated because: (1) one or both of the parties received a draft copy of the award prior to its official publication; (2) Arbitrator Arnold attended a professional association conference where he interacted with a PDVSA attorney who is not involved in this litigation; and (3) PDVSA paid the entire cost of the arbitration when RZS was incapable of paying its share of the costs.

[13] “A thorough examination of RZS’ multiple filings reveals that despite the lack of binding Fourth Circuit precedent on whether Chapter One or Chapter Three dictated the result in this matter, counsel for RZS failed to present his arguments in the alternative, under both potentially applicable frameworks, and unwisely elected to proceed exclusively under the grounds for vacatur provided in the FAA. RZS has failed to present argument connecting its proposed grounds for vacatur to any of the enumerated grounds for vacatur provided in [Art.] V of the Inter-American Convention. The Court believes it would be justifiable to end its analysis here and find that vacatur under Art. V of the Inter-American Convention is unfounded. However, in an abundance of caution, and owing to a desire to see this lengthy dispute come to a close, the Court engages in a

8. “RZS has advanced an abundance of complaints regarding the arbitration process throughout this litigation. In this Court’s Order dated 17 January 2008, the parties were ordered to brief their positions on the pending Motion for Confirmation of the Arbitration Award. The Court’s subsequent 7 October 2008 Order allowed the parties to submit supplemental briefs encompassing any information obtained via deposition, to be filed by 6 December 2008. The Court confines its consideration to the arguments submitted in the briefs filed in accordance with the 17 January 2008 and 7 October 2008 Orders. Despite these explicit instructions RZS has unjustifiably deemed it appropriate and permissible to inundate the Court with several improperly filed documents that are devoid of recently discovered and previously undiscoverable information that would justify such filings. The impropriety and shortcomings of these pleadings will be addressed later in this Memorandum Opinion.”
substantive analysis of the grounds asserted by RZS as they relate to the Inter-American Convention.

[14] “The Court holds that RZS’ contention that the award should be vacated due to the premature release of the award to the parties does not state a cause for vacatur under the Inter-American Convention because it does not fall under any of the enumerated grounds for vacatur and because RZS has presented insufficient support for the Court to find that this claim has any merit.

[15] “RZS has been afforded multiple opportunities to present evidence of arbitrator corruption, bias, and/or misconduct to the ICC and to this Court and has failed to do so. Only RZS knows how and from whom it allegedly received a draft of the arbitration award and RZS refuses to produce this information. RZS has provided nothing that rises above the level of speculation as to the origins of the draft award. It has provided multiple written statements from parties both identified and unidentified9 that, while alleging that the draft copy resided with PDVSA before being obtained by RZS fail to give any indication as to how the copy came into PDVSA’s possession. It is impossible for this Court to know how this draft copy was released to anyone. There are a variety of possible explanations for this occurrence, some pointing to foul play, others far more innocent. While acknowledging RZS’ accusations that Arbitrator Arnold is responsible for the leak, this Court notes that despite ample opportunities to do so, RZS refuses to provide any evidence of who received the draft. The draft of the decision leaked substantially tracks the final ICC decision. During the course of the ICC inquiry into RZS’ complaint, Mr. Arnold, the arbitrator accused of being the source of the leak, submitted a letter to the ICC, wherein he expressly denies any involvement in the release of the materials. Mr. Arnold testified under oath at his deposition that he was not involved in a leak of the draft award, RZS proposed during the limited discovery authorized by these proceedings to seek to have an anonymous deposition, where the witness would testify without identifying him/herself. The Court declines to allow a witness to testify under a pseudonym, as proposed by RZS, because such a procedure would deny PDVSA of its right to confrontation of the witness and right to inquire into the witness’ identity and any motivation the witness may have to testify. RZS has not presented any evidence that the decision was influenced by bribery or corruption. RZS’ inability and unwillingness to lay before the Court sufficient facts to support its otherwise bare allegations and ripe speculation prevent this Court from giving any sort of significant or substantive consideration to this claim as a basis for vacating

9. “Most recently, on 29 August 2008, RZS has provided the Court with a copy of a statement that is initialed by someone operating under an alias.”
the award. Furthermore even if the Court were to find that the draft award were improperly or unjustifiably released to one of the parties prior to its official release, it is unclear how this would justify vacatur under the provisions of Art. V of the Inter-American Convention.

[16] “Furthermore the Court holds that Mr. Arnold’s interaction with a PDVSA attorney at a professional association seminar held in Manzanillo, Mexico on 9-11 March 2005 that was co-sponsored by the Society of Maritime Arbitrators of New York and the Mexican Maritime Law Association during the pendency of this arbitration also fails to present a justification for vacatur under the provisions of Art. V for virtually the same reasons the Court declined to find a reason for vacatur on the previous allegations. RZS has presented no substantive assertions regarding this interaction. The Court has reviewed the transcript of Mr. Arnold’s deposition where he testified under oath that he never spoke directly with the attorney from PDVSA, Walter La Madriz, who was in attendance. Mr. Arnold has completely described this interaction, which was limited to their presence at the same lunch table with several other conference attendees, where the attendees exchanged business cards. No evidence has been presented that would
support a conclusion that there was anything improper about this interaction, and
certainly nothing that would support this Court vacating the arbitral award.

[17] “In Nicor International v. El Paso Corporation,13 the District Court for the
Southern District of Florida was presented with petitioners’ claims that an
arbiter was biased based on prior representations of corporations in the same
field as the corporation involved in the arbitration, and that such a bias was a
violation of public policy meriting vacatur under Art. V(1)(d) of the New
decided to vacate the award finding that petitioners did not ‘provide any
evidence to show that the Sole Arbitrator’s past representation of energy
corporations influenced his decision-making process or his findings and
conclusions’. Id. at 1375.

[18] “Similarly, the Court finds that RZS has presented no indication that Mr.
Arnold’s contact with a PDVSA attorney, not involved in the arbitration at a
group luncheon, in any way influenced Mr. Arnold’s decision-making, findings
or conclusions. The arbitration award was unanimous and RZS makes no claim
that the other two arbitrators were biased.15 The Court therefore declines to
vacate the award due to Arbitrator Arnold’s conversation with a PDVSA attorney
who was not involved in the arbitration at a conference hosted by the Society of
Maritime Arbitrators, because RZS has failed to show how this interaction in any
form or fashion influenced Arbitrator Arnold’s decision-making process and
therefore has failed to satisfy any of the enumerated reasons for vacatur under

Q: You wanted him to have some way to contact you later?
A: No. And I didn’t expect a Christmas card from him either, no.
Q: And you wanted to have a card from him so you might contact him later?
A: No, not really.”

Transcript of Manfred Arnold Deposition....”


14. “The substance of Arts. V(1)(d) of the New York and Inter-American Conventions are sufficiently
similar that the Court finds it appropriate for the analysis of a claim under Art. V(1)(d) of the New
York Convention to be instructive in an analysis under Art. V of the Inter-American Convention.”

15. “It is curious that RZS invests so much energy lobbing allegations of bias based on Arbitrator
Arnold’s negligible contact with Mr. La Madriz when it came to light in recent depositions that
the arbitrator appointed by RZS, Philip Lian, had extensive prior (and potentially undisclosed)
professional relationships with Mr. Deeb [of RZS], having worked with Mr. Deeb as a consultant
and serving as a professional reference. ... Despite this being Mr. Lian’s first occasion to serve as
an arbitrator, his prior relationship with Mr. Deeb, and his having been appointed by RZS, he too
was part of the unanimous award in favor of PDVSA. (Id.).”
“Finally, the Court declines to vacate the award under Art. V of the Inter-American Convention based on PDVSA’s payment of the full cost of the arbitration because there is no indication that this in any way influenced the arbitrators, or that this in some way constitutes any of the enumerated reasons for vacatur. Once again, the Court turns to Nicor, where petitioners raised similar challenges. There the court was not persuaded by petitioners’ argument because they had failed to adduce any evidence that would allow the court to conclude that payment of the entire costs by one side had in any manner influenced the judgment of the arbitrator or caused him to favor the paying party. Id. at 1374. This Court is similarly unpersuaded.

“In an abundance of caution, and because the Fourth Circuit has not issued a pronouncement on the question of whether and when to apply the FAA versus the Inter-American Convention this Court evaluates RZS’ arguments for vacatur under Sect. 10(a) of the FAA, and still finds no reason to vacate the arbitration award presently before the court.

“The Court denies RZS’ Motion to Vacate based on RZS’ previously addressed allegations concerning Mr. Arnold’s meeting and the draft award under Sect. 10(a)(1) of the FAA because RZS has failed to carry its heavy burden and demonstrate by clear and convincing evidence that the award was obtained by corruption, fraud, or undue means as well as its inability to demonstrate a material relationship between the alleged corruption, fraud, or undue means, and an issue in the arbitration.

(.....)

“The Court holds that the Inter-American Convention on International Arbitration provides the framework for a determination of whether or not to confirm or vacate this award because this is an international arbitration, the parties governed by the award are citizens of signatory nations to the Convention, and the terms and provisions of the Federal Arbitration Act regarding vacatur are in conflict with Art. V of the Inter-American Convention. Furthermore the Court holds that RZS failed to present allegations that would justify vacatur under the Inter-American Convention because neither the conversation between Arbitrator Arnold and a PDVSA attorney at a professional association conference, nor the premature release of a draft version of the arbitration award, nor the payment by PDVSA of the entire costs of the arbitration, as presented to this Court by RZS constitute a cause for vacatur under any of the reasons listed in Art. V.

“Additionally, the Court concludes that if it were to find that the Federal Arbitration Act governed the review of RZS’ claims, RZS has failed to demonstrate grounds under the FAA to warrant vacating the arbitration award.
Therefore the Court finds that there is no reason to vacate the arbitration award, and the confirmation is appropriate."
662. United States Court of Appeals, Sixth Circuit, 13 February 2009, Case Nos. 08-6014/6032

Parties: Plaintiff/Appellee/Cross-appellant: Answers in Genesis of Kentucky, Inc. (US)
Defendant/Appellant/Cross-Appellee: Creation Ministries International, Ltd. (Australia)

Published in: 2009 U.S. App. LEXIS 2743

Articles: II(1); II(3)

Subject matters: – appeal of order compelling arbitration
– forum selection clause and arbitration clause not mutually exclusive
– abstention from referral on grounds of comity (Colorado River doctrine)
– referral is mandatory
– scope of arbitration clause
– discretion in issuing anti-suit injunction (injunction enjoining foreign law-suit)


Facts

In 1980, a group of Australian creationists, among whom Ken Ham, a minister and creation science advocate, formed the Creation Science Foundation (the Foundation), with the purpose of promoting creationism in Australia. Soon after, another Australian creation science supporter, Carl Wieland, joined the Foundation and transferred production responsibility to the Foundation for the magazine he had founded in the late 1970s, *Ex Nihilo*, which later became *Creation Magazine*.

In 1987, Ham moved to the United States. In 1994, he founded Answers in Genesis of Kentucky, Inc. (AiG), an entity with close ties to the Foundation. AiG established and funded a website, <www.answersingenesis.org>, that both AiG
and the Foundation used to spread creation science. AiG also purchased significant numbers of each issue of *Creation Magazine* for distribution to American subscribers under a 1994 Distribution Agreement with the Foundation. AiG and the Foundation (which had changed its name to Answers in Genesis-Australia – AiG Australia) later jointly founded Answers in Genesis International (AiGI) to foster relationships among creation science organizations in other Commonwealth countries, such as Canada, South Africa, New Zealand and the United Kingdom (the Commonwealth organizations). Ownership of AiGI was split equally between AiG and AiG Australia.

As AiG grew in membership and financial resources, it began to eclipse its Australian counterpart, which had by now come to be led largely by Wieland. Around March 2005, Wieland proposed a new model for control of AiGI, under which each Commonwealth organization would have one vote at AiGI board meetings. AiG rejected this proposal, believing that it was an attempt to dilute AiG’s influence over the creation-science movement since some small Commonwealth organizations were allegedly under Wieland’s control.

On 13 October 2005, the boards of directors of AiG and AiG Australia sought to establish more businesslike relationships between the entities by executing two agreements: (1) a Memorandum of Agreement (MOA) providing for several transfers of property and contractual rights. The MOA contained an arbitration clause that provided that in the event of a disagreement the parties would submit the matter to Christian mediation and, if mediation failed, to Christian arbitration; (2) a Deed of Copyright License (DOCL) granting AiG a license to continue to use the articles AiG Australia had provided and would provide in the future for the website and publications. The DOCL stated that “the law applicable to the State of Victoria, Australia” applied and that “[t]he parties submit to the non-exclusive jurisdiction of its courts and courts of appeal”.

Wieland objected to the MOA and DOCL and internal tension led board members to resign. A new board appointed by Wieland sought to reject both agreements. It further voted to change the name of AiG Australia to Creation Ministries International (CMI) and commissioned an internal inquiry to examine the circumstances that led to the schism between CMI and AiG. The findings of this inquiry (the Briese Report) were that the new board had properly sought to renounce the prior board’s actions.

AiG rebuffed CMI’s efforts to invalidate the agreements. On 31 May 2007, CMI filed suit in the Supreme Court of Queensland, Australia, against both AiG and Ken Ham, seeking declaratory, injunctive and monetary relief. On 24 March 2008, in turn, AiG moved to compel arbitration in the United States District Court for the Eastern District of Kentucky. AiG also sought to enjoin CMI from
pursuing its Australian suit (the parties had in the meantime agreed voluntarily
to adjourn the Australian proceedings pending final resolution of the US
litigation). On 8 August 2008, the district court compelled arbitration of all
disputes and refused to grant the anti-suit injunction. On 15 August 2008, AiG
commenced arbitration against CMI at the International Centre for Dispute
Resolution.

The United States Court of Appeals for the Sixth Circuit, before Cole and
Gibbons, CJJ and Bell, US DJ for the Western District of Michigan, sitting by
designation, in an opinion by Julia Smith Gibbons, held that the district court
properly referred the parties to arbitration and did not abuse its discretion in
delaying to issue an anti-suit injunction.

The Court of Appeals first noted that though the Federal Arbitration Act
(FAA) generally prohibits interlocutory appeals of orders compelling arbitration,
the court had jurisdiction because AiG also petitioned the district court to enjoin
the Australian proceedings pending arbitration.

The court then agreed with the lower court’s reasoning – which the parties did
not contest on appeal – that the MOA and DOCL were to be read in pari materia
as they had been executed on the same day. It also shared the district court’s
conclusion that the plain language of the litigation and arbitration clauses in those
agreements indicated that the Australian courts were only one possible forum for
any potential litigation. Hence, the district court did not err in granting AiG’s
motion to compel arbitration.

CMI argued that the district court should have abstained in any case from
compelling arbitration on the basis of international comity. Noting that this issue
was an issue of first impression in the Sixth Circuit, the Court of Appeals
referred to the 1976 decision of the Supreme Court in Colorado River (see below),
which lists the factors to be taken into account in determining whether to abstain
in favor of parallel proceedings in another sovereign State; in particular, the
existence of a clear federal policy evincing the avoidance of piecemeal
adjudication. The Court of Appeals referred to a 1985 decision of the Supreme
Court (Dean Witter Reynolds, see below) where it was held that concerns over or
even the certainty of bifurcated proceedings should not cause a district court to
refuse to compel arbitration. The Court of Appeals added that the 1958 New
York Convention supported this conclusion, as “there is nothing discretionary”
about referral to arbitration under the Convention.

Additional factors in Colorado River also did not weigh in CMI’s favor: the
Australian proceeding was only in its initial stages; either forum would be
inconvenient because one group of witnesses was in Australia and the other in
Kentucky; the case involved “the interpretation of a half-century-old Convention whose terms are largely unambiguous” and no sovereign State was party thereto.

The Court of Appeals then dismissed CMI’s argument that some of AiG’s causes of action did not fall within the scope of the arbitration clause in the MOA. CMI claimed that the arbitration clause only covered trademark and copyright license issues under the MOA and DOCL and any breach of both agreements. Issues concerning the 1994 Distribution Agreement and AiG’s claim that CMI defamed AiG through its statements in the Briese Report and CMI’s own website would not fall within the scope of the arbitration clause.

The Court of Appeals disagreed, reasoning that the arbitration clause was broadly worded and expressly included “related agreements”. Hence, the district court did not err in finding that the arbitration clause was not limited to issues arising under the MOA and DOCL. In particular, (1) the 1994 Distribution Agreement was a related agreement as it concerned the distribution of Creation Magazine and the DOCL expressly granted rights to AiG in all articles produced by CMI members for Creation Magazine both before and after the execution of the DOCL; (2) the defamation claim involved an interpretation of the proper meaning of the agreements, which, in the light of the general presumption of arbitrability under the FAA, was for the arbitrators to determine.

The Court of Appeals also confirmed the district court’s refusal to grant an anti-suit injunction, noting that such injunctions may be granted where they are necessary to protect the jurisdiction of a federal court or if allowing the foreign litigation to continue would allow a party “to evade the forum’s important policies”. Here, reasoned the Court, it could not be said that CMI was attempting to evade an important public policy of the United States by filing suit in an Australian court when Australia is also a signatory to the New York Convention.

Excerpt

[1] “This appeal presents multiple issues of first impression for our circuit. Defendant-appellant Creation Ministries International, Ltd. (CMI) appeals the district court’s order compelling arbitration of its disputes with fellow ministry Answers in Genesis of Kentucky, Inc. (AiG). Specifically, CMI asserts that the district court erred in declining to dismiss AiG’s suit on the basis of the contracts’ forum selection clause, declining to abstain in favor of CMI’s prior-filed Australian litigation, and compelling arbitration on all of AiG’s claims. AiG cross-appeals the district court’s order declining to issue a foreign antisuit injunction to block CMI from further pursuing its Australian litigation. We hold
that the district court properly compelled the parties to arbitration and did not abuse its discretion in declining to issue an antisuit injunction based upon the facts as they now stand. We therefore affirm the judgment of the district court in its entirety.

[2] “We first note the issue of our jurisdiction. While neither of the parties has questioned this court’s jurisdiction to hear this appeal, federal courts have a duty to consider their subject matter jurisdiction in regard to every case and may raise the issue *sua sponte*. See *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir. 1990); see also *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127, 2 L.Ed. 229 (1804) (‘[I]t [is] the duty of the Court to see that they had jurisdiction, for the consent of the parties could not give it.’). The FAA [Federal Arbitration Act] generally prohibits interlocutory appeals of orders compelling arbitration. See 9 U.S.C. Sect. 16(b)(3). However, because AiG petitioned the district court to enjoin the Australian proceedings pending arbitration, we do have jurisdiction under 9 U.S.C. Sect. 16(a)(1) and 28 U.S.C. Sect. 1292(a)(1) to hear this appeal. See *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 863 (6th Cir. 2006).”

I. LITIGATION AND ARBITRATION CLAUSES

[3] “Having concluded that we have jurisdiction to consider this appeal, we now consider the arguments raised by both parties. CMI contends that the explicit language of the forum selection clause requires that the only proper forum for any suit between CMI and AiG concerning these agreements is in Australia. Importantly, CMI does not challenge on appeal either the ruling of the district court that the multiple contracts at issue are to be read *in pari materia* or that the MOA and DOCL are valid, enforceable contracts. AiG responds that the arbitration and forum selection clauses are mutually exclusive such that the forum selection clause only applies if neither party seeks to arbitrate the dispute. Therefore, AiG asserts that because it seeks to compel arbitration, the forum selection clause is inapplicable.

[4] “Both parties’ arguments are misguided, and the plain language of the contractual provisions at issue provides that Australia is only one possible forum for any potential litigation.

[5] “The proper construction of a contract is an issue of law; therefore, this court reviews questions of contract interpretation under a *de novo* standard. *Noe v. PolyOne Corp.*, 520 F.3d 548, 551 (6th Cir. 2008). The language of the forum selection clause appears in Sect. 6.2 of the DOCL. It reads:
‘This Deed is governed by the law applicable to the State of Victoria, Australia. The parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The parties will not object to the exercise of jurisdiction by those courts on any basis.’

DOCL at 7-8 (emphasis added). The district court held that one must read the DOCL and MOA in pari materia because the parties executed both agreements on the same day. As neither party has appealed this ruling of the district court, we will read the forum selection clause contained in the DOCL together with the arbitration language in the MOA. Paragraph eight of the MOA provides:

‘The parties will enter [in]to such other agreements as are necessary to accomplish the purposes and provisions of this Memorandum of Agreement. In the event of a disagreement of the parties regarding the meaning or application of any provision of this Agreement or any related agreements, the parties agree to submit such matter to Christian mediation to a Christian mediator agreed upon by them. In the event such matter is not resolved by mediation, then the parties will submit the matter to Christian arbitration to a Christian arbitrator agreed upon by them, and the decision of the arbitrator shall be final.’

MOA at 2-3. Notably, the arbitration agreement is silent as to where the arbitration should take place.

[6] “The plain language of the agreements quoted above forecloses CMI’s argument that the only proper forum is in Australia and makes AiG’s complicated argument unnecessary. The forum selection clause expressly provides that the ‘courts and courts of appeal’ of the ‘State of Victoria, Australia’ are the ‘non-exclusive jurisdiction’ in which the parties may file suit. CMI’s argument that this contractual provision required the district court to dismiss AiG’s motion to compel arbitration would read the word ‘non-exclusive’ out of the contract. AiG’s argument would have us read into the contract an entire clause that does not appear; namely, that the forum selection clause only applies if no one seeks arbitration. As we have noted, ‘If a contract is clear and unambiguous … there is no issue of fact to be determined.’ Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd., 525 F.3d 409, 421 (6th Cir. 2008) (alteration in original) (quoting Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672, 684 (6th Cir. 2000)). Reading the provision’s language ‘as a whole’ and giving it ‘its ordinary and natural meaning’, the contract language clearly and unambiguously provides that the courts of the State of Victoria are only one possible forum. Id.
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1. “We further note that CMI’s own actions ratify our interpretation. If CMI’s reading of the clause is correct, the only possible forum for any suit concerning these agreements is ‘the State of Victoria, Australia’. DOCL at 7 (emphasis added). CMI filed its suit in the State of Queensland, Australia. Thus, CMI’s proposed interpretation would mean that CMI itself has failed to file in the proper forum.”

II. COMITY

[7] “CMI next contends that if the district court properly construed the forum selection clause, the district court nonetheless should have abstained on the basis of international comity. CMI suggests that this court combine the Eleventh Circuit’s analysis in Turner Entm’t Co. v. Degeto Film GmbH, 25 F.3d 1512 (11th Cir. 1994), with the factors enumerated by the Supreme Court in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), to come to the conclusion that comity and fairness dictate staying the American litigation. AiG responds that abstention is inappropriate in this case—both because the factors suggested by CMI weigh against abstention and the strong public policy of the United States supporting arbitration makes abstention inappropriate.

[8] “We review a district court’s decision on issues of abstention de novo because of the complex interaction of federal jurisdictional and comity concerns. See Chellman-Shelton v. Glenn, 197 F. App’x 392, 393 (6th Cir. 2006) (citing Superior Beverage Co., Inc. v. Schieffelin & Co., Inc., 448 F.3d 910, 913 (6th Cir. 2006)). Cf. Traughber v. Beauchane, 760 F.2d 673, 676 (6th Cir. 1985). ‘Abstention from the exercise of federal jurisdiction is the exception, not the rule.’ Colorado River, 424 U.S. at 813. Abstention ‘is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it’. Id. (internal quotes and citation omitted). Despite this truism, ‘in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction’. Turner, 25 F.3d at 1518.

[9] “Whether to abstain in regard to a motion to compel arbitration because of international comity concerns is an issue of first impression in this circuit. Case law is available from other circuits in the area of abstention based upon international comity in general. ‘One approach has taken the criteria enunciated in Colorado River and applied them to the international context’ while another approach has developed a similar test with more of a focus on the ‘special

1. "We further note that CMI’s own actions ratify our interpretation. If CMI’s reading of the clause is correct, the only possible forum for any suit concerning these agreements is ‘the State of Victoria, Australia’. DOCL at 7 (emphasis added). CMI filed its suit in the State of Queensland, Australia. Thus, CMI’s proposed interpretation would mean that CMI itself has failed to file in the proper forum.”
concerns’ injected by international comity. Id. (collecting cases). CMI suggests adopting the approach of the Eleventh Circuit in *Turner*, which combined the two complementary lines of cases to develop a multi-factor balancing test weighing international comity, concerns about ‘fairness to litigants’, and the ‘efficient use of scarce judicial resources’. Id.

[10] “By contrast, *Colorado River* instructed courts to consider several factors in determining whether to abstain in favor of a parallel proceeding in the courts of another sovereign. The ‘most important’ factor courts are to consider is whether there exists a ‘clear federal policy evinc[ing] … the avoidance of piecemeal adjudication’. 424 U.S. at 819. Additional factors include how far the parallel proceeding has advanced in the other sovereign’s courts, the number of defendants and complexity of the proceeding, the convenience of the parties, and whether a sovereign government is participating in the suit. Id. at 820.

[11] “For the purposes of this appeal, it is not necessary that we decide whether abstention is ever appropriate when one party seeks to compel arbitration with regard to an agreement in which the other party is international in origin. We conclude that even assuming that abstention might be appropriate in such a circumstance, CMI has not met its burden in proving that abstention is required. We base our conclusion upon weighing the factors found in the *Colorado River* test. We believe the factors found in *Colorado River* are the most applicable to the case at bar because those factors and their relative weight match most closely the public-policy concerns the Supreme Court has identified as vital in the area of arbitration.

[12] "*Colorado River* instructs that the ‘most important’ factor a court must consider is whether there is a ‘clear federal policy evinc[ing] … the avoidance of piecemeal adjudication’ found within the statutory scheme at issue. Id. at 819. In the case of the Federal Arbitration Act, there most clearly is not such a policy.

[13] "In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), the Supreme Court considered whether concerns over ‘bifurcated proceedings’ should cause a district court to refuse to compel arbitration when one set of state-law claims was subject to arbitration and another interrelated set of federal-law claims was not. Id. at 216-217. Dean Witter wished to stay arbitration of the arbitrable state-law claims in favor of allowing the federal-law claims to proceed first in the district court. Id. at 215. Dean Witter raised many of the same concerns CMI raises here, including duplication of resources and the possible res judicata effect should one proceeding end prior to the other. Id. at 216-217, 221-222. The Supreme Court rejected Dean Witter’s arguments and held that the ‘Arbitration Act requires district courts to compel arbitration of … arbitrable claims when one of the
parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums’. Id. at 217 (emphasis added). The Court further observed that ‘[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered’. Id. at 221. This concern should govern even if ‘piecemeal litigation’ was the inevitable result. Id. (internal quotes omitted). Thus, CMI cannot point to a clearly articulated policy against bifurcated litigation with regard to the FAA.

14 “International law, as incorporated by congressional action, supports our conclusion that abstention is inappropriate in this case. A similar concern for enforcing private agreements led to the adoption of the international treaty under which AiG seeks to vindicate its right to arbitrate. AiG filed this action under Sect. 206 of the FAA. 9 U.S.C. Sect. 206. Sect. 206 provides that district courts may compel arbitration upon motion of a party to an agreement covered by the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (Convention).’ Chapter Two of the FAA incorporates the provisions of the Convention into American domestic law. See 9 U.S.C. Sects. 201-208. Both Australia and the United States are signatories to the Convention, and thus its terms govern the resolution of this dispute. See Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (listing both Australia and the United States as signatories).

15 “Art. II of the Convention, as incorporated by the FAA, establishes the requirements necessary for an arbitration agreement to come within the Convention’s terms. The agreement must be in writing, concern a ‘legal relationship … which is considered as commercial’, and either at least one party to the contract must not be an American citizen or the commercial relationship must have a ‘reasonable relation with one or more foreign states’. 9 U.S.C. Sect. 202. Cf. Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. II, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. (hereinafter Convention).

16 “The MOA and DOCL, which concern the transfer of multiples pieces of intellectual property and corporate stock, are in writing and clearly concern a commercial topic. Furthermore, it is undisputed that AiG is an American corporation; and CMI is Australian in citizenship. All of the Convention’s

requirements are therefore met. Consequently, ‘when one of the parties’ to the arbitration agreement requests a court refer the dispute to arbitration, that court ‘shall’ do so. Convention Art. II(3). Cf. 9 U.S.C. Sect. 208.

[17] “As other courts construing the Convention’s language have observed, ‘there is nothing discretionary about Art. II(3) of the Convention’. Tennessee Imports, Inc. v. Filippi, 745 F.Supp. 1314, 1322 (M.D. Tenn. 1990)\(^3\) (quoting McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032, 1037 (3d Cir. 1974)).\(^4\)

The language of the treaty and its statutory incorporation provide for no exceptions. When any party seeks arbitration, if the agreement falls within the Convention, we must compel the arbitration unless the agreement is ‘null and void, inoperative, or incapable of being performed’. Convention Art. II(3).

[18] “CMI makes no such argument before us. Further, it is difficult to see how comity concerns could come into play where both Australia and the United States, as signatories to the Convention, apply the same law. CMI did not seek to compel arbitration in its action. AiG instead filed the first action seeking to compel arbitration. To assume that the district court’s order infringes on comity concerns is to assume that Australian courts would not follow their obligation under the Convention, as CMI’s argument must rest upon an assumption that an Australian court would be less likely to order arbitration. Such an argument both demeans the foreign tribunal and hardly advances the comity interests that CMI claims to seek to vindicate. Cf. Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (noting that federal courts should not seek to convey a message that they have ‘little confidence in the foreign court’s ability to adjudicate a given dispute fairly’).

[19] “Finally, we note that the other factors delineated in Colorado River do not clearly weigh in CMI’s favor. The Australian proceeding is only in its initial stages, and the Australian courts have yet to consider AiG’s jurisdictional and venue defenses. Because one group of witnesses is in Australia and another separate group is in Kentucky, either forum will be inconvenient for half of the parties such that this factor is a draw. The issues raised by the parties involve the interpretation of a half-century-old Convention whose terms are largely unambiguous, and no sovereign is participating in these proceedings. Cf. Colorado River, 424 U.S. at 820. Consequently, because neither international comity nor the traditional abstention factors applicable to parallel proceedings require abstention, we hold that the district court did not err in declining to abstain in favor of the prior-filed Australian proceedings.”

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III. SCOPE OF ARBITRATION CLAUSE

[20] “CMI’s third issue on appeal is that the district court erred in submitting all of AiG’s numerous causes of action against CMI to binding arbitration. CMI claims that the text of the arbitration clause only requires issues concerning the ownership of the AiG trademark, the copyright licenses contained in the MOA and DOCL, and whether CMI breached its obligations under those two documents to be submitted to arbitration. AiG responds that, contrary to CMI’s assertions, the arbitration clause is broadly worded, and therefore the district court properly submitted all of the parties’ disputes to the arbitrator.


[22] “To determine the breadth of the arbitration clause at issue, we must refer to the actual wording found in the MOA, which provides in pertinent part: ‘In the event of a disagreement of the parties regarding the meaning or application of any provision of this Agreement or any related agreements ... then the parties will submit the matter to Christian arbitration ... and the decision of the arbitrator shall be final.’ MOA at 2-3 (emphasis added). Contrary to CMI’s arguments, the arbitration agreement is not limited to only the MOA and DOCL. The clear language of the arbitration clause says ‘this Agreement or any related agreements’. To limit the scope of the arbitration clause to only the MOA and DOCL would read the words ‘or any related agreements’ out of the contract. See Royal Ins. Co. of Am., 525 F.3d at 421 (‘clear and unambiguous’ terms should be enforced as written). Therefore, we hold that the district court did not err in its finding that the arbitration clause is not limited to only those issues whose origin one can find within the four corners of the MOA and DOCL.

[23] “We next turn to the question of whether the remaining disputed issues should be submitted to arbitration. CMI concedes that those issues concerning the intellectual property directly referenced in the DOCL and MOA are arbitrable.5 CMI, however, continues to assert that the district court erred in compelling arbitration as to the claims that deal with the Distribution Agreement

5. “To the extent that CMI argues that it is inappropriate for an American court to interpret the validity of foreign intellectual property rights, we note that this case does not require any American court to do so. Our role is merely to interpret and enforce the arbitration agreement. The question of the construction and validity of the underlying trademark and copyright provisions at issue is for the arbitrator. Cf. Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1375-1376 (Fed. Cir. 1994) (finding that district courts do not have jurisdiction to determine directly the validity of a foreign patent).”
of 1994, which governed how AiG would purchase copies of Creation Magazine and distribute them to American subscribers, and whether CMI has defamed or tortiously interfered with AiG’s contracts through CMI’s statements concerning the DOCL, MOA, and related agreements.

[24] “Determining whether the disputes are arbitrable requires examining the breadth of the arbitration clause. Watson Wyatt, 513 F.3d at 649. The clause requires ‘disagreement[s] … regarding the meaning or application of any provision … [of] any related agreements’ to be arbitrated. MOA at 2–3. In Watson Wyatt, we considered an arbitration agreement that provided ‘any dispute or claim arising from or in connection with this agreement’ is subject to arbitration and concluded that the arbitration clause was broad. 513 F.3d at 649 (emphasis removed). Comparing the language in Watson Wyatt to that in the agreement between AiG and CMI, we conclude that the language is similarly broad as long as an issue concerning ‘the meaning or application of any provision … [of] any related agreements’ is involved. Therefore, the dispositive question is whether one may fairly characterize the remaining disputes as concerning the ‘meaning’ or ‘application’ of the agreements’ provisions.

[25] “We have held that where a dispute involves a broadly written arbitration clause ‘only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators’. Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 577 (6th Cir. 2003) (internal quotes and citation omitted). Furthermore, district courts are ‘required to give a general presumption of arbitrability and to resolve any doubts in favor of arbitration’. Watson Wyatt, 513 F.3d at 650. This general rule governs ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute’. Masco Corp. v. Zurich Am. Ins. Co., 382 F.3d 624, 627 (6th Cir. 2004) (internal quotes and citation omitted). This is because, ‘[t]he FAA manifests a liberal federal policy favoring arbitration agreements’. Watson Wyatt, 513 F.3d at 649 (internal quotes and citation omitted).

[26] “Applying these considerations to the case at bar, the Distribution Agreement of 1994 concerns whether AiG was contractually required to distribute Creation Magazine to American subscribers. Creation Magazine contained articles written by CMI members on the topic of creation science. The DOCL expressly grants rights to AiG in all articles produced by CMI both before and after the execution of the DOCL and explicitly mentions Creation Magazine, and all of its prior titles, by name. DOCL at 1, 3. Therefore, the DOCL may well have altered the rights and obligations of the parties pursuant to the Distribution

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Agreement. Because the ‘meaning’ of the agreement is at issue in determining
the rights and obligations of the parties in the ‘related’ Distribution Agreement,
the district court properly held that all claims related to the Distribution
Agreement are arbitrable. Cf. Highlands Wellmont, 350 F.3d at 577 (only ‘the
most forceful evidence’ will result in exclusion of a claim from the scope of a
broad arbitration clause).

[27] “The second subset of claims consists of AIG’s contention that statements
made in the Briese Report and on CMI’s separate website defamed AIG and/or
tortiously interfered with contracts AIG had with third parties. Truth is an
absolute defense to defamation. See Lassiter v. Lassiter, 280 F. App’x 503, 504
(6th Cir. 2008); see also Li v. The Herald and Weekly Times Pty. Ltd., 2007 VSC 109
(S.Ct. Victoria 20 April 2007). If CMI is correct in its interpretation of the
‘meaning’ of the agreements, then CMI cannot have defamed or interfered
wrongfully with AIG’s contracts. Once again, in order to resolve the issue, an
adjudicatory body must determine what the proper ‘meaning’ of the agreements
is. Applying the ‘general presumption of arbitrability’, Watson Wyatt, 513 F.3d
at 650, the district court did not err in submitting these claims to arbitration.”

IV. ANTI-SUIT INJUNCTION

[28] “Finally, AIG cross-appeals the district court’s order declining to issue a
foreign antisuit injunction. We have only considered the propriety of a district
court’s issuance of such an injunction once. See Gau Shan Co., 956 F.2d at 1351.
In Gau Shan, we observed that while it is ‘well settled that American courts have
the power’ to issue foreign antisuit injunctions, ‘[c]omity dictates that [these
injunctions] be issued sparingly and only in the rarest of cases’. Id. at 1353-1354.
To determine whether a foreign antisuit injunction should issue, we are to look
at whether an injunction is necessary to protect the jurisdiction of a federal court
or if allowing the foreign litigation to continue would allow a party ‘to evade the
forum’s important policies’. Id. at 1355, 1357.

[29] “It would be difficult for us to say that CMI was ‘attempting to evade [an]
important public policy of this forum’ by filing suit in an Australian court when
Australia is also a signatory to the Convention. Cf. id. at 1358. However, we
need not interpret the full import of our holding in Gau Shan in order to decide
this case in its current procedural posture. The parties have voluntarily
suspended the Australian proceedings while we consider CMI’s appeal. With the
benefit of our opinion, the parties will be in a much-improved position to
consider their future legal options. It would be unwise for us to speculate as to
what course of action CMI will take, and such speculation would likely be required for us definitively to hold what Gau Shan demands of injunction-seeking parties. We simply note that with the Australian proceedings suspended, we believe that the district court clearly did not abuse its discretion in declining, at this time, to issue a foreign antisuit injunction. Id. at 1352 (noting that the standard of review is abuse of discretion). Should the status of the Australian litigation change following the issuance of our opinion, AiG may renew its motion for an injunction before the district court. At that time, the district court may apply the Gau Shan factors to the then-present facts and make a new determination.”

V. CONCLUSION

[30] “For the foregoing reasons, we affirm the judgment of the district court in its entirety. Our affirmance as to the district court’s refusal to issue a foreign antisuit injunction is without prejudice so that AiG may renew its motion before the district court should proceedings in the Australian suit resume. We also deny CMI’s motion to stay arbitration as moot in light of our disposition of this appeal.”
663. United States District Court, Southern District of New York, 27 March 2009, Case No. 07 Civ. 4038 (PAC)

Parties: 
Plaintiff: Clinique La Prairie, S.A. (Switzerland)  
Defendant: The Ritz Carlton Hotel Company, L.L.C.  
(nationality not indicated)

Published in:  
2009 U.S. Dist. LEXIS 61004

Articles:  
I(1); III; V; V(1)(e)

Subject matters:  
– grounds for refusal of enforcement are exhaustive  
– award on agreed terms is final and binding award

Commentary Cases:  

Facts

In 1982, Clinique La Prairie, S.A. (CLP), a company offering spa, health and fitness services, sold the “La Prairie” cosmetics line to Aviatrix Corporation, a US company which later became La Prairie, Inc. (La Prairie). The 1982 agreement between the parties provided that La Prairie was entitled to use the “La Prairie” name in connection with cosmetics and beauty products and services, while CLP reserved the right to use the name “Clinique La Prairie” in connection with its medical and health spas. In 1995, the parties entered into a second agreement (the 1995 Agreement) to clarify the terms of the use of the “La Prairie” name. The 1995 agreement provided for arbitration of disputes in Switzerland.

A dispute arose between the parties in respect of a La Prairie-licensed spa operated under the name “La Prairie” by The Ritz Carlton Hotel Company, L.L.C. (Ritz Carlton) at the Ritz Carlton Hotel on Central Park South in Manhattan. On 21 November 2005, CLP sent a cease-and-desist letter to La Prairie, claiming that Ritz Carlton’s use of the “La Prairie” name created the illusion of an affiliation between the Ritz Carlton spa and CLP’s spa services and that La Prairie’s licensing of spas constituted a breach of the 1995 Agreement. La Prairie responded in a letter dated 7 December 2005, arguing that nothing in the 1995 Agreement prevented it from being “present and active in spas”.

On 11 April 2007, CLP commenced the present action against Ritz Carlton in New York State Supreme Court, alleging injury to business reputation, unfair competition and trademark infringement. Ritz Carlton removed the action to the United States District Court for the Southern District of New York.

On 25 May 2007, CLP also initiated arbitration proceedings against La Prairie in Switzerland. On 27 June 2007, La Prairie moved to intervene in the US proceedings and asked the court to stay proceedings pending the outcome of the Swiss arbitration. On 18 October 2007, the district court permitted La Prairie to intervene and stayed the proceedings.

On 8 April 2008, following the conclusion of the Swiss arbitration but before the arbitrators had issued a final written decision, CLP and La Prairie agreed to an appendix to their 1995 Agreement (the 2008 Appendix). The 2008 Appendix further clarified the parties’ rights with respect to the use of the “La Prairie” name; in particular, it held that La Prairie could use the “La Prairie” name “for operations of beauty salons and facilities” that were not of a medical nature, such as the spa at the Ritz Carlton Hotel in Manhattan. CLP also agreed “to withdraw the action against Ritz Carlton in the United States within ten days of the mutual signing of this Appendix”.

On 22 April 2008, the Swiss arbitral tribunal issued its final decision (the Swiss Arbitration Decision), which incorporated the 2008 Appendix and further indicated that “[e]xcept for the rights and obligations assumed in the [2008 Appendix], all claims and counterclaims are deemed as withdrawn with prejudice and the arbitral procedure is herewith terminated”.

On 23 May 2008, La Prairie wrote to the Swiss arbitrators requesting clarification on the issue of whether the 2008 Appendix and Swiss Arbitration Decision mandated dismissal of the US action against Ritz Carlton with or without prejudice. On 2 June 2008, before the Swiss arbitral tribunal responded, CLP moved the US district court to dismiss the action without prejudice. On 23 June 2008, La Prairie filed a motion to stay proceedings until the Swiss arbitral tribunal responded to its letter. On 24 June 2008, the Swiss arbitrators responded to La Prairie’s letter, stating that although they could not issue a binding interpretation of the language in the 2008 Appendix, they did not need to because the 2008 Appendix and Swiss Arbitration Decision, taken together, clearly required that CLP’s action against Ritz Carlton be withdrawn with prejudice. They also noted that under the Zurich Rules of Civil Procedure, which governed the arbitration, “withdrawal of an action is always with prejudice”.

On 25 August 2008, La Prairie sought enforcement of the Swiss Arbitration Decision in the district court. Ritz Carlton moved to dismiss with prejudice.
The district court, per Paul A. Crotty, US DJ, (1) denied La Prairie’s motion to stay proceedings pending clarification of the Swiss Arbitration Decision as moot; (2) granted La Prairie’s motion to enforce the Swiss Arbitration Decision; (3) granted Ritz Carlton’s motion to dismiss the action with prejudice and (4) denied CLP’s motion to dismiss without prejudice.

The court dismissed the first motion as moot because the Swiss arbitrators issued the requested clarification on the day following La Prairie’s filing of that motion.

The court then granted La Prairie’s motion to enforce the Swiss Arbitration Decision under the 1958 New York Convention. CLP relied on “basic logical reasoning” to argue that enforcement was not appropriate. It maintained that while the Swiss Arbitration Decision did require dismissal of all claims and counterclaims, the withdrawal of CLP’s US action against Ritz Carlton was an obligation rather than a claim or counterclaim; as such, it was covered by the exception in the Swiss Arbitration Decision (“except for the rights and obligations assumed” in the 2008 Appendix).

The court held that this was not one of the grounds for refusal exhaustively listed in the Convention. In any event, it was without merit, since the language of the 2008 Appendix and the Swiss Arbitration Decision clearly contemplated settlement of the disputes between CLP and La Prairie and, consequently, dismissal of the action against Ritz Carlton with prejudice.

CLP also claimed that the Swiss Arbitration Decision was merely a procedural order to terminate arbitration proceedings rather than an award deciding the merits of the dispute; hence, it was not a final award and could not be confirmed. The court disagreed, reasoning that the Swiss Arbitration Decision expressly adopted the 2008 Appendix as its substantive findings and made those findings binding by stating that “The present resolution on the final closing of the arbitration procedure, inclusive of the arrangement in (the 2008 Appendix), is final and binding on both parties.”

Having found that there were no grounds for refusal and that the Swiss Arbitration Decision was final and binding, the district court granted La Prairie’s request for enforcement.

The district court then dismissed the action with prejudice, as requested by Ritz Carlton, and denied CLP’s motion to dismiss without prejudice. It noted that CLP specifically undertook in the 2008 Appendix to withdraw the US action against Ritz Carlton and that the arbitrators stated in the Swiss Arbitration Decision that all claims and counterclaims were deemed as withdrawn with prejudice. Having enforced the Swiss Arbitration Decision, the court accepted its provisions with respect to dismissal.
Excerpt

[1] “Plaintiff Clinique La Prairie, S.A. (CLP) brings this action against Defendant Ritz Carlton Hotel Company, L.L.C. (Ritz Carlton) alleging injury to business reputation, unfair competition, and trademark infringement. CLP’s claims stem from Ritz Carlton’s operation of a spa called ‘La Prairie’ at its hotel on Central Park South in Manhattan. On 18 October 2007, this Court allowed a third party, La Prairie, Inc. (La Prairie), to intervene as a defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure. There is a parallel Swiss arbitration proceeding between CLP and La Prairie. La Prairie claims that the arbitration panel’s April 2008 decision settled the issue of each party’s rights to use the name ‘La Prairie’ and obliged CLP to terminate the instant proceedings against Ritz Carlton.

[2] “The Court is faced with four outstanding motions. For the reasons that follow, La Prairie’s motion to stay the present proceedings pending clarification of the Swiss arbitration decision is denied as moot, and its motion to confirm the arbitration decision is granted. Ritz Carlton’s motion to dismiss the present action with prejudice is granted, while CLP’s motion to dismiss without prejudice is denied.”

I. MOTION TO STAY COURT PROCEEDINGS

[3] “La Prairie’s motion to stay proceedings pending the Swiss arbitration panel’s response to La Prairie’s 23 May 2008 letter is moot. La Prairie filed its motion on 23 June 2008. One day later, the Swiss arbitration panel held that the 2008 Appendix and Swiss Arbitration Decision required dismissal of the instant matter with prejudice. For obvious reasons, the motion is denied as moot.”

II. MOTION TO CONFIRM AWARD


Inc., 198 F.3d 88, 92 n. 4 (2d Cir. 1999)\(^2\) (‘The Convention ... shall be enforced in United States courts in accordance with’ Sect. 201 of the FAA.). The Convention:

‘appl[ies] to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.’ Convention Art. I(1).

\[5\] “A domestic court plays only a limited role in reviewing foreign arbitral awards under the Convention. It must ‘confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention’. 9 U.S.C. Sect. 207. Art. V(1) of the Convention enumerates five grounds for refusing to enforce a foreign arbitral award [quotation of Art. V(1) omitted]. A domestic court may also refuse to enforce a foreign award pursuant to Art. V(2) of the Convention if ‘[t]he subject matter of the difference is not capable of settlement by arbitration’, or ‘recognition or enforcement of the award would be contrary to the public policy’ of the state in which enforcement or recognition is sought. Convention Art. V(2).

\[6\] “There is ‘considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Art. V of the Convention are the only grounds available for setting aside an arbitral award’”. *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997)\(^3\) (citations omitted). ‘The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under [the Convention] applies.’ *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).\(^4\) ‘[T]he showing required to avoid summary confirmance is high.’ *Yusuf Ahmed Alghanim*, 126 F.3d at 23 (citing *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987)).

\[7\] “CLP’s opposition to confirmation of the Swiss Arbitration Decision is not grounded in the FAA, the Convention, or any other source of legal authority. Instead, it purports to rely upon ‘basic logical reasoning’ to refute La Prairie’s

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argument that confirmation is appropriate.... CLP argues that the phrase ‘except for the rights and obligations assumed’ in the 2008 Appendix creates a carve-out exception to the Swiss Arbitration Decision requiring the dismissal of ‘claims and counterclaims’ with prejudice.... It claims that the withdrawal of the instant action against Ritz Carlton, as required by para. 12 of the 2008 Appendix, is an ‘obligation’ rather than a ‘claim or counterclaim’ and therefore is not covered by the language of the Swiss Arbitration Decision....

[8] “As a threshold matter, CLP makes no showing that this argument, even if true, constitutes one of the seven grounds for refusing to enforce a foreign arbitral award under Art. V of the Convention. CLP appears to be conflating an argument in favor of dismissal without prejudice with its arguments in opposition to confirmation. In any event, the argument is wholly without merit. Taken together, the language of the 2008 Appendix and the Swiss Arbitration Decision clearly contemplates settlement of the underlying disputes between CLP and La Prairie and, consequently, dismissal of the action against Ritz Carlton with prejudice.

[9] “CLP further claims that the Swiss Arbitration Decision was not a final award, and therefore should not be confirmed, because it was merely a procedural order to terminate arbitration proceedings rather than an award adjudicated on the merits. The Second Circuit has held that ‘an arbitration award, to be final, must resolve all the issues submitted to arbitration, and ... must resolve them definitively enough so that the rights and obligations of the two parties, with respect to the issues submitted, do not stand in need of further adjudication’. Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 176 (2d Cir. 1998).

[10] “Prior to the issuance of the Swiss Arbitration Decision, the parties agreed to the 2008 Appendix. The Swiss Arbitration Decision specifically indicates that ‘the parties are obliged to meet all obligations defined in (the 2008 Appendix) and accepted by them in each case. The present resolution on the final closing of the arbitration procedure, inclusive of the arrangement in (the 2008 Appendix), is final and binding on both parties.’ (... (Emphasis added.) In other words, the Swiss Arbitration Decision adopts the 2008 Appendix as its substantive findings and makes them binding.

[11] “There are no applicable grounds for setting the arbitration award aside. The Swiss Arbitration Decision constitutes a final award and accordingly the Court confirms the award.”
III. MOTIONS TO DISMISS WITH/WITHOUT PREJUDICE

[12] “Finally, having confirmed the Swiss Arbitration Decision, the Court must determine whether CLP’s claims against Ritz Carlton should be dismissed with or without prejudice. In keeping with both the 2008 Appendix and the Swiss Arbitration Decision, the Court finds that the claims must be dismissed with prejudice.

[13] “In the 2008 Appendix, CLP undertook ‘to withdraw the action against Ritz Carlton in the United States within ten (10) days of the mutual signing of this Appendix’…. The Swiss Arbitration decision incorporated the 2008 Appendix and specifically stated that ‘all claims and counterclaims are deemed as withdrawn with prejudice and the arbitral procedure is herewith terminated’…. On 24 June 2008, the arbitration panel indicated that the language of the 2008 Appendix and Swiss Arbitration Decision clearly contemplated withdrawal of the present matter against Ritz Carlton with prejudice…. Having confirmed the Swiss Arbitration Decision, the Court accepts its provisions with respect to dismissal of the present matter against Ritz Carlton…. Accordingly, the Court grants Ritz Carlton’s motion to dismiss with prejudice and denies CLP’s motion to dismiss without prejudice.”

(…..)
664. United States District Court, Middle District of North Carolina, 31 March 2009, Case no. 1:08CV117

Parties: Plaintiff: Michael J. Riek (nationality not indicated)  
Defendants: (1) Xplore-Tech Services Private Limited (India);  
(2) Pankaj Dhanuka (India);  
(3) Kishore Saraogi (India);  
(4) Help Desk Now, Inc. (US)

Published in: 2009 U.S. Dist. LEXIS 28567

Articles: I(1); II(3)

Subject matters: – nonsignatory to arbitration clause  
– estoppel (equitable)  
– arbitration agreement “null and void” because unconscionable (no)


Facts

On 5 October 2004, Michael J. Riek, who was then president of Help Desk Now, Inc. (Help Desk) and a shareholder of its parent company DP Solutions, Inc. (DP Solutions), also a US company, made a loan in the amount of US$ 13,000 to Help Desk.

On 12 April 2007, Xplore-Tech Services Private Limited (Xplore-Tech) and DP Solutions executed a Share Purchase Agreement by which Xplore-Tech purchased Help Desk from DP Solutions. Under the Purchase Agreement, Xplore-Tech agreed to assume Help Desk’s existing liabilities up to an amount of US$ 4,500,000, with any excess liability to be borne by DP Solutions. The Purchase Agreement further contained a clause providing that any dispute arising out of or in relation to the Purchase Agreement be submitted to arbitration in Washington, DC, at the request of any party to the Agreement.

On 23 April 2007, Pankaj Dhanuka and Kishore Saraogi, both principals of Xplore-Tech, executed a “Personal Guarantee to DP Solutions and its
Shareholders Who Are Owed Money by Help Desk as of 31 March 2007” (the Personal Guarantee), by which they personally guaranteed that the balance owed to DP Solutions and some of its shareholders that had loaned money to Help Desk would be paid as represented in the Purchase Agreement. In the event that those amounts were not paid to Help Desk’s creditors by either Help Desk or Xplore-Tech, Dhanuka and Saraogi agreed to personally pay the amounts owed.

A dispute arose among the parties regarding the amount of liability Xplore-Tech assumed pursuant to the Purchase Agreement. Riek then made demands on Xplore-Tech, Dhanuka and Saraogi (collectively, the Defendants) for repayment of the loan. On 30 January 2008, he filed a Complaint against the Defendants in the Superior Court of Guilford County. The action was subsequently removed to the United States District Court for the Middle District of North Carolina on the basis of diversity jurisdiction.

On 10 March 2008, Riek filed an Amended Complaint adding Help Desk as a defendant and modifying his claims. By his Second Claim for Relief of the Amended Complaint, Riek sought repayment of the US$ 13,000 loan from Xplore-Tech pursuant to the terms of the Purchase Agreement, and from Dhanuka and Saraogi pursuant to the terms of their Personal Guarantee. The Defendants in turn filed a motion to compel arbitration of Riek’s claim on the basis of the arbitration clause in the Purchase Agreement. The Defendants further filed a motion to stay the litigation pending the outcome of arbitration, if granted. Riek opposed both Defendants’ motions, contending that as a non-signatory to the Purchase Agreement he was not bound by the arbitration clause.

The district court, per James A. Beaty, Jr, Chief US DJ, granted Defendants’ motion to compel arbitration in respect of Riek’s claims against Xplore-Tech, denied it in respect of Dhanuka and Saraogi and dismissed Defendants’ motion to stay the litigation.

The court first held that Riek could sue under the Purchase Agreement, to which he was not a party, as a third-party beneficiary, since the Purchase Agreement was intended to benefit Help Desk’s creditors such as Riek.

The court then held that Xplore-Tech could enforce the arbitration clause in the Purchase Agreement against Riek under the theory of equitable estoppel, which recognizes that a party may be estopped from asserting that the lack of his signature on a contract precludes enforcement of the contract’s arbitration clause when he relies on other provisions of the same contract to his “direct benefit”. The court reasoned that the direct-benefit test was met here because Riek sought a direct benefit from the Purchase Agreement in asserting his claim for repayment. As a consequence, Riek was estopped from denying that he was
bound by the arbitration clause in the Purchase Agreement and could only pursue his claim against Xplore-Tech in arbitration.

The court denied Riek’s argument that the arbitration agreement was null and void because unconscionable, in that an international arbitration would make enforcement of the loan repayment prohibitively expensive. The court reasoned that Riek presented no evidence that arbitration would be prohibitively expensive or otherwise unreasonable, noting in particular that the chosen venue for arbitration was Washington, DC, while Riek was a resident of North Carolina.

As a consequence, the court compelled arbitration of Riek’s claim against Xplore-Tech.

The court reached a different result in respect of Riek’s claim against Dhanuka and Saraogi under the Personal Guarantee, holding that the Personal Guarantee was an independent obligation and that Riek’s claim against Dhanuka and Saraogi did not arise out of the Purchase Agreement.

The district court finally denied the Defendants’ motion to stay proceedings, reasoning that having dismissed and referred to arbitration Riek’s claim against Xplore-Tech, there was no basis to stay the claim against Dhanuka and Saraogi, which was not subject to arbitration.

Excerpt

1. MOTION TO COMPEL ARBITRATION

[1] “Turning first to the Motion to Compel Arbitration, the Court notes that Defendants Xplore-Tech, Dhanuka, and Saraogi seek to compel Riek to arbitrate only his Second Claim for relief, which relates to repayment of the loan that Riek originally made to Help Desk.1 However, the Court further notes that Riek’s Second Claim for relief actually asserts two distinct avenues for recovery of the loan amount, each of which comprises a separate claim. Specifically, Riek seeks repayment of the loan amount (1) from Xplore-Tech pursuant to the Purchase Agreement, and (2) from Dhanuka and Saraogi pursuant to their Personal Guarantee. The Court will address in turn whether either one of these claims is subject to arbitration.”

1. “Riek’s First Claim for relief relates to an alleged breach of an employment contract between Riek and Xplore-Tech, and Defendants do not contend that there is any basis to require arbitration of that claim.”
1. Riek’s Claim Against Xplore-Tech

[2] “Under the first part of the Second Claim for relief, Riek seeks recovery of the [US]$ 13,000 loan amount from Xplore-Tech pursuant to Xplore-Tech’s purported agreement to assume repayment for the loan under the terms of the Purchase Agreement. In the present Motion to Compel Arbitration, Xplore-Tech contends that based on the terms of the arbitration provision contained within the Purchase Agreement and the [1958 New York Convention], Riek must proceed with his claim in arbitration. In this regard, the Court will address the applicable legal standards to determine whether the parties should be referred to arbitration.


[4] “The Convention would apply to arbitration in this case because Xplore-Tech, one of the parties to the arbitration agreement, is a foreign corporation whose principals are residents of India. See id. (citing 9 U.S.C. Sect. 202). The Convention provides that ‘[t]he court of a Contracting State … shall, at the request of one of the parties [to an arbitration agreement], refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative, or incapable of being performed’. Convention, Art. II(3). However, ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit’. Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000)4 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)); see also Southern Spindle & Flyer Co. v. Milliken & Co., 53

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N.C. App. 785, 788, 281 S.E.2d 734, 736 (Ct. App. 1981) (noting that under contract law, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes).

[5] “In this case, Xplore-Tech seeks to compel Riek to arbitrate his Second Claim for repayment of the loan pursuant to the arbitration provision of the Purchase Agreement between DP Solutions and Xplore-Tech.5 Specifically, Defendants contend that although Riek is a non-signatory to the Purchase Agreement, he nevertheless should be compelled to arbitrate his Second Claim against Xplore-Tech because the claim falls within the scope of the arbitration agreement in that it arises out of and is contingent upon interpreting the Purchase Agreement. Defendants further contend that Riek should be compelled to arbitrate his claim against Xplore-Tech because by seeking repayment of the loan from Xplore-Tech, Riek seeks to enforce the terms of the Purchase Agreement.

[6] “Riek, however, contends that because he did not sign the Purchase Agreement containing the arbitration provision, he is not bound by the arbitration provision and thus has no obligation to arbitrate his claim. Riek further contends that as a loaner of money to Help Desk, he did not give consent to arbitrate claims for repayment of the loan, and therefore he did not enter into a valid agreement to arbitrate disputes with Help Desk, nor with any of the other Defendants.

[7] “The Court notes that the arbitration provision of the Purchase Agreement explicitly applies to disputes between the ‘Parties’, who are defined in the agreement as the Seller, DP Solutions, and the Purchaser, Xplore-Tech. The Court further notes that while Xplore-Tech is a ‘Party’ to whom the arbitration
provision applies, Riek is neither a signatory to the Purchase Agreement nor a ‘Party’ to the arbitration provision contained therein.

[8] “Nevertheless, while a mutual agreement to arbitrate disputes must be shown in the case of two parties to a contract, that scenario is not at issue in this case. In this case, both Rick and Xplore-Tech are attempting to enforce provisions of a contract to which Rick is a third-party beneficiary. In this regard, the legal standards that apply include a third-party’s right to enforce a contract to which he is a stranger, and the ability of a signatory to a contract containing an arbitration provision to enforce that provision against a non-signatory.

[9] “The rule is well established in this jurisdiction that a third person may sue to enforce a binding contract or promise made for his benefit even though he is a stranger both to the contract and to the consideration.’ Carl v. State, 665 S.E.2d 787, 794 (N.C. Ct. App. 2008) (quoting American Trust Co. v. Catawba Sales & Processing Co., 242 N.C. 370, 379, 88 S.E.2d 233, 239 (1955)) (quotation marks omitted). ‘[A] person may bring an action to enforce a contract to which he is not a party, if he demonstrates that the contracting parties intended primarily and directly to benefit him or the class of persons to which he belongs.’ DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 604, 544 S.E.2d 797, 801 (Ct. App. 2001). ‘The intent of the parties is ascertained by construction of the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.’ Id. (quoting Chem. Realty Corp. v. Home Fed. Sav. & Loan, 84 N.C. App. 27, 33, 351 S.E.2d 786, 790 (Ct. App. 1987)). Thus, where a corporation, in purchasing the assets of another corporation from receivers, agrees to assume the liabilities of the receivers in connection with the operation of the business, such agreement constitutes a contract for the benefit of creditors and they may sue upon the contract as third-party beneficiaries. See Canestrino v. Powell, 231 N.C. 190, 195, 56 S.E.2d 566, 569 (1949).

[10] “In this case, Xplore-Tech and DP Solutions executed a Purchase Agreement by which Xplore-Tech purchased Help Desk from DP Solutions. In purchasing the assets of Help Desk, Xplore-Tech agreed to assume the liabilities of Help Desk up to a certain dollar amount as indicated in the Purchase Agreement. Pursuant to the payment provision of the Purchase Agreement, Xplore-Tech agreed to pay specified amounts to the Seller (DP Solutions) and other creditors to pay off the loans and liabilities of Help Desk. These terms of the Purchase Agreement make it evident that Xplore-Tech and DP Solutions in contracting the sale of Help Desk, intended to primarily and directly benefit creditors such as Rick. This type of agreement constitutes a contract for the benefit of creditors, and these credit beneficiaries may sue to enforce the
provisions of the contract as third-party beneficiaries. See Canestrino, 231 N.C. at 195, 56 S.E.2d at 569.

[11] "Therefore, because the facts here demonstrate that the contracting parties, Xplore-Tech and DP Solutions, intended to benefit creditors such as Riek, the Court finds that Riek, as a third-party beneficiary to the Purchase Agreement, may enforce the promises made therein for his benefit even though he is a stranger to the contract. See DeMent, 142 N.C. App. at 604, 544 S.E.2d at 801 (‘[A] person may bring an action to enforce a contract to which he is not a party, if he demonstrates that the contracting parties intended primarily and directly to benefit him or the class of persons to which he belongs.’).

[12] "Having found that Riek may properly sue to enforce the terms of the Purchase Agreement, the Court must examine whether Xplore-Tech likewise may enforce the arbitration provision of the Purchase Agreement against Riek.

[13] "The Fourth Circuit has held that ‘[w]hile a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, it does not follow … that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision’. Int’l Paper, 206 F.3d at 416. ‘Well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.’ Id. at 416-417.

[14] "An appropriate case for enforcement is under a theory of equitable estoppel. See id. at 417; Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006); Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392 (4th Cir. 2005); R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n, 384 F.3d 157 (4th Cir. 2004). ‘In the arbitration context, the doctrine [of equitable estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.’ Int’l Paper, 206 F.3d at 418; see also Am. Bankers Ins. Group, 453 F.3d at 627 (noting that ‘[t]he legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage’) (internal quotation and citation omitted).

[15] "The test for determining when equitable estoppel applies against a non-signatory who sues a signatory to an arbitration provision states that ‘a non-signatory will be estopped when his underlying claims seek a “direct benefit” from the contract containing the arbitration clause’. Am. Bankers Ins. Group, 453 F.3d at 628. The ‘direct benefit’ test ‘recognizes that a non-signatory should be estopped from denying that it is bound by an arbitration clause when its claims
against the signatory arise from the contract containing the arbitration clause’.

[16] “In this case, Riek seeks to enforce certain provisions of the Purchase Agreement in asserting his claim for repayment, in that he contends that Xplore-Tech agreed to assume the liabilities of Help Desk, including the repayment of the loan to Help Desk from Riek. Xplore-Tech, however, invokes the doctrine of equitable estoppel, in substance, by arguing that by seeking repayment of the loan from Xplore-Tech, Riek seeks to enforce the terms of the Purchase Agreement and is thus bound by the arbitration provision contained in the Purchase Agreement.

[17] “The Court notes that Riek’s Second Claim for repayment seeks a direct benefit from the Purchase Agreement in that Riek contends that ‘[p]ursuant to the Share Purchase Agreement between [Xplore-Tech] and [DP Solutions], dated 12 April 2007, Xplore-Tech assumed the Loan and promised to repay it’…. As a result, the Court affirmatively finds that Riek’s Second Claim for relief, to the extent it is asserted against Xplore-Tech, arises from the Purchase Agreement. Under the principles of equitable estoppel Riek cannot now avoid the arbitration provision of the Purchase Agreement and at the same time enforce another contract provision that operates to his benefit. See Int’l Paper, 206 F.3d at 418 (noting that ‘a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him’).

[18] “The Court finds that the facts in this case meet the test for equitable estoppel because Riek’s Second Claim against Xplore-Tech arises out of the Purchase agreement and because Riek, in pursuing his claim, seeks a direct benefit from the Purchase Agreement. See Am. Bankers Ins. Group, 453 F.3d at 628 (‘equitable estoppel applies against a non-signatory who sues a signatory to an arbitration provision [when] … his underlying claims seek a “direct benefit” from the contract containing the arbitration clause’).

[19] “Having found that equitable estoppel applies in this case, the Court concludes that Riek is estopped from denying that he is bound by the arbitration provision of the Purchase Agreement, and therefore Riek may only pursue his Second Claim for repayment of the loan to the extent it is asserted against Xplore-Tech in arbitration.

[20] “Having concluded that Riek is under an obligation to arbitrate his Second Claim against Xplore-Tech, the Court notes that Riek contends that in any event, the arbitration provision in the Purchase Agreement is unconscionable and may be voided by the Court. Specifically, Riek contends that Xplore-Tech cannot
bind him to an international arbitration agreement that would make enforcement of the loan repayment prohibitively expensive. In examining Riek’s contention, the Court turns to the applicable legal standards for evaluating the enforceability of arbitration agreements.

[21] “The Federal Arbitration Act contemplates that ‘equity may require invalidation of an arbitration agreement that is unconscionable’. Murray v. UFCW Int’l, Local 400, 289 F.3d 297, 302 (4th Cir. 2002). The grounds for invalidation, however, must relate specifically to the arbitration clause and not just to the contract as a whole. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). ‘Unconscionability is a narrow doctrine whereby the challenged [agreement] must be one which no reasonable person would enter into, and the inequality must be so gross as to shock the conscience.’ Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 305 (4th Cir. 2001) (internal quotation and citation omitted). With regard to expenses making an arbitration agreement unenforceable, ‘the party seeking to avoid arbitration must prove that arbitration would be prohibitively expensive’. Id. at 306 (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92, 121 S.Ct. 513, 522, 148 L.Ed.2d 373 (2000)).

[22] “In this case, while Riek contends that this ‘international arbitration agreement’ would make enforcement of his loan repayment prohibitively expensive, Riek has presented no evidence for the Court to consider in making a determination as to whether arbitration in this instance is prohibitively expensive. See Sydnor, 252 F.3d at 305 (‘party seeking to avoid arbitration must prove that arbitration would be prohibitively expensive’). Moreover, to the extent that Riek contends that the international nature of the Purchase Agreement might be prohibitively expensive, the Court notes that the chosen venue for arbitration is Washington, DC, which is not an international location for Riek, who is a resident of North Carolina. In addition, Riek has presented no evidence to show that the arbitration agreement is otherwise unreasonable or so grossly unequal to warrant a finding of unconscionability. See id. (noting that to be unconscionable, an agreement must be ‘one which no reasonable person would enter into’, and so grossly unequal ‘as to shock the conscience’.)

[23] “Therefore, because Riek has not demonstrated that the arbitration provision in the Purchase Agreement is unconscionable in any manner, the Court declines to invalidate the arbitration provision on this ground.

[24] “Having concluded that Riek is under an obligation to arbitrate his Second Claim for relief, to the extent that it is asserted against Xplore-Tech, and having further concluded that the arbitration provision is otherwise enforceable, the
Court will grant Defendants’ Motion to Compel Arbitration with respect to Riek’s Second Claim for relief against Xplore-Tech.”

2. **Riek’s Claim Against Dhanuka and Saraogi**

[25] “With respect to the second part of the Second Claim for relief, Riek seeks repayment of the (US)$ 13,000 loan from Dhanuka and Saraogi pursuant the Personal Guarantee executed by these two Defendants on 23 April 2007. Dhanuka and Saraogi, however, move to compel arbitration of this claim contending that based on the terms of the arbitration provision contained within the Purchase Agreement, and the [New York Convention], Riek may only proceed with his claim in arbitration.

[26] “In this case, Riek asserts his claim for repayment against Dhanuka and Saraogi pursuant to the Personal Guarantee, and not the Purchase Agreement which contains the arbitration provision. Riek contends that the Personal Guarantee executed by Dhanuka and Saraogi renders the two of them ‘unconditional’ guarantors of the loan, and that the Personal Guarantee is absolute and independent from any obligation that Xplore-Tech may have to repay the loan. Riek further argues that the Personal Guarantee expressly states that the forum for collection is in a United States court.

[27] “The Court notes that the terms of the Personal Guarantee state that Dhanuka and Saraogi ‘personally guarantee that [a specified amount] that is of this date still owed to [DP Solutions] and some of its shareholders that have loaned money to Help Desk will be paid as presented in the Share Purchase Agreement between Xplore-Tech and DP Solutions.... If for any reason the [specified amounts] ... are not paid [according to the schedule in the Purchase Agreement] by either Help Desk or Xplore-Tech, Dhanuka and Saraogi will personally pay the amount(s) owed within 15 days of the dates that such unpaid amounts were to have been paid.’... The Personal Guarantee further states that ‘in the event of default in paying the amounts due when they become due as per the Purchase Agreement ... [DP Solutions] and its Shareholders that are owed money by Help Desk may seek payment directly from [Dhanuka] and [Saraogi].’ Id.

[28] “The Court notes that although the Personal Guarantee makes reference to the Purchase Agreement, it does so only with regard to the schedule for repayment of loans owed to the shareholders. The Court further notes that reference to the Purchase Agreement merely indicates the point in time at which Dhanuka and Saraogi’s obligations mature, and the substantive terms of the Personal Guarantee are independent from those of the Purchase Agreement. See SNML Corp. v. Bank of North Carolina, N. A., 41 N.C. App. 28, 36, 254 S.E.2d 1065

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6. "Dhanuka and Saraogi argue that although Riek is a non-signatory to the Purchase Agreement, he
nevertheless should be compelled to arbitrate his Second Claim against Dhanuka and Saraogi
because the claim arises out of and is contingent upon interpreting the Purchase Agreement. As
noted above, the Court recognizes that in the appropriate circumstance, under a theory of equitable
estoppel, 'a non-signatory can enforce, or be bound by, an arbitration provision within a contract
executed by other parties'. Int'l Paper, 206 F.3d at 416-417. To the extent that a non-signatory
seeks to compel arbitration of another non-signatory's claims, the party seeking to compel
arbitration must demonstrate that the party seeking to avoid arbitration relies on the contract
containing the arbitration provision in pursuing his claim. See Am. Bankers Ins. Group, 453 F.3d at
628 (noting that Beasley's 'rely on' legal test is appropriate where a non-signatory plaintiff attempts
to avoid arbitration). The 'rely on' test provides that 'equitable estoppel applies when the signatory
to a written agreement containing an arbitration clause must rely on the terms of the written
agreement in asserting [its] claims against the non-signatory. When each of a signatory's claims
against a non-signatory makes reference to or presumes the existence of the written agreement,
the signatory's claims arise out of and relate directly to the written agreement, and arbitration is
appropriate.' Beasley, 424 F.3d at 395-396. Because the Second Claim for relief, to the extent that
it is asserted against Dhanuka and Saraogi, relies on the Personal Guarantee, and not the Purchase
Agreement, equitable estoppel would not apply to this claim."
and that the proper forum for pursuing collection under the Personal Guarantee is the court, the Court concludes that Riek’s Second Claim for repayment of the loan against Dhanuka and Saraogi will not be referred to arbitration. Therefore, the Court will deny Defendants’ Motion to Compel Arbitration of Riek’s Second Claim for repayment of the loan against Dhanuka and Saraogi.’’

II. MOTION TO STAY PROCEEDINGS

[31] “In connection with Defendants’ Motion to Compel Arbitration, Defendants also move to stay the litigation as to the Second Claim pending the outcome of arbitration if granted. However, in response, Riek has requested that if the Court grants Defendants’ Motion to Compel Arbitration with respect to his claim against Xplore-Tech, that instead of allowing Defendants’ Motion to Stay, the Court would, pursuant to his request, dismiss Riek’s claim against Xplore-Tech and thereby allow him to proceed with his Second Claim only to the extent it is asserted against Dhanuka and Saraogi.

[32] “As discussed above, the Court has concluded that the Motion to Compel Arbitration should be allowed as to Riek’s Second Claim as against Xplore-Tech. Therefore, this Second Claim against Xplore-Tech will be referred to arbitration and will be dismissed from the present suit. The Court further concludes that, having dismissed Riek’s Second Claim as against Xplore-Tech that is subject to arbitration, there is no basis to stay the Second Claim as against Dhanuka and Saraogi which is not subject to arbitration. Therefore, the Court will deny Defendants’ Motion to Stay Litigation of the Second Claim as against Defendants Dhanuka and Saraogi.”

(.....)
Facts

On 6 December 2007, CTA Lind & Co Scandinavia AB in Liquidation’s Bankruptcy Estate (petitioner) filed a request for arbitration against Erik Lind, who was a principal owner, director and, at times, chairman of the board and/or managing director of CTA Lind & Co Scandinavia AB (CTA). The request was made pursuant to the Bylaws of CTA, which provided that disputes between the company and the board, a director, managing director, liquidator or shareholder be referred to arbitration in accordance with the Swedish Arbitration Act.

Petitioner appointed an arbitrator, Lind appointed a second arbitrator and the two party-appointed arbitrators subsequently selected a third arbitrator. Lind made a written submission to the arbitral tribunal indicating that he had no objection to the tribunal’s jurisdiction, but did not appear at the hearing. On 19 June 2008, the arbitral tribunal issued an award in favor of petitioner. Petitioner then sought enforcement of the award in the United States under the 1958 New York Convention.

The United States District Court for the Middle District of Florida, Tampa Division, per James S. Moody, Jr., US DJ, granted enforcement, holding that Lind had waived his right to oppose arbitration by making a written submission to the arbitral tribunal indicating he did not object to the tribunal’s jurisdiction.


[3] “In Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1291 (11th Cir. 2004), the Eleventh Circuit discussed that ‘Art. II of the Convention imposes a prerequisite on a party asking the court to compel arbitration: it requires that the party bring the court the written agreement’ (citing the Convention, Art. II, 9 U.S.C. Sect. 201 (historical and statutory notes)). Art. II requires recognition of an agreement in writing, which is defined as follows: ‘[t]he term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in exchange of letters or telegrams’. Furthermore, Art. IV of the Convention requires the party applying for recognition and enforcement to supply the following at the time of the application: ‘(a) [t]he duly authenticated original award or duly certified copy thereof’; and ‘(b) [t]he original agreement referred to in Art. II or a duly certified copy thereof’. The court in Czarina held that ‘the party seeking confirmation of an award falling under the Convention must meet Art. IV’s prerequisites to
establish the district court’s subject matter jurisdiction to confirm the award’. 
Czarina, 358 F.3d at 1292.

[4] “Lind has failed to timely respond to the instant motion. However, in his Answer, he denies that the arbitration provision within the Bylaws of CTA constitutes an agreement to arbitrate under the Convention. Specifically, Lind argues that there is no allegation in the Petition that he signed the Bylaws in an individual capacity. The copies of the relevant portions of the Bylaws provided by Petitioner do not contain Lind’s signature.

[5] “Petitioner argues that, despite the lack of a signature, the arbitration provision in CTA’s Bylaws has the force of a contract under applicable Swedish law. Pursuant to the Swedish Companies Act (SFS 2005:551), Chapter 7, Sect. 54:

'[a] clause in the bylaws to the effect that a dispute between the company and the board of directors, a member of the board of directors, the managing director, a liquidator or a shareholder shall be determined by one or more arbitrators shall have the same force as an arbitration agreement'.

Moreover, Petitioner argues that even if the subject provision is not an arbitration agreement under the Convention, Lind made a written submission to the arbitral tribunal indicating he had no objection to the tribunal’s jurisdiction.

[6] “In Czarina, the Eleventh Circuit addressed a similar argument. The party seeking confirmation relied on two award-confirmation cases that bypassed the Convention’s written agreement requirement because the parties had proceeded in the arbitrations without sufficiently contesting jurisdiction. Czarina, 358 F.3d at 1294. The court rejected this argument because the party opposing confirmation had objected ‘early and often’ to arbitration and had never agreed to arbitrate the dispute. Id.

[7] “Unlike in Czarina, Lind did not object to the arbitral tribunal’s jurisdiction. To the contrary, he declared in writing that he had no objection to the tribunal’s jurisdiction. Given Lind’s express submission to the tribunal’s jurisdiction, the court found no basis to set aside the award. Id.”
jurisdiction and the validity of the arbitration agreement under Swedish law, the Court determines Lind waived any objection to the tribunal’s jurisdiction. Accordingly, Petitioner has met the jurisdictional prerequisites to a confirmation action under the Convention.

[8] “Once the party seeking confirmation meets this jurisdictional burden, it establishes a prima facie case for confirmation of the award, Id. at 1292 n. 3. The burden then ‘shifts to the defendant to establish the invalidity of the award on one of the grounds specified in Art. V … [t]hat is, the award is presumed to be confirmable’. Id. By not responding to the instant motion, Lind has failed to meet his burden. The Court thus concludes Petitioner is entitled to final summary judgment and confirmation of the Award.

(....)

[9] “The Award also requires Lind to pay interest at an annual rate equal to the reference rate set by the Central Bank of Sweden from time to time plus eight percentage points, commencing 12 December 2007, until such time as full payment is made. The average annual reference rate set by the Central Bank of Sweden for the time period between 12 December 2007, and the date hereof (7 April 2009) is 4.254%.

Thus, Petitioner is entitled to interest at a rate of 12.254% over the same time period, which results in an interest amount of $ 908,284.89. Accordingly, Petitioner is entitled to judgment in the amount of $ 6,532,893.57.

(....)

[10] “This judgment shall bear interest at the rate prescribed by 28 U.S.C. Sect. 1961....

5. “This amount is equal to the $ 5,624,604.68 award, plus $ 908,284.89 in interest.”
6. “Notwithstanding the rate of interest required by the arbitral panel, this is the rate federal courts must use when awarding post-judgment interest. See Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1447 (11th Cir. 1998) (reported in Yearbook XXIV (1999) pp. 819-831 (US no. 276)).”
666. United States District Court, Eastern District of New York, 13 April 2009, Case No. 08 Civ. 4990 (BMC)

Parties: Plaintiff: Betzalel Schwartzman (nationality not indicated)
Defendant: Yaakov Harlap, also known as Jacob Charlap (nationality not indicated)

Published in: 2009 U.S. Dist. LEXIS 31389

Articles: III; V(2)(b)

Subject matters: – review of merits of award (no)
– public policy and disclosure by arbitrator
– availability of post-award, pre-judgment interest


Facts

The Schwartzman family – growers and wholesalers of esrog, an ancient fruit that plays a role at the Jewish holiday of Sukkot – sold esrogim to Yaakov Harlap for over thirty years. On 8 September 2005, Betzalel Schwartzman and Harlap concluded a contract setting forth the terms governing their relationship for that year. The contract provided, inter alia, that Harlap would be the exclusive US distributor for all esrogim and that esrogim harvested prior to Rosh Hashanah (the Jewish New Year) of that year could not be sold to third parties without notice to Harlap. The contract provided that Betzalel Schwartzman would maintain the hakosher (kosher certification) on all esrog orchards, which was necessary for marketing the fruit, “from Belz or [Rabbi Eliezer] Stern”. Schwartzman’s orchards had long been certified as kosher by the Belz organization, but the certification responsibility was switched to Rabbi Stern in 2005 or 2006 after the signing of the contract at issue. At the bottom of the contract there was a handwritten arbitration clause providing that Rabbi Stern would arbitrate any disputes arising under the contract.
A dispute arose between the parties when Harlap complained that Schwartzman had violated his exclusive distributorship and refused to pay the balance owed on his account. By a submission agreement of September 2006, the parties agreed to submit the dispute to Rabbi Stern. This submission agreement was signed by an attorney identifying himself as counsel for Harlap; this was later disputed by Harlap. In any event, the parties eventually submitted the dispute to Rabbi Stern, who rendered an award in favor of Schwartzman.

The award was challenged in the Israeli courts, where Harlap argued, inter alia, that Rabbi Stern failed to disclose that Schwartzman had hired him to supply the kosher certification. The parties eventually agreed to withdraw the Israeli proceedings and to remand the dispute to Rabbi Stern for further consideration of two additional arguments raised by Harlap. Rabbi Stern issued a supplemental decision stating that he had already considered and rejected Harlap’s additional arguments in rendering his award, and therefore he adhered to his original decision. Schwartzman sought enforcement of the award in the United States District Court for the Eastern District of New York. Harlap, appearing pro se, opposed enforcement and sought to vacate the award, challenging its merits and asserting that Rabbi Stern failed to disclose that Schwartzman had hired him to supply the kosher certification for the esrog orchards.

The district court, per Brian M. Cogan, US DJ, granted enforcement. It denied at the outset Harlap’s request that the court review the merits of the award, noting that none of the grounds for refusal of enforcement set out in the 1958 New York Convention permits the court to do so.

Harlap further argued that enforcement should be denied because there had been no disclosure of the relationship between Schwartzman and Rabbi Stern. Schwartzman argued in turn that since the Convention provides for no such ground, Harlap’s argument must be rejected.

The court first stated that Schwartzman was wrong: the Convention allows courts to refuse enforcement if the award violates public policy, and disclosure by arbitrators of material relationships with the parties that could impact their impartiality is a basic principle of US public policy.

Harlap however could not avoid enforcement because of the alleged nondisclosure. The court referred to the Second Circuit’s case law denying objections based on an undisclosed relationship where the complaining party should have known of the relationship. Here, the contract itself advised Harlap

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1. The district court noted that it was not clear on the record whether Harlap initiated proceedings to set the award aside or Schwartzman initiated proceedings to confirm it and Harlap opposed confirmation.
that Rabbi Stern might be called upon to give the hakosher for the orchards, and Harlap did not contend that he expected this to be done without Schwartzman paying Rabbi Stern a fee. Also, Harlap raised the non-disclosure issue in the Israeli courts but then withdrew his objection and agreed to resubmit the matter to Rabbi Stern. The court therefore concluded that even if Harlap originally had a valid complaint of non-disclosure, which he had not, he waived that right by resubmitting the dispute to Rabbi Stern.

The district court rejected Schwartzman’s request for attorneys’ fees. It found that Harlap’s “mild opposition to paying the award”, although without merit, did not constitute an act of bad faith. The court did hold however that granting pre-judgment interest “is appropriate under the Convention in the absence of some reason not to award interest”. Here, the court found that interest was appropriate on the facts of this case.

Excerpt

[1] “The [1958 New York Convention] provides limited grounds for declining to confirm a foreign arbitral award. Sect. 207 requires this Court to confirm the award ‘unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the … Convention’. This refers the Court to Art. V, which lists various grounds for denying recognition. None of those grounds permit the Court to revisit the merits of the award as respondent urges here. Respondent cannot use this Court to obtain a second bite of the esrog.

[2] “The more substantial question, albeit only slightly so, is whether there was a non-disclosure of the relationship between petitioner and Rabbi Stern that warrants denial of recognition. Petitioner contends that since the Convention provides no such ground, respondent’s argument must be rejected.

[3] “This is wrong. The Convention allows for non-recognition if an award violates the public policy of the country in which recognition is sought. It is a fundamental aspect of United States’ policy concerning arbitration that arbitrators must disclose material relationships with the parties that could impact their impartiality. See Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). Although Commonwealth Coatings involved a domestic award under the Federal Arbitration Act’s ‘evident partiality’ standard, the policy considerations set forth in the case are equally applicable through the ‘public policy’ standard for non-recognition in the

[4] “However, respondent cannot avoid recognition here. The Second Circuit has ‘viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic rigidity’, and has ‘not been quick to set aside the results of an arbitration because of an arbitrator’s alleged failure to disclose information’. *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 700 (2d Cir. 1978).

[5] “Of particular relevance here, the Circuit has rejected efforts to avoid recognition based on an undisclosed relationship where the complaining party should have known of the relationship, see *Cook Indus., Inc. v. C. Itoh & Co. (America)*, 449 F.2d 106, 107-108 (2d Cir. 1971), or could have learned of the relationship ‘just as easily before or during the arbitration rather than after it lost its case’. *Andros*, 579 F.2d at 702. The motivating concern of these cases is that an arbitral litigant should not be allowed to sit back, hope for a successful outcome, and then raise the alleged non-disclosure only if he is unhappy with the result. See *Lucent Technologies, Inc. v. Tatung Co.*, 379 F.3d 24, 28-29 (2d Cir. 2004).

[6] “At the core of this concern is the recognition that because arbitration is a creature of contract, parties are free to appoint an arbitrator that has a relationship with one of them, as long as reasonable steps have been taken to disclose it and the parties therefore know or should know of that relationship. Under this standard, the award must be recognized. The contract itself advised respondent that Rabbi Stern might be called upon to give the *hakosher* for the orchards; respondent does not contend, nor could he reasonably, that he expected this to be done without petitioner paying Rabbi Stern a fee. Respondent’s argument boils down to his contention that at the time he signed the agreement, he knew it was possible, and allowable, for Rabbi Stern to give the kosher certification, but he did not know, at the time of the arbitration, that it had actually happened. That does not matter. Respondent had ‘blessed’ the arrangement between petitioner and Rabbi Stern at the time he signed the contract by agreeing to arbitrate before Rabbi Stern and allowing Rabbi Stern to work for petitioner; that Rabbi Stern actually did the work later did not give respondent grounds to withdraw the consent that he had previously given.
[7] “But there is more. Even putting aside the submission agreement signed by an attorney purporting to act for respondent after disclosure that Rabbi Stern had in fact been engaged, the facts are undisputed that petitioner raised in the Israeli court the very point of non-disclosure that he raises here. He then withdrew that objection and agreed to resubmit the matter to the very same Rabbi Stern about whom he is now complaining. There is thus no doubt that even if respondent originally had a valid complaint of non-disclosure, which I hold he did not, he waived that right by resubmitting the dispute back to Rabbi Stern with full knowledge that Rabbi Stern had been engaged to give the kosher certification. See Garfield & Co. v. Wiest, 432 F.2d 849 (2d Cir. 1970).


[9] “However, an award of prejudgment interest is appropriate under the Convention in the absence of some reason not to award interest. See Waterside Ocean Navigation Co., Inc. v. Int’l Navigation Ltd., 737 F.2d 150, 153-154 (2d Cir. 1983).5 Interest is appropriate on the facts of this case.

[10] “The petition to confirm the award is granted, and the motion to vacate the award is denied....”

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667. United States District Court, Eastern District of New York, 27 April 2009, Case No. 07-CV-745 (JFB) (WDW)

Parties: 

Plaintiff: Apple & Eve, LLC (US) 
Defendant: Yantai North Andre Juice Co. Ltd. (PR China)

Published in: 2009 U.S. Dist. LEXIS 35248

Articles: II(3)

Subject matters: 

– waiver of arbitration by seeking annulment of arbitration clause 
– waiver makes arbitration agreement inoperative 
– jurisdiction of court to determine waiver of arbitration (“null and void”)

Commentary Cases: ¶ 220

Facts

The facts of this case are also reported in Yearbook XXXIII (2008) at pp. 985-998 (US no. 624). In June 2004, Apple & Eve, LLC (Apple & Eve) negotiated two contracts with Yantai North Andre Juice Co. Ltd. (Yantai) by which Yantai was to supply Apple & Eve with apple juice concentrate. The contracts contained an arbitration clause providing for arbitration “in the country of defendant in accordance with the arbitration organization of the defendant country”.

A dispute arose between the parties. On 5 December 2006, Apple & Eve commenced an action for breach of contract before the United States District Court in the Eastern District of New York. In February 2007, Yantai moved to compel arbitration pursuant to the arbitration clause in the contract. Apple & Eve argued in reply that the arbitration clause in the contract was “null and void, inoperative or incapable of being performed” because it did not specify a place of arbitration other than the “country of defendant” or name a specific arbitration organization in China and was therefore invalid under Chinese law.

On 20 June 2007, the district court, per Joseph F. Bianco, DJ, granted Yantai’s motion to compel arbitration, holding that all requirements for referral
of the action to arbitration were met. It also concluded that the arbitration agreement was not invalid or ineffective, even if it failed to designate a specific arbitration commission, because Chinese law allows parties to conclude a supplementary agreement when the original agreement to arbitrate “fails to specify or specify clearly matters concerning arbitration or the choice of arbitration commission”. In the present case, such supplementary agreement could still be concluded. The court acknowledged the possibility that the parties would not be able to arbitrate their dispute in China and therefore exercised its discretion to stay, rather than dismiss, the action. This decision is reported in Yearbook XXXIII (2008) pp. 985-998 (US no. 624).

Apple & Eve thereafter commenced arbitration before the Hong Kong International Arbitration Commission (HKIAC). Yantai refused to participate in the proceedings because the proposed seat was not in Mainland China, arguing that Apple & Eve was compelled by the district court’s order to agree to arbitration only in Mainland China. On 25 February 2008, Apple & Eve filed a motion in the district court in New York to vacate the stay or, in the alternative, to compel arbitration in New York, based on Yantai’s refusal to accept HKIAC arbitration. On 22 September 2008, the court denied the motion without prejudice as premature because of the absence of a ruling by a Chinese court or arbitration commission as to the enforceability of the arbitration clause in the contract between the parties. Apple & Eve again sought arbitration before the HKIAC by requesting that Yantai appoint a second arbitrator. By a letter of 27 October 2008, Yantai rejected the appointment request and informed Apple & Eve that on 15 January 2008 it had commenced an action in the Intermediate People’s Court of the city of Yantai in PR China to have the arbitration clause annulled (the Yantai petition).

On 24 November 2008, Apple & Eve filed a second motion to vacate the stay. On 12 January 2009, the district court ordered Yantai to respond by 19 January 2009. When Yantai failed to comply, Judge Bianco held a telephone conference on 14 April 2009 with counsel for the parties and permitted Yantai a final opportunity to submit a response. On 21 April 2009, US counsel for Yantai filed an affidavit in the district court stating that while “neither [she] nor any person from [her] law firm has had any communication with Yantai’s Chinese counsel concerning this matter”, a Yantai representative had informed her that “Yantai has instructed its Chinese counsel to withdraw” the Yantai petition and proposed to consent unconditionally to HKIAC arbitration. On 24 April 2009, in a telephone conference with counsel for both parties, Judge Bianco granted Apple & Eve’s motion on the record.
By the Memorandum and Order reported below, following the 24 April 2009 oral ruling, the district court, again per Joseph F. Bianco, DJ, vacated the stay order on the ground that Yantai waived its right to arbitration, thereby rendering the arbitration clause in the contract null and void under the 1958 New York Convention.

The court reasoned at the outset that (1) the “null and void” clause in the Convention must be construed narrowly and encompasses only those situations – including waiver – that can be applied on an international scale; (2) parties are deemed to have waived their right to arbitrate when they actively participate in a lawsuit or take other action inconsistent with that right; (3) notwithstanding the Supreme Court’s 2001 holding in *Howsam* (see below) that the presumption is that issues of waiver should be decided by the arbitrators, lower courts have remained reluctant to refer to arbitration allegations of waiver due to litigation conduct. In the Second Circuit, this issue was not specifically addressed and courts have continued to apply Second Circuit precedent preceding *Howsam*.

The district court then held that in the case at issue, Yantai “acted in a manner completely inconsistent with the preservation of its right to arbitrate” and its “stealth action in filing the Yantai petition” amounted to a waiver of its right to arbitrate the dispute. In reaching this decision, the district court was mindful of the strong federal policy favoring arbitration, but concluded “after carefully considering the record and the policies weighing in favor of arbitration” that a finding of waiver was justified in this case.

Excerpt

[1] “‘Upon finding that [an agreement to arbitrate within the meaning of the [1958 New York] Convention and the FAA] exists, a federal court must compel arbitration of any dispute falling within the scope of the agreement pursuant to the terms of the agreement’, *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 146 (2d Cir. 2001), 1 ‘unless [the court] finds that the said agreement is null and void, inoperative or incapable of being performed’. 9 U.S.C. Sect. 201 (Art. II of the Convention). ‘The limited scope of the Convention’s null and void clause “must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale”’. *Bautista v. Star Cruises*, 396 F.3d 1289, 1302

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(11th Cir. 2005)\(^2\) (quoting Di:Mercurio v. Sphere Drake Ins. PLC, 202 F.3d 71, 80 (1st Cir. 2000));\(^3\) see also Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 960 (10th Cir. 1992)\(^4\) (‘[W]e agree with the Third Circuit and its reasoning to the effect that the “null and void” exception in the Convention is to be narrowly construed.’) (citing Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro, 712 F.2d 50, 53 (3d Cir. 1983));\(^5\) Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Serv., Inc., 760 F.Supp. 1036, 1043 (E.D.N.Y. 1991)\(^6\) (‘This is a narrow exception limited to cases in which the arbitration clause itself (1) is “subject to an internationally recognized fraud, or waiver” or (2) “contravenes fundamental policies of the forum state”.’) (quoting Rhone, 712 F.2d at 53).

[2] “With respect to the issue of waiver by a party, ‘[t]he right to arbitration, like any other contract right, can be waived’. Cornell & Co., Inc. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966); accord PPG Indus., Inc. v. Webster Auto Parts Inc., 128 F.3d 103, 107 (2d Cir. 1997); Morales Rivera v. Sea Land of Puerto Rico, Inc., 418 F.2d 725, 726 (1st Cir. 1969); see also Sucrest Corp. v. Chimo Shipping Ltd., 236 F.Supp. 229, 230 (S.D.N.Y. 1964) (‘parties to an arbitration agreement, or either of them may by their conduct waive their right to arbitration’). ‘A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right.’ Cornell & Co., Inc., 360 F.2d at 513. In this Circuit, ‘a party may waive its right to arbitrate in one of two ways:

by expressly indicating that it wishes to resolve its claims before a court, Gilmore v. Shearson/Amer. Express Inc., 811 F.2d 108, 112 (2d Cir. 1987), or

by impliedly waiving its right to enforce a contractual arbitration clause by “engag[ing] in protracted litigation that results in prejudice to the opposing party”. S & R Co. of Kingston v. Latona Trucking, 159 F.3d 80, 83 (2d Cir. 1998) (citations omitted); see also Standard Microsystems Corp. v. Dahod, 84 F.Supp. 2d 396, 398 (E.D.N.Y. 2000).’


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In addition, there is no question that the Court has the power to consider whether a stay is justified pursuant to 9 U.S.C. Sect. 3, which requires that the party requesting the stay is not ‘in default in proceeding with such arbitration’. See Doctor’s Assoc. v. Distajo, 66 F.3d 438, 454-455 (2d Cir. 1995); see also Satcom Intern. Group PLC v. Orbcomm Intern. Partners, L.P., 49 F.Supp.2d 331, 339 (S.D.N.Y. 1999) (“Waiver operates as “an equitable defense” and is appropriately decided by the Court.”). Indeed, the question of whether a party is ‘in default in proceeding with such arbitration’ is a ‘statutorily mandated inquiry in Sect. 3 cases’. Doctor’s Assoc., 66 F.3d at 456. Importantly, ‘[o]nce having waived the right to arbitrate, that party is necessarily “in default in proceeding with such arbitration”’. Cornell & Co., Inc., 360 F.2d at 513 (internal citations omitted); see also Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 12-13 (1st Cir. 2005) (noting that the FAA permits courts to stay an action pending arbitration only if “the applicant for the stay is not in default in proceeding with such arbitration”, 9 U.S.C. Sect. 3, and courts have generally viewed parties who have waived their rights to arbitration as being in default).

While a substantial body of caselaw has developed on the meaning of the term “default”, the touchstone of that analysis appears to be the Second Circuit’s 1942 decision in Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 989 (2d Cir. 1942). There, the court interpreted the statute’s limiting clause “to refer to a party who, when requested, has refused to go to arbitration or who has refused to proceed with the hearing before the arbitrators once it has commenced”. Id. Since that decision, courts interpreting that phrase have recognized that if a party takes actions inconsistent with its right to arbitrate, those actions may amount to a waiver. PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 109 (2d Cir. 1997); Doctor’s Assoc., Inc. v. Distajo, 66 F.3d 438, 455 (2d Cir. 1995) (“A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right”) (quoting Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966) (per curiam)), cert. denied, 517 U.S. 1120 (1996). In a comprehensive opinion analyzing the development of the law on the waiver doctrine in the context of arbitration agreements, the Second Circuit observed that “the modern
evolution of our waiver doctrine” has resulted in a judicial distinction “between cases where the waiver defense was based on prior litigation by the party seeking arbitration – when the court should decide the issue of waiver – and those when the defense was based on other actions [when the arbitrators should decide the issue of waiver].”

In undertaking this analysis, the Court is mindful of the Supreme Court’s guidance in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), in which it stated that “the presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability’. Id. at 85. However, ‘[d]espite the Supreme Court’s decision in *Howsam*, several lower courts have remained reluctant to submit certain waiver issues to arbitrators. Both the First and Fifth Circuits have explicitly held that despite the Supreme Court’s statement in *Howsam*, the specific type of waiver dispute at issue in this case – one involving an allegation of waiver due to litigation conduct – should be determined by a judge rather than an arbitrator.’ *Reidy v. Cyberonics, Inc.*, No. 1:06 Civ. 249, 2007 WL 496679, at *3 (S.D. Ohio 8 Feb. 2007) (citing *Marie*, 402 F.3d at 11); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004)) (other citations omitted); see also *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551-552 (Ky. 2008) (*Howsam* did not actually reach the question of litigation-conduct waiver. Rather *Howsam* focused upon whether a party waived its arbitration rights by not complying with a contractual time limitation for asserting arbitration. Some federal courts have applied *Howsam*’s dicta to conclude that litigation-conduct waiver must be decided by arbitrators, while other federal courts have continued to decide litigation-conduct waiver issues themselves even after *Howsam*. Given this divergence of federal of [sic] authority, we conclude that courts should generally resolve issues of litigation-conduct waiver. Questions of litigation-conduct waiver are best resolved by a court that has inherent power to control its docket and to prevent abuse in its proceedings (i.e. forum shopping), … and which could most efficiently and economically decide the issue as where the issue is waiver due to litigation activity, by its nature the possibility of litigation remains, and referring the question to an arbitrator would be an additional, unnecessary step.’) (internal citations and quotations omitted); *Glazer’s Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 876 SDD99, Inc. v. ASA Intern., Ltd., No. 06 Civ. 6089 (CJS), 2007 WL 952046, at *6 (W.D.N.Y. 29 Mar. 2007).

N.E.2d 203, 215 (Ill. App. Ct. 2007) (‘[W]e find that the circuit court here had the discretion to decide the issue of Glazer’s purported waiver of its right to arbitration. Glazer’s reliance on the United States Supreme Court’s decision in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), does not alter our conclusion. Notably, Howsam did not hold that issues of waiver must be decided by an arbitrator, but rather concluded that such issues were presumptively reserved for an arbitrator.’).

[6] “These courts have reasoned, as relevant to the matter at hand and stated supra, that ‘[a] “default” [within the meaning of the statute] has generally been viewed by courts as including a “waiver”. This language would seem to place a statutory command on courts, in cases where a stay is sought, to decide the waiver issue themselves.’ Marie, 402 F.3d at 13 (citations omitted).

[7] “Although the Second Circuit has not ruled on this specific issue, courts in this Circuit have continued to apply Second Circuit precedent preceding Howsam to address the waiver issue in cases involving litigation conduct before the Court. See, e.g., Haenel v. Washington Mut. Bank, No. 07 Civ. 2320, 2007 WL 4326828, *3 (E.D.N.Y. 6 Dec. 2007); SDD99, Inc. v. ASA Intern., Ltd., 2007 WL 952046, *6 (W.D.N.Y. 29 Mar. 2007); Century Indem. Co. v. Clearwater Ins. Co., 2007 WL 1599157, *3 (S.D.N.Y. 4 June 2007); Arbercheski v. Oracle Corp., No. 05 Civ. 0591, 2006 WL 1738046, *2 (S.D.N.Y. 26 June 2006); Jung v. Skadden, Arps, Slate, Meagher & Flom, LLP, 434 F.Supp.2d 211, 217 (S.D.N.Y. 2006); Katel LLC v. AT&T Corp., 2004 WL 1192072, *1 (S.D.N.Y. 28 May 2004); see also Scott v. First Union Securities, Inc., 761 N.Y.S.2d 770, 771 (N.Y. Sup. Ct. 2003) (‘Howsam involved a determination of whether a period of limitation, imposed by the rules of the arbitrator, should be determined by the courts or by the arbitrator. As such, to the extent that the decision addresses waiver issues it is dicta.... Indeed, in many cases decided since [Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983), cited by Howsam], the New York courts have determined whether a party’s conduct constituted a waiver of the right to arbitrate an issue. The Court of Appeals two years after Cone stated “[l]ike contract rights generally, a right to arbitration may be modified, waived or abandoned.”’ (citations omitted).

[8] “Under the circumstances of this case, the Court finds that the Arbitration Clause falls within the Convention’s limited exception of being declared ‘null and void’. Specifically, defendant’s unilateral and stealth action in filing the Yantai petition and seeking the invalidation of the Arbitration Clause in China has, in the Court’s view, amounted to a waiver of defendant’s right to arbitrate the proceeding in China. As set forth below, this is a not a close case. It is clear to the
Court that defendant has acted in a manner completely inconsistent with the preservation of its right to arbitrate.

[9] “This action was commenced by plaintiff on 5 December 2006. Over twenty-eight months have passed without any examination of the merits of plaintiff’s claims, whether by a court or an arbitrator, in the United States or in China. Since the start of this litigation, defendant has (1) failed to agree to or initiate any arbitration in China, (2) opposed plaintiff’s attempts twice to begin arbitration before the HKIAC, (3) filed a petition seeking to invalidate the very Arbitration Clause relied upon to avoid litigation in this Court, and (4) actively hid the filing of the Yantai petition from plaintiff and this Court in an effort to keep the stay in this case in place.

[10] “Thus, since the Court’s June 2007 Order, defendant has not only failed to seek arbitration of these claims in China, it has sought a legal determination by a Chinese court that the same Arbitration Clause that it relied upon to stay these proceedings in the United States is invalid and unenforceable under Chinese law, thereby attempting to evade the arbitration in China that was compelled by this Court. Moreover, defendant filed its petition in China following this Court’s 20 June 2007 Order, which relied on defendant’s position that the Arbitration Clause was enforceable and valid in China, as well as this Court’s 22 September 2008 Order denying plaintiff’s first motion to vacate, during which defendant never made known to the Court its pending petition in Yantai court. At no time during which plaintiff’s first motion to vacate was pending before this Court from February to September 2008 did defendant inform plaintiff or the Court of its Yantai petition seeking the invalidation of the Arbitration Clause, whether in its submissions to the Court or during oral argument.

[11] “In that respect, while this Court ‘ascribe[s] absolutely no improper motive to [defendant’s] United States counsel’, it is of the view that ‘counsel’s representation on the record, particularly in view of the context in which they were made, were both inconsistent with [defendant’s] ultimate position on this issue, as well as misleading both to opposing counsel and the Court’. Touton v. M.V. Rizcun Trader, 15 F.Supp.2d 669, 671 (E.D. Pa. 1998).

[12] “Consequently, the Court concludes that defendant’s actions since June 2007 clearly indicate that defendant has no intent to actually arbitrate these claims in China, and the past twenty-two months during which the action has been stayed is an illustration of defendant’s intentional pattern of gamesmanship and delay. See Sucrest Corp., 236 F.Supp. at 230 (‘Dilatory conduct or delay … constitutes a waiver where such conduct is inconsistent with an intention to rely

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upon arbitration. The respondent’s failure to make any attempt to arbitrate … can only be construed as conduct inconsistent with an intention to arbitrate. It was “an intentional relinquishment or abandonment of a known right”).\footnote{10. Reported in Yearbook XI (1986) pp. 555-566 (US no. 59).} (citations omitted). Moreover, defendant here has specifically and expressly renounced its reliance on the Arbitration Clause.

[13] “Thus, because defendant has intentionally acted in a manner utterly inconsistent with preserving its right to arbitrate and has, by the totality of its conduct, prejudiced plaintiff’s right to have its claim heard on the merits, the Court concludes that defendant has waived its right to arbitrate this proceeding in China pursuant to the Arbitration Clause between the parties. See Touton, 15 F.Supp.2d at 672 (holding that where defendant let critical time elapse before seeking arbitration while simultaneously advising the court and its opponents that no time bar was at issue, defendant had waived its right to arbitrate).

[14] “Furthermore, defendant’s last minute effort, as expressed through its counsel, to agree to arbitration before the HKIAC is insufficient to resurrect the right to arbitration that it has waived. The Court finds it implausible that defendant’s Yantai petition or its failure to inform the Court of such is the result of a ‘misunderstanding’. (See Affirmation of Kimberly Summers [US counsel for Yantai]: ‘[I]t is my belief that Chinese counsel did not understand the implications of seeking a declaration based on the argument that the arbitration provision is invalid and unenforceable.’)

[15] “Defendant’s conduct is simply inexcusable, and the Court has no confidence, given defendant’s record of conduct in this litigation, that it will not attempt to further delay the case. Moreover, because plaintiff’s position since the start of this litigation has been that the Arbitration Clause is invalid, the Court would essentially be rewarding the defendant for its tactics if it granted its requested fallback position of consenting to arbitration before the HKIAC. Under these circumstances, the Court declines to grant defendant the benefit of its malfeasance.

[16] “In reaching this decision, the Court recognizes the strong federal policy favoring arbitration. “The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp., 473 U.S. 614, 626 (1985)\footnote{10. Reported in Yearbook XI (1986) pp. 555-566 (US no. 59).} (quoting Moses H. Cone Mem’l Hosp., 460 U.S. at 24-25). Further, this strong federal policy applies with equal force to international
disputes. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974)\(^\text{11}\) (‘The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.’). The Second Circuit has made clear, however, that ‘[w]hereas there is a strong federal policy favoring arbitration, the right to arbitrate may be waived’. Demsey & Assoc., Inc. v. S.S. Sea Star, 461 F.2d 1009, 1017 (2d Cir. 1972) (citing Cornell & Co., Inc., 360 F.2d 512) (other citation omitted). Moreover, ‘[w]hile waiver of arbitration is not to be lightly inferred, the issue is fact-specific and there are no bright-line rules’. S&R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998).

\[17\] ‘Finally, a vacatur of the stay under these circumstances is consistent with the principle, discussed supra in connection with the court’s authority to decide the waiver issue, that ‘a court’s ability to reach the question of waiver as a defense to arbitration [is grounded in part on] its ability to control litigation practices before it’. Doctor’s Assocs., 66 F.3d at 456 n. 12 (collecting cases and stating that, ‘[o]ur decisions to rule on the waiver issue, rather than to refer the question to the arbitrators, could have been explained as exercises of the federal courts’ inherent power to deal with abusive litigation practices in their courtrooms’); see also Marie, 402 F.3d at 13 (‘Where the alleged waiver arises out of conduct within the very same litigation in which the party attempts to compel arbitration or stay proceedings, then the district court has power to control the course of proceedings before it and to correct abuses of those proceedings’); cf. Reid Burton Const. Inc. v. Carpenters Dist. Council of Southern Colorado, 535 F.2d 598, 604 (10th Cir. 1976) (‘It is entirely appropriate in some instances for a district court to retain … jurisdiction of an arbitrable dispute where, because of conduct before the court, it may be deemed that a party is prevented on the basis of some equitable principle from asserting a right to arbitration…. If … it is determined that the unions have waived their right to arbitration, or in some other way should be prevented from asserting this right, because of conduct which falls within the control of the court, then the district court can properly proceed to the merits of the underlying dispute.’).

\[18\] ‘Moreover, the fact that the Yantai petition was filed in a court in China and not before this Court is of no import, where its impact is to undermine the Court’s prior order granting defendant’s motion to compel arbitration in China and the legitimacy of the stay granted in this case. See Marie, 402 F.3d at 14

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\(^{11}\) Reported in Yearbook I (1976) pp. 203-204 (US no. 4).

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('The waiver here is somewhat unusual in that the claim is of litigation activity before the EEOC that is inconsistent with a right to arbitrate, as opposed to activity before a court. But this makes no difference. Courts are still well suited to determine the sort of forum-shopping and procedural issues that are likely to arise in litigation before the EEOC, and sending the waiver issue to the arbitrator would still be inefficient. The proper presumption in this case is that the waiver issue is for the court and not the arbitrator.

[19] "Because of the egregious nature of defendant’s conduct, coupled with its newly discovered legal position that is plainly inconsistent with any intent to preserve its right to arbitrate, the Court concludes that, after carefully considering the record and the policies weighing in favor of arbitration, a finding of waiver by defendant of its right to arbitrate this proceeding in China is justified in this case. Cf. Zwitserse Maatschappij van Levensverzekering en Lijfrente v. ABN Intern. Capital Markets, 996 F.2d 1478, 1480 (2d Cir. 1993) (‘[T]his is one of those “rare cases” where the strong policy favoring arbitration has been outweighed.’). Accordingly, because defendant is now deemed to be in ‘default in proceeding with such arbitration’, 9 U.S.C. Sect. 3, the stay in this case is vacated. Furthermore, due to such waiver, the Arbitration Clause is ‘null and void’ within the meaning of Art. II of the Convention.”

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Parties:

Plaintiff/Petitioner: Four Seasons Hotels and Resorts B.V. (Netherlands) et al.
Defendant/Respondent: Consorcio Barr, S.A. (Venezuela)

Published in:
2009 U.S. Dist. LEXIS 39802

Articles:
V(1)(a); V(1)(b); V(1)(c); V(2)(b)

Subject matters:
– arbitration clause in related contracts
– arbitration agreement “in writing” is condition for enforcement
– grounds for refusal of enforcement are exhaustive
– due process
– public policy and foreign court decisions
– comity

Commentary Cases:
[2]-[8] = ¶ 507 (conflicting contracts) + ¶ 512; [9] = ¶ 501; [10]-[15] = ¶ 511 (withdrawal from arbitration to preserve right to challenge arbitral jurisdiction);
[16]-[21] = ¶ 524 (violation of international comity)

Facts

The facts of this case are also reported in Yearbook XXIX (2004) at pp. 882-885 (US no. 452), Yearbook XXX (2005) at pp. 872-874 (US no. 496) and Yearbook XXXIII (2008) at pp. 1183-1186 (US no. 646). On 9 April 1997, Four Seasons Hotels and Resorts, BV and two other Four Seasons entities entered into five agreements – the Hotel Management Agreement, the Hotel Advisory Agreement, the Hotel Services Agreement, the Hotel Pre-opening Service Agreement and the Loan Agreement (LA) – with Consorcio Barr, S.A. (Consorcio) to manage and operate Consorcio’s hotel and related real property in Caracas, Venezuela. The first four agreements contained substantially identical arbitration clauses providing for the application of Venezuelan law and referring...
disputes to American Arbitration Association (AAA) arbitration in either Miami or Caracas. The LA contained no arbitration provision.

A dispute arose between the parties. On 30 November 2001, Four Seasons commenced AAA arbitration in Miami against Consorcio for breach of the agreements. In turn, Consorcio commenced proceedings in the Venezuelan courts, seeking to remove Four Seasons from operating the hotel and to obtain a declaration that the arbitration clause in the agreements was invalid because Venezuelan law vests exclusive jurisdiction in the Venezuelan courts over disputes relating to immovable property rights. In 2002 and 2003, Consorcio obtained declarations that the arbitration clause in the agreement was vague and therefore invalid, and that it did not exclude the jurisdiction of the Venezuelan courts.

On 10 October 2002, the AAA arbitral tribunal issued a Partial Award. The arbitrators held that US procedural law and Venezuelan substantive law applied, that they had jurisdiction to decide whether the dispute was arbitrable and that the dispute was arbitrable as it did not affect immovable property rights; they also enjoined Consorcio from pursuing parallel litigation in Venezuela.

On 15 November 2002, Consorcio moved for a preliminary injunction against enforcement of the Partial Award in a Caracas Superior Court. On 2 December 2002, the court granted Consorcio’s motion to suspend execution of the Partial Award. On 21 March 2003, the court also declared the Partial Award null and void.

In turn, also on 15 November 2002, Four Seasons sought enforcement of the Partial Award before the United States District Court for the Southern District of Florida; it also sought an injunction to enjoin Consorcio from any further proceedings in Venezuela. On 4 June 2003, the district court granted the injunction and enforcement, finding that by participating in the arbitration Consorcio waived its right to raise the 1958 New York Convention defense that the arbitration clause was invalid under the applicable Venezuelan law. This decision is reported in Yearbook XXIX (2004) at pp. 882-889 (US no. 452).

On 20 July 2004, the United States Court of Appeals for the Eleventh Circuit vacated the enforcement decision as to the finding of waiver and remanded the case to the district court as to the other issues. This decision is reported in Yearbook XXX (2005) at pp. 872-881 (US no. 496). On remand, the district court confirmed the Partial Award and the anti-suit injunction. On 14 July 2008, the Eleventh Circuit affirmed the lower court’s decision. This decision is reported in Yearbook XXXIII (2008) at pp. 1183-1186 (US no. 646).

In the meantime, AAA arbitration proceedings continued; a final evidentiary hearing was scheduled for 22 September 2003. Two weeks before the hearing,
Consorcio notified the arbitral tribunal that it would no longer participate in the arbitration. On 21 September 2003, Consorcio’s party-appointed arbitrator, Emilio Pittier, notified the other arbitrators that he would not attend the hearing. Consorcio declined to appoint a replacement and the arbitral tribunal appointed Jose Maria Abascal as the third arbitrator.

On 22 March 2004, the AAA arbitral tribunal rendered a Final Award in favor of Four Seasons. The arbitrators

(1) found that Consorcio breached the agreements;
(2) required Consorcio to specifically perform its obligations under the agreements;
(3) enjoined Consorcio from interfering directly or indirectly with the management of the Hotel while the agreements were in effect;
(4) awarded Four Seasons US$ 8,166,100 in damages, plus pre-award and post-award interest.

Four Seasons sought enforcement of the award before the district court. (The enforcement proceedings for the Final Award were initially stayed pending the appeal to the Eleventh Circuit in respect of the Partial Award.)

By the present decision, the district court, per K. Michael Moore, US DJ, granted enforcement of the Final Award in all respects but in respect of damages for claims under the LA, finding that the LA did not contain an arbitration provision. The court disagreed with the arbitrators’ finding that the arbitration clause in the Hotel Management Agreement (HMA) extended to the LA because the latter was a modification of the former and ancillary thereto – the LA regulated Consorcio’s access to a credit facility from Four Seasons and explicitly superseded the section in the HMA which previously regulated the same matter. The district court reasoned that the fact that two separate contracts have the same aim is insufficient to impute the arbitration provision in one contract to the other, where the second contract lacks an arbitration provision in writing. The court therefore denied enforcement of this part of the award.

The district court then granted enforcement of the other parts of the Final Award. It first dismissed Consorcio’s argument that the specific performance granted by the award was contrary to Venezuelan law, reasoning that contrariness to the substantive law governing the arbitration is not one of the defenses exhaustively listed in the New York Convention. The court also dismissed Consorcio’s contention that enforcement should be denied on grounds of violation of due process. Consorcio claimed that it was unable to present its case because it had to refuse to participate in the final evidentiary hearing to
preserve its right to challenge the arbitral tribunal’s jurisdiction and the US anti-suit injunction. The court found that in fact Consorcio’s withdrawal from the hearing was unnecessary and did not constitute a defense under the Convention.

The district court finally considered Consorcio’s argument that enforcement of the Final Award would be contrary to public policy because it would be in contravention of rulings by Venezuelan courts and contrary to comity considerations. The court reasoned that the anti-suit injunction issued in the proceedings for the enforcement of the Partial Award barred Consorcio from seeking relief in the Venezuelan courts for claims arising out of the agreements at issue. If the Venezuelan rulings, which Consorcio did not clearly indicate, were in respect of those claims, then they violated the anti-suit injunction. If they were not, then the potential for conflict had to be considered. However, the court concluded that under the present circumstances there were no comity or other public policy concerns sufficient to give rise to a defense under Art. V(2)(b) Convention.

Excerpt

I. DISPUTE FALLS OUTSIDE OF ARBITRATION CLAUSE

[2] “Consorcio argues that the portion of the Final Award based on damages for claims under the Loan Agreement … dated 19 May 2000 should not be confirmed because claims under the Loan Agreement were not arbitrable. A court may decline to confirm an arbitration award if ‘[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration’. Convention Art. V(1)(c).

[3] “The Loan Agreement governs Consorcio’s access to a credit facility from Four Seasons for the purpose of repaying outstanding Senior Debt principal or funding costs and expenses necessary to complete construction of the Hotel…. Consorcio’s access to a credit facility was originally governed by Sect. 8.03 of the Hotel Management Agreement, dated 9 April 1997…. The Hotel Management Agreement contained an arbitration provision…. However, the Loan Agreement, which explicitly superseded Sect. 8.03 of the Hotel Management Agreement, contained no arbitration provision.

[4] “In the Final Award, the Arbitral Tribunal found that it had jurisdiction to hear and decide claims under the Loan Agreement…. The Arbitral Tribunal concluded that the Loan Agreement was a modification of Sect. 8.03 of the Management Agreement, and that as such, the Loan Agreement was an ancillary agreement to the Hotel Management Agreement ‘since its only aim is to facilitate or make possible the compliance by the Owner of its obligations covenanted in each of the Contracts to cause the construction, furnishing and equipping of the Hotel as a World Class Luxury Hotel’…. The Arbitral Tribunal also found that the interrelationship between provisions in the Loan Agreement and the Hotel Management Agreement supported the ancillary nature of the Loan Agreement…. Based on these findings, the Arbitral Tribunal concluded that the Loan Agreement ‘is a part of the one and single contractual structure including the Contracts and the Loan Agreement, the main purpose of which was to transform the Hotel into, and operate it as, a World Class Luxury Hotel’….
[5] “As an initial matter, the mere fact that two separate contracts have as their purpose the same ultimate objective is insufficient to impute the arbitration provision in one contract to the other, where the second contract lacks an arbitration provision. The importance of a written arbitration provision in a contract is evidenced in both Chapter 1 of the Federal Arbitration Act (the FAA)\textsuperscript{8} and in Chapter 2 of the FAA’s incorporation of the New York Convention. [Quotation of Art. II Convention omitted.]

[6] “Thus, the presence of an arbitration provision in writing is a prerequisite to an action to confirm an arbitration award. \textit{Czarina, L.L.C. v. W.F. Poe Syndicate}, 358 F.3d 1286, 1292 (11th Cir. 2004).\textsuperscript{9} ‘Where a party has failed to satisfy the agreement-in-writing prerequisite, courts have dismissed the action for lack of jurisdiction.’ Id. (citing cases).

[7] “The Arbitral Tribunal’s finding that the Loan Agreement was a modification of Sect. 8.03 of the Hotel Management Agreement was descriptively accurate, inasmuch as the Loan Agreement replaced Sect. 8.03 as the agreement governing Consorcio’s access to a credit facility from Four Seasons. However, the fact that Sect. 8.03 was superseded by a new and separate agreement does not mean that the Loan Agreement is effectively the new Sect. 8.03 of the Hotel Management Agreement. Were that intended to be the case, the parties could have simply entered into a revised Hotel Management Agreement with the terms of the Loan Agreement replacing the terms found in Sect. 8.03.

[8] “Instead, the Parties entered into a separate agreement, the Loan Agreement, which explicitly states that ‘[t]his Agreement and the Related Agreements constitute the entire agreement between the Parties with respect to the subject matter hereof … and supersede all prior agreements … of the parties with respect to the subject matter hereof … including the provisions of Sect.

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8. “Sect. 2 of the FAA states:

‘A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.’

9 U.S.C. Sect. 2.”

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8.03 of the Hotel Management Agreement.\textsuperscript{10} Loan Agreement, Sect. 1.5. By its plain language, this provision severs the Loan Agreement from the Hotel Management Agreement and proscribes a finding that the arbitration clause of the Hotel Management Agreement is incorporated into the Loan Agreement or otherwise applies to the Loan Agreement. Therefore, despite any similarity of purpose of the Loan Agreement and the Hotel Management Agreement and any effect provisions of the Hotel Management Agreement may have on the credit facility governed by the Loan Agreement, the Loan Agreement is a separate agreement that stands apart from the Hotel Management Agreement. Therefore, the absence of an arbitration provision in the Loan Agreement deprives this Court of jurisdiction to confirm the Final Award, inasmuch as it awards damages for claims under the Loan Agreement.”

II. GROUNDS FOR REFUSAL ARE EXHAUSTIVE (SPECIFIC PERFORMANCE)

\textsuperscript{9} "Consorcio challenges the propriety of specific performance as a remedy granted by the Final Award on the ground that it is contrary to Venezuelan law and that the specific performance portion of the Final Award should not be confirmed pursuant to Art. V(1)(c). A holding in an arbitration award that is contrary to the substantive law governing the arbitration is not a defense under the Convention, and therefore a district court generally may not review an arbitration award on the merits. China Nat’l Metal Products, 379 F.3d at 799 (citing Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003)).\textsuperscript{11} Therefore, Consorcio has not met its burden of proving the applicability of one of the Convention’s enumerated defenses with respect to the propriety of specific performance as a remedy.”

III. DUE PROCESS

\textsuperscript{10} “Consorcio asserts that it refused to participate in the final evidentiary hearing to preserve its right to challenge the Arbitral Tribunal’s jurisdiction and the anti-suit injunction, and that Consorcio is entitled to a defense under Art. V(1)(b) of the Convention. Art. V(1)(b) provides a defense against confirmation where ‘[t]he party against whom the award is invoked was not given proper

\textsuperscript{10} “‘Related Agreements’ means the Promissory Note and the Mortgage.’ Loan Agreement....”

notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'.

[11] “Consorcio discontinued its participation in the arbitration proceeding just prior to the final evidentiary hearing and removed its selected arbitrator from the Arbitral Tribunal in September of 2003. In June of 2003, prior to Consorcio’s withdrawal, this Court issued an Order Confirming the Partial Award. Four Seasons, 267 F.Supp.2d at 1335. In the Order Confirming the Partial Award, this Court found that Consorcio’s participation in the arbitration proceeding constituted a waiver of its ability to argue that the Venezuelan court’s finding that the arbitration proceedings were invalid was an adequate basis for denying confirmation of the Partial Arbitration Award under the Convention. Id. at 1343. This finding was reversed by the Court of Appeals in July of 2004. Four Seasons, 377 F.3d at 1171-1172.

[12] “The question, then, is whether this Court’s finding that Consorcio’s participation in the arbitration proceeding leading to the Partial Arbitration Award constituted a waiver was grounds for Consorcio to withdraw from the final evidentiary hearing in order to preserve its right to challenge the Arbitral Tribunal’s jurisdiction and the anti-suit injunction on appeal.

[13] “In fact, Consorcio’s withdrawal from the arbitration proceeding after this Court issued its Order Confirming the Partial Award was unnecessary to preserve its rights on appeal and the Court of Appeals did not rely on Consorcio’s withdrawal in reaching its conclusions. Just as the Court of Appeals declined to consider a number of Consorcio’s arguments that Consorcio did not raise before this Court, the Court of Appeals did not rely on any of Consorcio’s actions taken after this Court issued its Order in June of 2003, nor did such actions constitute matters properly within the scope of Consorcio’s appeal.

[14] “Moreover, regardless of the decision ultimately reached by the Court of Appeals concerning the waiver issue in the previous action to confirm the Partial Arbitration Award, the issue of the Arbitral Tribunal’s jurisdiction and the propriety of the anti-suit injunction was to be conclusively decided one way or the other in the action to confirm the Partial Arbitration Award. With the jurisdictional and anti-suit injunction issues thus decided, Consorcio’s withdrawal from the final evidentiary hearing, the proceeding governing the issuance of the Final Award, in an attempt to preserve its right to contest jurisdiction, was futile. Consorcio’s withdrawal was thus ineffective to preserve its right to contest jurisdiction or the anti-suit injunction in the appeal of the Partial Arbitration Award or in this action to confirm the Final Award.

[15] “Given that Consorcio’s withdrawal from the arbitration proceeding was unnecessary to preserve its rights, Consorcio was not precluded from or unable
to present its case. Even if Consorcio’s decision to withdraw from the proceeding was taken based on a good faith subjective belief that such action was necessary to preserve its rights on appeal, such a misgiving did not render Consorcio unable to present its case within the meaning of Art. V(1)(b). Therefore, Consorcio has not met its burden of proving that Art. V(1)(b) applies as a defense.”12

IV. PUBLIC POLICY

16. “Consorcio contends that confirmation of the Final Award is contrary to public policy because it would require this Court to supervise the operation of the Hotel, which Consorcio suggests would be an impractical or impossible task, and would also be in contravention of rulings by other Venezuelan courts and contrary to comity considerations. Art. V(2)(b) provides that a court may refuse to confirm an arbitration award where ‘[t]he recognition or enforcement of the award would be contrary to the public policy of that country’.

17. “As an initial matter, consideration of these public policy concerns is not barred by the district or appellate court holdings in the action to confirm the Partial Arbitration Award because no prior rulings addressed the public policy concerns raised here.

18. “Under the Convention, “the country in which, or under the [arbitration] law of which, [an] award was made” is said to have primary jurisdiction over the arbitration award.” Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004)13 (quoting Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 23 (2d Cir 1997)).14 ‘All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award.’ Id.

19. “Consorcio’s assertion that the Final Award’s potential to conflict with the rulings of other Venezuelan courts is of no moment here. The Partial Arbitration Award’s anti-suit injunction, which was confirmed by this Court, barred Consorcio from seeking relief in Venezuelan courts for claims arising out of the agreements at issue. Consorcio has stated that confirmation ‘will conflict directly with decisions of the Venezuelan courts regarding this very Hotel’....

12. “Consorcio received proper notice of the arbitration proceeding and of the appointment of Abascal to replace Pittier in the Arbitral Tribunal. Final Award....”


“Consorcio does not elaborate on the subject matter of these rulings nor explain the nature of the alleged conflict. It is therefore unclear if the Venezuelan court rulings to which Consorcio refers arise out of the agreements at issue here. If so, the Final Award takes precedence because the foreign ruling violates the anti-suit injunction. If the Venezuelan court rulings are not covered by the anti-suit injunction, then the potential for conflict must be considered when and if an enforcement action arises. However, this Court finds that under these circumstances, and given the lack of specificity provided concerning the alleged conflicts with foreign court rulings, the possibility that confirmation of the Final Award may result in conflict with a foreign court’s valid ruling is insufficient to raise comity or other public policy concerns sufficient to give rise to a defense under Art. V(2)(b).

“In any event, Four Seasons has indicated that it would be inclined to bring an enforcement action in Venezuela, a secondary jurisdiction…. However, even if an enforcement action were brought before this Court, there is no reason to believe that this Court would be unable to assess the claims and resolve them accordingly, without going so far as to supervise the day to day operations of the Hotel. Therefore, Consorcio has failed to meet its burden of proving that confirmation of the Final Award entitles it to a defense under Art. V(2)(b).”
669. United States District Court, District of Delaware, 20 May 2009, Civil No. 08-941 (RBK/JS) (Docket Entry Nos. 4, 10)

Parties: Plaintiff: Invista S.a.r.l. (nationality not indicated) et al.  
Defendant: Rhodia S.A. (France)

Published in: 2009 U.S. Dist. LEXIS 42897

Articles: II(3)

Subject matters: – nonsignatory plaintiff not bound by arbitration clause  
– “direct benefits” theory of estoppel  
– discretion to stay court proceedings

Commentary Cases: ¶ 217

Facts

In the 1960s, E.I. DuPont de Nemours (DuPont) developed the “Gen I” technology for manufacturing adiponitrile (ADN), a chemical used in the production of nylon. In 1974, DuPont de Nemours France S.A.S. (DuPont France) entered into a joint venture (Butachimie) with Societe des Usines Chimiques Rhone-Poulenc (SUCRP) to manufacture and sell ADN. The joint venture was governed, inter alia, by a joint venture agreement (JVA). The JVA provided that neither party would use or disclose to third parties confidential information relating to the production of ADN for fifteen years from the date of disclosure. It also contained a clause providing for ICC arbitration of disputes.

The ownership of Butachimie was transferred several times; at the time of the present decision, the shares originally owned by SUCRP were held by Rhodianyl, a subsidiary of Rhodia S.A. (Rhodia). DuPont’s shares were purchased by KoSa France Holding S.a.r.l. (KoSa France), an affiliate of Invista S.a.r.l. (Invista), as part of Invista’s purchase of the Gen I technology. DuPont and Invista entered into two agreements whereby DuPont agreed not to compete with Invista in the manufacture of ADN until 2011 and to maintain the confidentiality of the trade secrets being transferred to Invista.

On 19 September 2006, Invista announced plans to build an ADN manufacturing facility in Asia. Shortly thereafter, Rhodia also revealed plans to
build an ADN plant in Asia. Invista accused Rhodia of misappropriating the Gen I technology trade secrets it learned through the joint venture. On 3 October 2007, Rhodianyl and Rhodia (collectively, Rhodia) initiated ICC arbitration against Invista, KoSa France and other Invista entities (collectively, Invista), seeking a declaratory ruling that they had a right to use the confidential information that was disclosed to Butachimie more than fifteen years before.

In turn, on 12 November 2008, Invista filed suit against Rhodia in the Court of Chancery of the State of Delaware, bringing claims of misappropriation and conversion of trade secrets, unfair competition, tortious interference with contracts and conspiracy to misappropriate trade secrets. (Invista also filed suit in Texas and New York; those proceedings are not relevant here.) On 12 December 2008, Rhodia removed the action to the United States District Court for the District of Delaware under the 1958 New York Convention and moved to dismiss or stay proceedings pending arbitration.

The district court, per Robert B. Kugler, US DJ, denied Rhodia’s motion, holding that Invista was not bound by the arbitration provision in the JVA.

Rhodia claimed that although Invista was not a signatory to the JVA, it benefitted from the JVA and was therefore estopped from avoiding the arbitration clause therein. The court dismissed Rhodia’s contention, holding that Invista’s claims in respect of Rhodia’s misuse of information gained through participation in Butachimie were not directly based on the JVA.

The district court also refused to exercise its discretion to grant a stay, reasoning that though Rhodia’s assertions – that the issues in this case were inseparable from the issues in the ICC arbitration, that Rhodia will not hinder the ICC arbitration and that Invista will not be harmed by a delay in the present litigation – were correct, they did not amount to exceptional circumstances justifying a stay.

Excerpt


‘[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in

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accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.’


[2] “A court faced with a motion to dismiss or stay proceedings pending the completion of arbitration must determine ‘(1) whether the parties entered into a valid arbitration agreement; and (2) whether the specific dispute falls within the scope of the agreement’. Id. (citing John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 136 (3d Cir. 1998)). In addressing the first question, courts apply the summary judgment standard. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 n. 9 (3d Cir. 1980). The Third Circuit Court of Appeals has explained this standard as follows:

‘Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement. The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.’

Id. at 54.

[3] “In this case, the parties disagree as to whether Rhodia may invoke the arbitration provision in the JVA, whether Invista may be bound by the arbitration provision, and whether Invista’s claims in this lawsuit fall within the scope of the JVA. The Court finds that Invista may not be bound by the arbitration provision in the JVA, and therefore Rhodia’s motion to dismiss or for a mandatory stay pending arbitration will be denied.”

1. ESTOPPEL

[4] “In DuPont, the plaintiff, a non-party to a written agreement containing an arbitration clause, sued a party to the contract and its parent company, alleging a breach of an oral agreement to fulfill obligations in the written agreement. Id.
at 190-191, 192-193. The DuPont court noted that the plaintiff’s claims arose, ‘at least in part, from the underlying Agreement’ and arguably ‘require[d] proof that [one of the defendants] ultimately breached the underlying Agreement’. Id. at 200, 201. The Court still found that the plaintiff was not bound by the arbitration provision in the Agreement because the plaintiff’s claim was primarily based on the oral agreement. Id. at 201.

[5] “Here, Invista’s tortious interference claim is not related to the JVA. Furthermore, Invista’s other claims, which are based on Rhodia’s misuse of information gained through participation in the joint venture, are not directly based on the confidentiality provision in the JVA. Therefore, the Court finds that Invista is not estopped from resisting arbitration based on the nature of its claims in this action.

[6] “Second, Rhodia argues that Invista has benefitted from the JVA by actively participating in the management of Butachimie. However, Invista’s right to participate in the management of Butachimie does not come from the JVA.

[7] “Third, Rhodia argues that Invista has exploited the JVA’s confidentiality provisions to maintain its market dominance. Rhodia argues that Invista has asserted that it is the owner of the Gen I technology and receives direct benefits of revenue, market position, and reputation from owning that technology. However, Invista’s ownership of the Gen I technology does not come from the JVA. Rather, it comes from Invista’s contracts with DuPont.

[8] “In sum, the Court finds that Invista is not estopped from avoiding the arbitration provision in the JVA. Therefore, dismissal or a stay pursuant to the FAA is not appropriate.”

II. DISCRETION TO GRANT STAY

[9] “Even if a court is not required by the FAA to stay litigation, the court may, in its discretion, grant a stay pending the outcome of the arbitration. See E.I. duPont de Nemours and Co. v. Rhodia Fiber and Resin Intermediates, S.A.S., 197 F.R.D. 112, 128 (D. Del. 2000) (‘This court has discretion to grant or deny a stay pending the decision in another proceeding.’), aff’d in part and appeal dismissed in part, DuPont, 269 F.3d 187. However, a court should grant such a stay only when there are “exceptional” circumstances, the “clearest of justifications” … justifying the surrender of [its] jurisdiction’. CTF Hotel Holdings, Inc. v. Marriott Int’l, Inc., 381 F.3d 131, 139 (3d Cir. 2004) (quoting Moses H. Cone Hospital v. Mercury Const. Corp., 460 U.S. 1, 25-26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). The party seeking a stay ‘must make out a clear case of hardship or inequity in
being required to go forward …’. CTF Hotel, 381 F.3d at 139 (quoting Landis v. North Am. Co., 299 U.S. 248, 255, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). Judicial efficiency alone does not justify a stay pending the outcome of arbitration. See CTF Hotel, 381 F.3d at 139.1

[10] “Here, Rhodia argues that a discretionary stay is appropriate because the issues in this case are inseparable from the issues in the ICC arbitration, Rhodia will not hinder the ICC arbitration, and Invista will not be harmed by a delay in this litigation. The Court finds that even if Rhodia’s assertions are correct, they do not amount to ‘exceptional circumstances’ justifying a stay. Therefore, the Court will deny Rhodia’s request for a discretionary stay.”

(....)

1. "Rhodia, without addressing the standard set forth in CTF Hotel, argues that a different standard should apply. Specifically, Rhodia argues that a court should grant a stay pending the outcome of arbitration if '(a) "there are issues common to the arbitration and the court, and ... those issues will finally be determined by arbitration", (b) the stay would facilitate arbitration, and (c) the stay would not harm the party opposing the stay’. ([Reply Brief], citing Birmingham Assocs. Ltd. v. Abbott Labs., 547 F.Supp.2d 295, 302 (S.D.N.Y. 2008)). This Court must apply the standard articulated by the Third Circuit Court of Appeals, and not the standard advanced by Rhodia."
670. United States District Court, Southern District of New York, 23 June 2009, Case No. 08 Civ. 8226 (SAS)

Parties:  
Plaintiffs: (1) Kelso Enterprises Limited (nationality not indicated);  
(2) Pacific Fruit Limited (nationality not indicated)  
Defendants: (1) M/V DIADEMA, her engines, boilers, etc. (nationality not indicated);  
(2) M/V ROTTERDAM, her engines, boilers, etc. (nationality not indicated);  
(3) M/V MARYSTOWN, her engines, boilers, etc. (nationality not indicated);  
(4) A.P. Moller-Maersk A/S (nationality not indicated);  
(5) Maersk Line (nationality not indicated);  
(6) Maersk del Ecuador CA (nationality not indicated);  
(7) CW Schiffahrts GmbH & Co KG (nationality not indicated);  
(8) JMS Schiffahrtsges mbH & Co KG (nationality not indicated);  
(9) M/S ANTARES J (nationality not indicated);  
(10) Seaspan Corp. (nationality not indicated)

Published in:  
2009 U.S. Dist. LEXIS 54588

Articles:  
II(3)

Subject matters:  
– referral to arbitration  
– presumption in favor of validity of arbitration agreement

Commentary Cases:  
¶ 217

Facts

On 15 January 2007, Kelso Enterprises Limited and Pacific Fruit Limited (Kelso/Pacific) entered into a service contract with A.P. Moller-Maersk A/S,
Maersk Line and Maersk del Ecuador CA (collectively, Maersk) for Maersk to transport bananas from Ecuador to Japan for Kelso/Pacific. The service contract was on a Maersk standard form. The shipments were made pursuant to ten bills of lading, also on a Maersk standard form.

Clause 6 of the service contract provided that any suit arising under the contract was governed exclusively by New York and US federal maritime law. The bills of lading provided for an alternative: if damage occurred en route to or from the US or if the Carriage of Goods by Sea Act (COGSA) applied – which applies to all contracts of carriage of goods by sea to or from ports of the US in foreign trade – US law applied; if not, English law applied. The bills of lading also contained a forum-selection clause designating the High Court of Justice in London as the appropriate forum when English law applied and the United States District Court for the Southern District of New York when US law applied. Clause 7 of the service contract addressed potential conflicts between the two contracts:

“The terms and conditions of Maersk Line standard form of bill of lading covering individual shipments shall apply to shipments hereunder. The provisions in this Contract for rates and charges and US arbitration/US law shall not be overridden by the bill of lading. However, in the event any provision in Maersk Line’s bill of lading which limits or governs its liability for damages to persons or property (including cargo), delays, misdelivery, or any other provision of the bill of lading mandated by applicable law is or are in conflict with the Contract, the bill of lading shall prevail.”

Clause 9 of the service contract establishes that either party could initiate arbitration proceedings to be held in New York City “pursuant to the terms and procedures of the United States Arbitration Act”.

A dispute arose between the parties when part of the cargo – transported on the M/V MAERSK ROTTERDAM, then the M/V MAERSK DIademA and finally, the M/V MARYSTOWN – arrived at its destination damaged or short. Kelso/Pacific commenced an action against Maersk in the United States District Court for the Southern District of New York for damage to the cargo. Maersk moved to dismiss the suit based on improper forum. Kelso/Pacific cross-moved to compel arbitration.

The district court, per Shira A. Scheindlin, US DJ, granted both motions. It first held that it was not the proper forum for the claim, as even if the US choice-of-law provision in the service contract prevailed over the English choice of law in the bills of lading, the application of US law did not necessarily activate
COGSA and the alternative venue provision in the bill of lading with it.

The court then reasoned that the arbitration clause in the service contract was a broad clause carrying a presumption of arbitrability. The dispute however was whether the service contract or the bill of lading governed arbitrability. Clause 7 of the service contract, which explained how a conflict between the bill of lading and the service contract was to be resolved, was contradictory and thus ambiguous. The district court concluded that, since doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, the service contract governed and established the applicability of the US arbitration clause in cases of cargo damage.

Excerpt

1. PRELIMINARY CONSIDERATIONS

1. Forum Selection Clause

[1] “Although forum selection clauses were once disfavored by US courts, the Supreme Court has established that such provisions are ‘primaiy facie valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances’.1 In Phillips v. Audio Active Limited, the Second Circuit adopted a four-part test to determine whether a forum selection clause is valid and enforceable.2 First, the clause must have been reasonably communicated to the party resisting enforcement.3 Second, the clause must be mandatory.4 Third, ‘the claims and parties involved in the suit [must be] subject to the forum selection clause’.5 A presumption of validity applies to a forum

3. “See Phillips, 494 F.3d at 383 (citing D.H. Blair & Co., 462 F.3d at 103).”
4. “See id. (citing John Boutari & Son, Wines and Spirits, S.A. v. Attiki Imps. & Distsirs, Inc., 22 F.3d 51, 53 (2d Cir. 1994)). Accord Klotz, 519 F.Supp. 2d at 433 (explaining that the court must determine if the parties ‘are required to bring any dispute to the designated forum or simply permitted to do so’).”
selection clause if it was communicated to the party resisting its enforcement, it is mandatory, and both the claims and parties involved are subject to it.6

[2] “Fourth, the resisting party may rebut the presumption of enforceability ‘by making a sufficiently strong showing that “enforcement would be unreasonable or unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.”’ This exception is to be interpreted narrowly.8 In Roby v. Corporation of Lloyd’s, the Second Circuit discussed four instances where enforcement of a forum selection clause would be unreasonable:

‘(1) if incorporation [of the clause] into the agreement was the result of fraud or overreaching; (2) if the complaining party will for all practical purposes be deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state’.9

[3] “The Second Circuit has not directly ruled on whether the expiration of the statute of limitations in the forum selected by an enforceable forum selection clause would render enforcement of the clause unjust. However, courts in this district have overwhelmingly answered that question in the negative.”10

2. Motion to Dismiss

[4] “In deciding a Rule 12(b)(3) motion to dismiss the court may consider material outside of the pleadings.” However, “[t]he plaintiff is entitled to “have

6. “See id. (citing Roby, 996 F.2d at 1362-1363).”
7. “Id. at 383-384 (quoting Bremen, 407 U.S. at 15).”
8. “See Roby, 996 F.2d at 1363.”
9. “Id. (citations and quotations omitted).”
10. “See, e.g., Nippon Express U.S.A. (Illinois), Inc. v. M/V CHANG JIANG BRIDGE, No. 06 Civ. 694, 2007 U.S. Dist. LEXIS 92032, 2007 WL 4457033, at *7 (S.D.N.Y. 13 Dec. 2007). In New Moon Shipping Co. v. Man B & W Diesel, the Second Circuit stated in dicta that consideration of the expiration of the statute of limitations ‘would create a large loophole for the party seeking to avoid enforcement of the forum selection clause. That party could simply postpone its cause of action until the statute of limitations has run in the chosen forum and then file its action in a more convenient forum.’ 121 F.3d 24, 33 (2d Cir. 1997).”
the facts viewed in the light most favorable to it” and to be heard before any disputed facts are resolved against it. If a party does not include an objection to venue in its answer or fails to make a 12(b)(3) motion before responding to a complaint, the defense is waived and the party has consented to the venue. \(^{\text{12}}\)

3. **Arbitration Clause**

[5] “Although ‘[p]arties may be required to arbitrate only when they have agreed to do so … there is an “emphatic federal policy in favor of arbitral dispute resolution”’. \(^{\text{14}}\) “[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration…”\(^{\text{15}}\) Arbitration must be ordered “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”. \(^{\text{16}}\) “Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”\(^{\text{17}}\)

[6] “The Second Circuit has adopted a two-step process for determining whether an arbitration clause governs a dispute when there are no federal statutory claims advanced,\(^{\text{18}}\) First, “a court should classify the particular clause as either broad or narrow”. \(^{\text{19}}\) The use of the language ‘arising out of or relating

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19. “Id. (quoting Louis Dreyfus Negoce S.A., 252 F. 3d at 224).”
to’ in the arbitration clause falls into the broad classification. 20 Second, when interpreting a narrow arbitration clause, the court must decide if the claim involves an issue that ‘is on its face within the purview of the clause’ or is a collateral issue. In most cases, narrow clauses do not apply to collateral issues. When interpreting a broad clause, “there arises a presumption of arbitrability” and arbitration of even a collateral matter will be ordered if the claim alleged “implicates issues of contract construction or the parties’ rights and obligations under it”. 21

4. Contract Interpretation

[7] “An ambiguity exists where a contract term “could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business”. 22 “The cardinal principle for the construction and interpretation of … contracts … is that the intentions of the parties should control.” 23 “An ambiguity in a contract should be construed against its drafter.” 24 When specific and general phrases conflict, the specific phrases determine the meaning of the contract. 25

5. The 1958 New York Convention

[8] “The United States is a party to the [1958 New York Convention]. 26 ‘An arbitration agreement or arbitral award arising out of a legal relationship [involving at least one non-US citizen party] … which is considered as commercial, including a transaction, contract, or agreement … falls under the

25. “See Aramony v. United Way of Am., 254 F.3d 403, 413 (2d Cir. 2001) (citations omitted).”
When a district court has jurisdiction over an action falling under the New York Convention and the district court is also in the ‘district and division which embraces the place designated in the agreement as the place of arbitration’, it is the appropriate venue for the purposes of recognizing an award or compelling arbitration. All district courts have original jurisdiction over actions falling under the Convention.

[9] “The Federal Arbitration Act (FAA) is applied to actions brought under the New York Convention when the two are not in conflict. The FAA establishes that a court must stay a proceeding when an action is brought to compel arbitration regarding a matter that is ‘referable to arbitration under ... [the] agreement.’”

II. DISCUSSION

1. No Proper Forum

“Although there is no dispute that the first two parts of the Phillips test are satisfied, the parties contest the third part – which forum provided in the forum selection clause applies to the claims in this suit. Maersk argues that this Court is an inappropriate venue, and therefore that this case should be dismissed.”

Specifically, Maersk claims that clause 26 of the bill of lading mandates resolution in the English High Court of Justice, as COGSA does not apply and the United States was neither the origin nor destination of the shipments [footnote omitted]. Kelso/Pacific, on the other hand, argues that the service contract’s choice of law clause opens an escape hatch from the bill of lading’s default forum provision. Kelso/Pacific asserts that the choice of law provision found in the service contract, which dictates the application of US federal maritime law, implicitly triggers the application of COGSA [footnote omitted]. In turn, Kelso/Pacific

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27. “Id. Sect. 202.”
28. “Id. Sect. 204.”
29. “See id. Sect. 203.”
30. “See id. Sect. 208.”
31. “Id. Sect. 3. There is no contrary provision in the New York Convention.”
32. “... The parties disagree as to which of the two forums provided in the forum selection clause applies under the third step of the Phillips test – which mandates that the forum selection clause apply to the parties and claims.”

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argues, the application of COGSA brings into effect an alternative venue provision in clause 26 of the bill of lading, which states that this Court is the exclusive venue for a suit when COGSA applies [footnote omitted].

[11] “Even assuming, arguendo, that the service contract’s American choice of law provision prevails over the bill of lading’s English choice of law provision, the application of US law does not necessarily activate COGSA. COGSA only applies when a dispute concerns transportation to or from US ports or arises under a ‘bill of lading or similar document of title … containing an express statement that it shall be subject to COGSA’. Neither the bill of lading nor the service contract expressly invokes COGSA; thus the alternative venue provision of clause 26 of the bill of lading does not apply. This Court is not the proper venue for litigation on the merits of this dispute.”

2. Arbitration Clause Applies

[12] “Even when the merits of a dispute cannot be properly brought in this Court, this Court may still entertain an action to compel arbitration under the New York Convention, as it is the designated site of arbitration pursuant to the service contract. Clause 9 of the service contract establishes that either party can require arbitration of a dispute ‘arising out of or relating to’ the contract [footnote omitted]. This is a broad arbitration clause and therefore carries a presumption of arbitrability. The true dispute is whether the service contract or the bill of lading governs arbitrability. Clause 7 of the service contract explains how a conflict between the bill of lading and the service contract is to be resolved. However, this clause is ambiguous. The second sentence notes that the service contract’s choice of US arbitration and US law may not be overridden by the bill of lading, while the third sentence notes that the bill of lading will prevail regarding liability as a result of cargo damage.

[13] “Because any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, I find that the service contract is the governing document and establishes the applicability of the US arbitration clause in cases of cargo damage. The fact that Maersk drafted the service contract also supports this decision, as Maersk now argues that the service contract requires that the terms of the bill of lading must apply [footnote omitted]. While cargo damage

34. “See Eastern Fish, 105 F.Supp.2d at 237-238 (citing Collins & Aikman Prods., 58 F.3d at 20). See also Bristol-Myers Squibb, 354 F.Supp.2d at 503 (quoting Louis Dreyfus Nameco S.A., 252 F.3d at 224).”
35. “See Eastern Fish, 105 F.Supp.2d at 237.”
claims may be collateral to the substance of the service contract, which sets
freight and rate charges for the transport of the bananas, the damage claim
implicates the parties’ rights and obligations under the contract and hence is
arbitrable under the broad arbitration clause found in the service contract.”

III. CONCLUSION

[14] “For the foregoing reasons, both Maersk’s motion to dismiss and
Kelso/Pacific’s motion to compel arbitration are granted. This action is now
closed, without prejudice to re-open if and when a party moves to enforce an
arbitration award....”
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

671. United States District Court, Eastern District of Louisiana, 26 June 2009, Civil Action No. 09-3322 Section ‘F’

Parties: 
- Plaintiff: Larry J. Viator, Sr. (nationality not indicated)
- Defendants: (1) Dauterive Contractors, Inc. (nationality not indicated); (2) Western Geophysical Company of America, Inc. (nationality not indicated)

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Subject matters: 
- removal from state court to federal court
- requirements for referral to arbitration (in general)
- arbitration agreement falling under 1958 New York Convention
- state court action “relates to” 1958 New York Convention arbitration agreement
- general removal provisions do not apply to removal under 1958 New York Convention
- unanimous consent to removal to federal court of all defendants
- 1958 New York Convention not reverse preempted by state law on insurance (Louisiana)

Commentary Cases: 

Facts

In June 1997, Larry J. Viator, Sr., an employee of Dauterive Contractors, Inc. (Dauterive), was injured while working aboard a barge owned by Magnolia Quarterboats, Inc. (Magnolia) and chartered by Western Geophysical Company of America, Inc. (Western Geophysical). At the relevant time, Western Geophysical was insured by The Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual). The insurance policy provided for arbitration of “any difference or dispute” between the parties in London.
On 13 May 1998, Viator commenced a personal injury action against Dauterive and Western Geophysical in state court in the United States. On 5 November 2002, Western Geophysical filed a third-party demand against Magnolia, asserting that Magnolia was responsible for any damages because of its negligence or the unseaworthiness of the barge. Magnolia in turn filed a third-party demand for defense and indemnity against Western Geophysical and its insurer. When Western Geophysical disclosed its insurance policy and the name of its insurer, Steamship Mutual, Magnolia filed an amended third-party demand adding Steamship Mutual as a defendant. On 20 April 2009, Steamship Mutual removed the suit to the United States District Court for the Eastern District of Louisiana under the 1958 New York Convention and sought an order to compel arbitration under the arbitration clause in the insurance policy. Western Geophysical consented to removal one month later, on 19 May 2009. Magnolia moved to remand the case to state court.

The district court, per Martin L.C. Feldman, US DJ, granted Steamship Mutual’s motion to compel arbitration, staying court proceedings pending arbitration. The court noted at the outset that the general rule that requirements for removal are to be interpreted restrictively does not apply to removal under the 1958 New York Convention, as the relevant removal provision – Sect. 205 of the Federal Arbitration Act (FAA) – is “generous”. It then stated that removal under the New York Convention is proper when the removing defendant shows that (1) the arbitration clause falls under the Convention and (2) the litigation relates to the arbitration clause.

First, the court reasoned that an arbitration clause falls under the New York Convention if four prerequisites are met: (1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; (3) the agreement arises out of a commercial legal relationship and (4) a party to the agreement is not an American citizen. There was no dispute that these elements were met here: the insurance policy contained an arbitration agreement in writing providing for arbitration in England, a signatory State; a contract of insurance is a commercial legal relationship and Steamship Mutual was a foreign association.

Second, the court concluded that the dispute also related to the arbitration clause. In its 2006 decision in Acosta (see below), the Fifth Circuit articulated the rule that “a clause determining the forum for resolution of specific types of disputes relates to a lawsuit that seeks the resolution of such disputes”. This was the case here: the insurance policy contained a clause declaring that England was the forum for the resolution of coverage disputes and Magnolia sought the benefit of Steamship Mutual’s coverage for Western Geophysical’s alleged liabilities.
The district court then dismissed Magnolia’s argument that removal was procedurally defective because it was sought in an untimely manner and because Western Geophysical did not consent thereto. The court held in respect of the first contention that Sect. 205 FAA clearly provides that an action may be removed under the Convention “at any time before trial”. The general, thirty-day time limit for removal in non-Convention cases therefore does not apply.

Nor was removal defective for lack of consent by all defendants. The district court noted that Western Geophysical did in fact consent to removal on 19 May 2009, one month after Steamship Mutual filed its notice of removal on 20 April 2009.

Magnolia argued that consent was untimely because it was filed after the thirty-day time limit provided for in the general removal provision, which in its opinion also applies to removal under the New York Convention. The district court disagreed. It reasoned that the rule in the Fifth Circuit that all served defendants are required to join in the removal and that the thirty-day time limit begins to run as soon as the first defendant is served “relies entirely” on the thirty-day time limit for removal. As seen above, Congress rejected this time limit in implementing Sect. 205, which permits removal at any time before trial. The court added that it was also persuaded by the suggestion in the decision of the district court in the Acosta case that consent by all defendants to removal is in fact not required by the New York Convention.

Excerpt

I. REQUIREMENTS FOR REMOVAL UNDER THE 1958 NEW YORK CONVENTION

[1] “Although the plaintiff challenges removal in this case, the removing defendants carry the burden of showing the propriety of this Court’s removal jurisdiction. See Manguno v. Prudential Property and Cas. Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002) (the removing party bears the burden of showing both that federal jurisdiction exists and, if challenged, that the removal was procedurally proper); see also Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 815 (5th Cir.), cert. denied, 510 U.S. 868, 114 S.Ct. 192, 126 L.Ed.2d 150 (1993); Willy v. Coastal Corp., 855 F.2d 1160, 1164 (5th Cir. 1988).

[2] “In most removal contexts, any ambiguities are construed against removal, Butler v. Polk, 592 F.2d 1293, 1296 (5th Cir. 1979), as the general removal statute should be strictly construed in favor of remand. York v. Horizon Fed. Sav. and Loan Ass’n, 712 F.Supp. 85, 87 (E.D. La. 1989); see also Shamrock Oil & Gas
“Title 9 of the United States Code contains both the Federal Arbitration Act and the US implementing legislation for the Convention. When the Convention governs the recognition and enforcement of an arbitration agreement or award, the FAA applies only ‘to the extent that [the FAA] is not in conflict with [the Convention Act] or the Convention as ratified by the United States’. See Sedco, Inc. v. Petroles Mexican Nat’l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985).5 The Fifth Circuit has observed that the purpose of ratifying the Convention was ‘to secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and awards made in this and other signatory nations’. McDermott Int’l, Inc. v. Lloyds Corp. v. Sheets, 313 U.S. 100 (1941). However, when a party invokes the [1958 New York Convention] as its vehicle for removal, the Fifth Circuit broadly instructs, ‘[s]o generous is [the Convention’s removal provision that] the general rule of construing removal statutes strictly against removal “cannot apply … because in these instances, Congress created special removal rights to channel cases into federal court”’. Acosta v. Master Maint. & Constr. Inc., 452 F.3d 373, 377 (5th Cir. 2006)1 (quoting McDermott Int’l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1213 (5th Cir. 1991)).2 Because Steamship Mutual’s jurisdictional predicate is based on the Convention, the Court examines its provisions to determine whether its grant of jurisdiction extends to this case.

[3] “The Convention was negotiated pursuant to the Constitution’s treaty power. The United States is a party to the Convention, which Congress implemented at 9 U.S.C. Sect. 201, et seq., 3 ‘mak[ing] the Convention the highest law of the land’. See Sedco, Inc. v. Petroles Mexican Nat’l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985).5 The Fifth Circuit has observed that the purpose of ratifying the Convention was ‘to secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and awards made in this and other signatory nations’. McDermott Int’l, Inc. v. Lloyds

3. “Title 9 of the United States Code contains both the Federal Arbitration Act and the US implementing legislation for the Convention. When the Convention governs the recognition and enforcement of an arbitration agreement or award, the FAA applies only ‘to the extent that [the FAA] is not in conflict with [the Convention Act] or the Convention as ratified by the United States’. See 9 U.S.C. Sect. 8; Francisco v. STOLT ACHIEVEMENT MT, 293 F.3d 270, 274 (5th Cir.) [reported in Yearbook XXVII (2002) pp. 600-612 (US no. 364)].1 Because Steamship Mutual’s jurisdictional predicate is based on the Convention, the Court examines its provisions to determine whether its grant of jurisdiction extends to this case.
5. "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

6. "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over an action or proceeding, regardless of the amount in controversy;"

1. Arbitration Clause "Falls Under" the 1958 New York Convention

6. "In determining whether the Convention requires compelling arbitration in a given case, the Fifth Circuit instructs, the Court 'conduct[s] only a very limited inquiry'. Freudensprung v. Offshore Technical Services, Inc., 379 F.3d 327, 339 (5th Cir. 2004) (citing Francisco v. STOLT ACHIEVEMENT MT, 293 F.3d 270,
274 (5th Cir.), 10 cert. denied 537 U.S. 1030, 123 S.Ct. 561, 154 L.Ed.2d 445 (2002)). An agreement ‘falls under’ the Convention pursuant to Sect. 202, and the Court should compel arbitration if these four prerequisites are met: ‘(1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen’. Id. (citing Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co., 767 F.2d 1140, 1144-1145 (5th Cir. 1985) (citation omitted)); 9 U.S.C. Sect. 202. ‘Once “these requirements are met, the Convention requires the district court … to order arbitration … unless it finds that the said agreement is null and void, inoperable or incapable of being performed”.’ Id. (citing Sedco, 767 F.2d at 1146 (quoting Convention, Art. II(3))).

[7] “There is no serious dispute that these elements are met. First, there is an agreement in writing to arbitrate the coverage dispute. 11 Second, the Rules of Entry provide for arbitration in the territory of a Convention signatory – London, England. Third, the agreement arises out of a commercial legal relationship – a contract of insurance between a mutual protection and indemnity association and an insured. See Roser v. Belle of New Orleans, L.L.C., No. 03-1248, 2003 WL 22174282, at (E.D. La. 12 Sept. 2003) (Engelhardt, J.)12 (determining that a protection and indemnity insurance agreement satisfies the commercial legal requirement under the Convention). Finally, the fourth element is met because the record establishes that Steamship Mutual is not a United States citizen.

[8] “Having determined that the arbitration agreement falls under the Convention, the Court must now turn to the language of Sect. 205 to determine whether the state court litigation relates to the arbitration clause. If it does, this Court has removal jurisdiction.”

2. Dispute “Relates to” the Arbitration Clause

[9] “The plain and expansive language [of Sect. 205], the Fifth Circuit has observed, ‘embodies Congress’s desire to provide the federal courts with broad jurisdiction over Convention Act cases in order to ensure reciprocal treatment

11. “When evaluating this factor, the Fifth Circuit instructs the Court to consider whether the arbitration provision is broad or narrow: ‘it is difficult to imagine broader general language than “any dispute”. Sedco, 767 F.2d at 1145. The arbitration clause in Rule 36 of the Rules of Entry uses the broad language of “any difference or dispute”.”
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

Indeed, the Supreme Court has made clear: ‘The goal of the [C]onvention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.’ Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457 n. 15, 41 L.Ed.2d 270, 281 n. 15 (1974)) [reported in Yearbook I (1976) pp. 203-204 (US no. 4)].

The Fifth Circuit has further observed that this unambiguous policy of favoring recognition of arbitration agreements that fall under the Convention is patently reflected in the Convention’s incorporation of the Federal Arbitration Act (9 U.S.C. Sect. 208) and its enforcement mechanism, empowering courts to compel arbitration pursuant to 9 U.S.C. Sect. 206.14 Id. at 376-377. To further promote uniformity, Congress guaranteed a federal forum for enforcement by granting the federal courts jurisdiction over Convention cases, and adding a generous removal provision at Sect. 205. Id. at 377 (citing McDermott Int’l, Inc. v Lloyds Underwriters of London, 944 F.2d 1199, 1207-1208 (5th Cir. 1991) (‘uniformity is best served by trying all [Convention] cases in federal court unless the parties unequivocally choose otherwise’)). The Court must determine whether there is a nexus between the arbitration clause and the lawsuit – whether the arbitration clause ‘relates to’ the litigation.

[10] “The Fifth Circuit confronted the application of Sect. 205’s ‘relates to’ phrase in Acosta. The plaintiffs in Acosta sued Georgia Gulf Corporation and several of its contractors for negligence arising from the September 1996 release of mustard-gas agent at the GGC facility; pursuant to Louisiana’s direct action statute, the plaintiffs also sued two foreign insurers, whose policies included arbitration clauses governing disputes over coverage. 452 F.3d at 375. Invoking the American Heritage Dictionary (4th ed. 2000) definition of ‘relate’ (as meaning ‘to have connection, relation, or reference’), the Court of Appeals concluded that the subject matter of the litigation related to the arbitration clauses. Id. at 378-379 (‘Common sense dictates the conclusion that policy provisions relating to coverage of the insured’s torts are, almost by definition, related to claims that

13. “Indeed, the Supreme Court has made clear: ‘The goal of the [C]onvention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.’ Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457 n. 15, 41 L.Ed.2d 270, 281 n. 15 (1974)) [reported in Yearbook I (1976) pp. 203-204 (US no. 4)]."

14. “Sect. 206 provides: ‘A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.’”
are based on the disputed assertion of coverage of the insured’s torts’). Moreover, the arbitration clauses in the Acosta insurance policies declared the forum for resolution of coverage disputes. Thus, the Court of Appeals articulated the rule that ‘a clause determining the forum for resolution of specific types of disputes relates to a lawsuit that seeks the resolution of such disputes’. Id. at 379.

[11] “Applying Sect. 205, and the broad construction of ‘relates to’ sanctioned by Acosta, compels the same end result: this litigation is related to the arbitration clause in Steamship Mutual and Western Geophysical’s insurance contract. The insurance contract contains an arbitration clause that declares England as the forum for the resolution of coverage disputes; the arbitration clause is therefore related to the state court litigation, where Magnolia seeks the benefit of Steamship Mutual’s disputed coverage for Western Geophysical’s alleged protection and indemnity.”

3. Conclusion

[12] “Because the arbitration agreement ‘falls under’ the Convention (pursuant to Sect. 202) and the litigation ‘relates to’ the agreement (pursuant to Sect. 205), Steamship Mutual has established that this Court has removal jurisdiction. Accordingly, this Court has jurisdiction, and may enforce the arbitration clause, unless (as Magnolia asserts) removal was procedurally defective.”

II. PROCEDURAL REQUIREMENTS FOR REMOVAL UNDER THE 1958 NEW YORK CONVENTION

1. Timeliness

[13] “Magnolia contends that removal was untimely. Even though Sect. 205 permits removal ‘at any time before trial’, Magnolia insists that the general removal procedure statute, 28 U.S.C. Sect. 1446(b), applies to require ‘[t]he notice of removal of a civil action … shall be filed within thirty days’ of service. As this Court has previously pointed out regarding this same issue, Magnolia ‘seems to ignore Sect. 205’. Lejano v. K.S. Bandak, No. 00-2990, 2000 WL

15. “The Fifth Circuit made clear that '[t]he operation of the direct-action statute as a matter of Louisiana state law does not alter the fact that the litigation is related to the arbitration clause as a matter of logic and federal removal law’. Id. at 379 (noting ‘we cannot ignore Congress’s decision that the federal courts are best able to establish uniformity in the enforcement of arbitral agreements’).”
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33416866, at *4 (E.D. La. 2000). Indeed, Magnolia’s argument would convert simple, clear words to mere cliches.

[14] “This Court has long ago observed that the plain language of Sect. 205 commands that ‘defendants who removed under the Convention are not limited by the usual thirty day window in which to petition for removal’. Id. Although, as Magnolia points out, Lejano was decided some years ago, the Court remains persuaded that Sect. 205 is unclouded and ‘leaves no room for interpretation’. Id. Thus, Steamship Mutual’s removal was timely under the Convention.”

Unanimous Consent

[15] “Magnolia next contends that the case should be remanded because Western Geophysical failed to consent to removal, thereby violating the Fifth Circuit’s rule of unanimity. In its Notice of Removal, Steamship Mutual asserted that ‘Western consents to and joins in the removal of this action although its consent is not necessary for removal pursuant to the Convention’. However, one month after Steamship Mutual filed its Notice of Removal on 20 April 2009, Western Geophysical (on 19 May 2009) filed a formal Consent to Removal, which ‘evidenc[ed] its consent to the removal of this action by Steamship Mutual’. The Court must determine whether Western Geophysical’s consent to removal complied with the Convention’s removal requirements.

[16] “A defect in the procedure for removal, if timely asserted, may be grounds for remand to state court. 28 U.S.C. Sect. 1447 (c) (providing 30-day window.


17. “Magnolia fails to cite any case law to the contrary. The Court notes that a section of the Middle District of Louisiana reached the same conclusion as this Court did almost nine years ago, and the Fifth Circuit affirmed (without addressing the timeliness issue). See Acosta v. Master Maintenance & Construction, 52 F.Supp.2d 699, 705 (M.D. La. 1999), aff’d, 452 F.3d 373 (2006). In Acosta, the district court rejected the plaintiffs’ interpretation of ‘at any time before trial’ and determined that the phrase means that ‘removal may occur at any time before an adjudication on the merits’. Also, the Fifth Circuit has suggested that, if presented with the issue, it would apply the plain words of Sect. 205:

‘Under Sect. 1441(d) [of the Foreign Sovereign Immunity Act], a defendant may remove “at any time for cause shown” and under Sect. 205 [of the Convention], a defendant may remove “at any time before the trial”. Other cases may be removed only within 30 days after the defendant receives a pleading. See 28 U.S.C. Sect. 1446(b).’

McDermott Int’l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, (5th Cir. 1991) [reported in Yearbook XVIII (1993) pp. 472-486 (US no. 126)] (comparing the FSIA to the Convention and noting that ‘a restrictive construction of a district court’s authority to remand certain types of cases fosters uniformity in that area of law’).”
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for challenges to procedural defects in removal); Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996). The Court first looks to the Convention’s removal provision to see whether it speaks to this issue, as it directly spoke to the issue of timeliness of removal. Sect. 205 states that ‘the defendant or the defendants may, at any time before the trial thereof, remove such action …’. Magnolia insists that this language (‘the defendant or defendants … may remove such action …’) should be given the same construction as the identical language found in 28 U.S.C. Sect. 1441(a), the general removal statute. The Court is not persuaded.

18. “The case literature applicable to removals under Sect. 1446(b), in the case of multiple defendants, is well-settled in the Fifth Circuit: absent exceptional circumstances, all served defendants are required to join in the removal. Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 423 (5th Cir. 1990); Fontenot v. Global Marine, Inc., 703 F.2d 867, 870 n. 3 (5th Cir. 1983). The 30-day time limit imposed by Sect. 1446, says the circuit court, begins to run as soon as the first defendant is served. Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254, 1261-1262 (5th Cir. 1988) (holding that all served defendants are required to join in petition for removal no later than 30 days from the date on which the first defendant was served). Thus, the ‘first-served defendant’ rule in this Circuit is inherently linked to the 30-day time period for removal imposed by Sect. 1446(b).”

19. “The Fifth Circuit narrowly avoided deciding whether Sect. 205 removals require the unanimous consent of defendants in Acosta. 452 F.3d at 379. Instead of affirming the district court’s ruling that the consent of all defendants to

18. “Sect. 205 also states, regarding procedure generally, that ‘[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this Section need not appear on the face of the complaint but may be shown in the petition for removal.’ Magnolia urges that this provision bolsters their argument that the same construction given Sect. 1441 should be given Sect. 205. (Magnolia invoked this same portion of Section in an attempt to support their argument that removal was untimely.)”

19. “Courts outside the Fifth Circuit generally reject the first-served defendant rule in favor of a last-served (or ‘each served’) defendant rule. See, e.g., Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202 (11th Cir. 2008) (noting that, and following, the trend in recent case law favors the last-served defendant rule); Massaro Enters. of Kan. v. Z.Teco Reeds., L.P., 254 F.3d 753, 755 (8th Cir. 2001) (endorsing last-served defendant rule); Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 532 (6th Cir. 1999) (later-served defendants are entitled to 30 days to remove, and pointing out that ‘[t]he statutory language [of Sect. 1446(b)] itself contemplates only one defendant and thus does not answer the question of how to calculate the timing for removal in the event that multiple defendants are served at different times, one or more of them outside the original 30-day period’); McKinney v. Board of Trustees of Maryland Community College, 955 F.2d 924 (4th Cir. 1992) (each defendant has 30 days from the time they are served with process to join a timely-filed notice of removal).”

removal is not required by the Convention, the Court of Appeals affirmed the district court’s (alternate) finding that unanimity was satisfied because the allegedly non-consenting defendants were nominal parties, whose consent was not required under the unanimity rule. Id.

[19] “Some courts outside the Fifth Circuit have determined that Sect. 205 is subject to the unanimity rule.” If the general rule of unanimity (that all defendants join in removal), with no time requirement, applies, Western Geophysical’s consent filed into the record satisfies the rule. This Court, however, is also persuaded by the Acosta district court’s suggestion that consent by all defendants to removal is not required by the Convention.

[20] “The Fifth Circuit acknowledged in McDermott, in comparing the Foreign [Sovereign] Immunities Act and the Convention, that ‘Congress deliberately sought to channel cases … away from the state courts and into federal courts … for the purpose of assuring a unitary federal jurisprudence’. 944 F.2d at 1213. As the Acosta district court pointed out, ‘[t]hat purpose is best served by construing Sect. 205 in a fashion that allows a foreign insurer to remove a case arising under the Convention Act without the consent of any other party defendant’. Acosta v. Master Maintenance and Construction, Inc., 452 F.3d 373, 377 (5th Cir. 2006) (citation omitted).”

[21] “The Fifth Circuit’s gloss on the removal procedure of 28 U.S.C. Sects. 1441(a) and 1446(b) – in articulating a first-served rule in multiple defendant cases – relies entirely on the 30-day time limit for removal, which Congress rejected in implementing Sect. 205. 9 U.S.C. Sect. 205 (permitting removal ‘at any time before trial’). It would make little sense to incorporate the 30-day time limit into the Convention’s removal procedure for the purpose of enforcing ‘timely’ unanimity among defendants. Moreover, unlike general removal provisions, which the Court ordinarily strictly construes in favor of remand, the public policy favoring uniformity in enforcement of arbitration agreements pursuant to the Convention calls for the Convention’s removal provisions be construed in favor of federal jurisdiction. Acosta v. Master Maintenance and Construction, Inc., 452 F.3d 373, 377 (5th Cir. 2006) (citation omitted).”

[22] “Acosta, 52 F.Supp.2d at 709 (“this court concludes that the jurisprudence under 28 U.S.C. Sect. 1441(a) as to the meaning of "the defendant or defendants" has no application to that phrase as used in 9 U.S.C. Sect. 205”)."
‘[t]o condition the foreign insurer’s access to the uniform body of federal law upon the whim of unknown and unknowable future party defendants is to completely thwart the very purposes of the Convention Act’. 23 Id.

[21] “Magnolia seems to argue that the removal was procedurally defective because Western Geophysical never formally consented to the removal. 24 But Western did file formal consent to removal on 19 May 2009.” 25

III. CONCLUSION

[22] “Accordingly, it is ordered: that, because removal complied with Sect. 205, Magnolia’s motion to remand is denied. Because the arbitration clause falls under the Convention, and the litigation relates to the arbitration clause, arbitration is required by the Convention.” 26 It is further ordered: that Steamship Mutual’s

23. “Indeed, this Court finds that, to import the unanimity rule into Sect. 205 would severely undermine the enforcement of foreign arbitrations in violation of arbitration agreements and the Convention. Consider if Western Geophysical in this matter had refused to consent to removal of the case by Steamship Mutual. That would permit a signatory to the arbitration clause to avoid arbitration in clear violation of the Convention. Moreover, to require the consent of Western Geophysical (a signatory to the arbitration agreement) could lead to an awkward and inefficient consequence: If this Court required Western Geophysical’s consent to removal, but found it absent from the record in light of the Fifth Circuit’s gloss on the general removal law, remand would be required. But, once the case was remanded, Western Geophysical (or even Steamship Mutual) could simply remove the suit again ‘at any time before trial’ consistent with Sect. 205. Furthermore, as the Acosta district court noted, to the extent the purpose of the Convention Act is to encourage foreign trade by assuring foreign businesses that they will have access to a uniform body of law if their contracts contain arbitration clauses, to condition a foreign insurer’s access to that uniform body of law on the unanimous consent of all defendants would thwart the Convention’s purpose. Id. at 708-709.”

24. “Getty Oil specifically instructs that an ‘unsupported statement in the original removal petition … indicating that [a co-defendant] actually consented to removal when the original petition was filed’ is insufficient to provide formal notice of consent. 841 F.2d at 1262.”

25. “Given Western Geophysical’s unequivocal consent, Magnolia would presumably resort to a rendition of its untimeliness-as-procedural-defect argument, which the Court has rejected for all the reasons noted.”

26. “The Court finds Magnolia’s attempts to brand with every infirmity Steamship Mutual’s motion to dismiss pending arbitration is ineffective: As noted, all that is required to compel arbitration is that an arbitration agreement fall under the Convention. The Court rejects Magnolia’s suggestion that there is no reasonable connection in this matter to any foreign jurisdiction. Finally, the Court rejects Magnolia’s argument that Louisiana statutory law reverse-preempts the Convention by application of the McCarran-Ferguson Act. A panel of the Fifth Circuit has held that the Convention is a treaty, and therefore not an Act of Congress within the meaning of the McCarran-Ferguson Act. Accordingly, the panel rejected an assertion that the McCarran-Ferguson Act caused a Louisiana statute — one that had been interpreted as prohibiting arbitration agreements in

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motion to compel arbitration is granted: pursuant to Sect. 206, arbitration must be held in accordance with the arbitration clause. It is further ordered: that this action is stayed and closed pending arbitration, rather than dismissed.”

insurance contracts — to reverse-preempt the Convention under the circumstances presented by that case. See Safety Nat’l Casualty Corp. v. Certain Underwriters at Lloyd’s London, 543 F.3d 744 (5th Cir. 2008) [reported in this Yearbook, at pp. 986-999 (US no. 657)]; rehearing en banc has been granted.”
Facts

Antonio Matabang Jr. entered into a Revue Show Performer Contract with Carnival Corporation (Carnival) to perform as a singer aboard Carnival’s M/V SENSATION. Para. 17 of the Contract required employment disputes to be settled by arbitration in either London, Panama City, or Manilla, whichever was closest to the employee’s home.

On 1 January 2009, Matabang fell overboard the SENSATION off the coast of Florida and died at sea. On 14 April 2009, Matabang’s father, Antonio Matabang, Sr. (plaintiff) filed a lawsuit against Carnival in state court in Miami Dade County, claiming that Carnival breached the Revue Show Performer Contract by refusing to pay Matabang’s US$ 50,000 death benefit. (Death benefits were governed by a separate Seafarer’s Manual, which the parties agreed was applicable.) On 6 May 2009, Carnival removed the action to federal court, where it sought referral of the dispute to arbitration under the 1958 New York Convention. Plaintiff moved to remand to the Circuit Court of the Eleventh Judicial Circuit in Miami Dade County.

The United States District Court for the Southern District of Florida, per William M. Hoeveler, Senior US DJ, granted plaintiff’s motion to remand. It reasoned that where, as here, all parties to the action are US citizens, removal is proper only where the legal relationship at issue has significant non-US elements:
it involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

The district court noted that there was no case law dealing with the precise question whether a US crew member’s employment onboard a US-based cruise ship is the kind of transnational legal relationship governed by the New York Convention. The court examined related decisions and concluded that such legal relationship does not fall under the Convention. The court reasoned that no property located abroad was involved, that the Revue Show Performer Contract contained no references to performance abroad or any foreign state, apart from the arbitration clause, and that even assuming that the SENSATION spent most of its time in the Bahamas, in Bahamian waters or sailing on the high seas, as estimated by Carnival, this did not equate with a reasonable relation with a foreign state.

Excerpt

"This principle comes from the language of 9 U.S.C. Sect. 202, which provides that:

‘An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered commercial, including a transaction, contract, or agreement described in Sect. 2 of [the Federal Arbitration Act], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.’

Thus, the arbitration agreement between Matabang and Carnival is outside of the Convention unless their legal relationship ‘involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states’. 9 U.S.C. Sect. 202. Under Sect. 202, the ‘legal relationship’ can be a transaction, contract, or agreement, among other things. In this case, it is a contract: the Revue Show Performer Contract. The Court must see a nexus to foreign commerce from that document.

"It appears no court has squarely considered whether an American crew member’s employment onboard a US-based cruise ship is the kind of transnational legal relationship governed by the Convention. Carnival highlights the international aspects of the relationship, pointing out that the SENSATION flew a Bahamian flag, spent nights in the Bahamas, and was at sea five days a week during Matabang’s employment. Further, the arbitration clause identified foreign locations for arbitration, and the choice-of-law provision identified the ‘laws of the flag of the vessel on which [Matabang] is assigned at the time the cause of
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action accrues’ as the governing law; in this case, Bahamian law. On the other hand, the plaintiff emphasizes that Carnival and Matabang were both US citizens; Matabang auditioned for the job in California and received training in Miami; the SENSATION’s home port was in Port Canaveral, Florida, where the ship was supplied and passengers boarded for each three-day or four-day roundtrip excursion; and the employment contract was negotiated and signed in Florida by Carnival’s Florida-based representative.

[4] “Some of these details are more significant than others. The law is clear that an agreement to arbitrate in a foreign country or to apply foreign law does not transform an otherwise domestic commercial relationship into one involving a foreign state. See Jones v. Sea Tow Services, Inc., 30 F.3d 360, 366 (2d Cir. 1994);5 Reinholtz v. Retriever Marine Towing & Salvage, 1993 WL 414719, at *4 (S.D. Fla 1993). Arbitration and choice-of-law clauses are created by the parties themselves; they do not represent an independent connection with a foreign country, and do not ‘infuse the parties’ relationship with transnational elements of sufficient moment to invoke [federal] jurisdiction under the Convention’. Reinholtz, 1993 WL 414719 *5. The Court also is not persuaded that the employment agreement involves ‘property located abroad’. Matabang was hired as a singer, and his obligations had nothing to do with property.

[5] “A somewhat closer point is whether Matabang’s employment agreement involves ‘performance ... abroad’. Several illuminating court of appeals cases provide a framework for deciding what constitutes performance abroad. See Freudensprung v. Offshore Technical Services, Inc., 379 F.3d 327, 340 (5th Cir. 2004)6 (Convention applied between US citizen and US corporation where the employment contract called for performance in waters off the coast of Nigeria); Lander Company, Inc. v. MMP Investments, Inc., 107 F.3d 476, 481 (7th Cir. 1997)7 (Convention applied between two US companies where performance of contract was in Poland); Jones v. Sea Tow Services, Inc., 30 F.3d 360, 366 (2d Cir. 1994) (Convention did not apply where performance was on Long Island and the only foreign element was the arbitration clause choice of law provision).


related to the ‘development of oil and natural gas reserves in West Africa and other countries’. The job would include significant travel outside of the United States to, among others, West Africa, Europe, and Asia, and the consultant was required to obtain ‘legal documents and permits necessary to allow [work] in Africa, Europe, Japan, or Asia, including a passport, valid work permit, and medical certificates’. Id. The employer agreed to pay for ‘any non-domestic flight (traveling to or from the United States)’ and ‘all costs of foreign travel/medical/evacuation insurance’. Id. Finally, only two ‘Covered Projects’ were even listed in the agreement: ‘the Sudan visit’ and ‘OPL 229, Offshore Nigeria’. The court concluded that, ‘this Consultant Agreement envisages performance abroad from its opening clause to its concluding exhibit’. Id. (internal punctuation omitted). Therefore, the arbitration agreement fell within the New York Convention and the case was removable under Sect. 205 of the Convention Act.

[7] “The district court in ENSCO Offshore Co. v. Titan Marine LLC, 370 F.Supp.2d 594 (S.D. Texas 2005), considered an arbitration clause in a contract between two US citizens for the salvage of an oil rig 90 miles off the Louisiana coast in the Gulf of Mexico. Titan, the salvor, agreed to salvage the legs of the rig and deliver them to Texas for repair. Titan argued that the contract ‘envisaged performance ... abroad’ because the rig was in international waters, and because the contract anticipated that a British-flagged support vessel would be used for the operation. Id. at 596. However, the district court found these international aspects too insignificant to establish federal jurisdiction under the Convention Act, concluding that ‘Congress did not envision American companies with a dispute just off the Gulf Coast with eventual performance in Texas to be property, performance, or enforcement “abroad”’. Id. at 600. Further, the ENSCO court found no authority for the proposition that every ‘offshore’ event connected to a contract is ‘abroad’ for the purposes of the statute. ‘[T]he fact that the rig sat in international waters and would require work more than twelve miles off the coast of the United States’, the court wrote, ‘is insufficient in and of itself to qualify this agreement under the exceptions outlined in Sect. 202’. Id. at 601. With respect to the British flag vessel, which was not a party to the contract, the court observed that, ‘as critical as [its] role may have been in the motivation of these two parties ... the foreign element must involve the legal
11. “Plaintiff disagrees with this estimation.”

12. “From the full context of Sect. 202 and the New York Convention, it is clear that ‘performance abroad’ is more than a simple geographic requirement meaning, for example, beyond the airspace or territorial waters of the United States. Such a formulaic interpretation would raise unnecessary questions about the international character of all manner of domestic legal relationships that incidentally touch upon extra-domestic spaces. In testimony before the Senate Foreign Relations Committee on 13 February 1970, Richard Kearney, the Chairman of the Secretary of State’s Advisory Committee of Private International Law explained that, ‘We have included in Sect. 202 a requirement that any case concerning an agreement or award solely between US citizens is excluded unless there is some important foreign element involved, such as property located abroad, the performance of a contract in a foreign country, or a similar reasonable relation with one or more foreign states.’ Abroad appears to equate with a foreign state, not international water.”
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signed off the assigned vessel [and], if so, will not be under Carnival’s employ’. Finally, even accepting the SENSATION entered Bahamian territory as part of its weekly routine, the relevant Sect. 202 ‘legal relationship’ is the employment contract, which does not reasonably relate to a foreign state.

[10] “The fact that the SENSATION is a Bahamian-flagged vessel does not change this conclusion. Sect. 202 of the Convention Act instructs courts to disregard the foreign corporate status of a US-based company in deciding whether the relationship is international. 9 USC. Sect. 202. Carnival’s Panamanian corporate status, therefore, does not introduce the requisite foreign element into the contract. This is based on the recognition that when both sides of a commercial transaction are closely connected to the same country, by virtue of citizenship or principal business location, the international character of their relationship is not obvious. In these situations, a company seeking to invoke the New York Convention must point to other international elements. See Jones v. Sea Tow Services, Inc., 30 F.3d at 366 (foreign choice-of-law clause does not provide independent connection to a foreign state). The significance of the M/V SENSATION’s foreign flag, much like the significance of Carnival’s foreign incorporation, is greatly diminished if by virtue of the vessel’s home port in Florida. If the vessel itself were a corporation, it would be deemed a US citizen.11

[11] “The Court is not attempting to draw a precise line where jurisdiction attaches in a federal court under the Convention Act, nor would it seem possible to do so. But the facts of this case fall outside the letter and spirit of the implementing legislation to the New York Convention. Carnival has not alleged a basis for federal jurisdiction other than the Convention Act. The notice of removal relies only on the allegation that the Court has original jurisdiction under 9 U.S.C. Sect. 202, and that the case may be removed under 9 U.S.C. Sect. 205, because it relates to an arbitration agreement falling under the New York Convention. The Court concludes, however, that the legal relationship between Carnival and Matabang does not fall under the New York Convention. The jurisdictional requirements of 9 U.S.C. Sect. 202 have not been met, and, therefore, the case cannot be removed under 9 U.S.C. Sect. 205.”

(....)

13. “The only reference to the SENSATION in the contract is in para. 1: ‘Carnival hereby engages [Matabang] as a Production Singer appearing on the CARNIVAL SENSATION of the Carnival Cruise Lines.’”
Parties: Plaintiff: Rimac Internacional Cia. de Seguros y Reaseguros, S.A. (Peru)  
Defendants: (1) Exel Global Logistics, Inc. (nationality not indicated);  
(2) Cielos Del Peru S.A. (nationality not indicated);  
(3) Galaxy Aviation Cargo Inc. (nationality not indicated);  
(4) Checkmate Priority Express, Inc. (nationality not indicated);  
(5) Continental Freightways, Inc., d/b/a Fineline Trucking (US)

Published in: 2009 WL 1868580

Articles: II(3)

Subject matters: – stay of court proceedings  
– 1975 Panama Convention provides for referral to arbitration within or without the US

Commentary Cases: ¶ 217; [3] = ¶ 704(A)

Facts

On 1 January 2004, Exel Global Logistics Sucursal del Peru S. A. (Exel Peru) and Rimac Internacional Cia. de Seguros y Reaseguros, S.A. a/s/p Telefonica Moviles, S.A. (Telefonica) entered into a service contract for the integrated transportation and customs clearance and delivery of Telefonica’s international cargo. The contract was renewed on 16 January 2006. It contained a clause referring disputes to arbitration in Lima, Peru.

On 28 April 2006, a shipment of about 15,000 Nokia cell phones was hijacked in Florida while being shipped by land from Texas to Florida for further transport by air to Telefonica in Peru. The transport was carried out by Exel Global Logistics, Inc. (Exel); Continental Freightways, Inc. (Continental) and
Checkmate Priority Express, Inc. (Checkmate) worked to facilitate the transport of the cargo.

Telefonica filed a complaint in Peru against DHL Global Forwarding Peru S.A. (DHL), Exel’s successor company and assignee to the service contract, for the cell phones loss, claiming damages in the amount of US$ 804,153.34. The Peruvian court referred the dispute to arbitration.

On 25 April 2008, Telefonica also filed a complaint against Exel, Cielos del Peru, S.A., Galaxy Aviation Cargo, Inc., Checkmate and Continental in the United States District Court for the Southern District of New York, seeking damages in the same amount of US$ 804,153.34. Exel moved to dismiss the complaint based upon the arbitration clause in the service contract or, in the alternative, to stay the action. Continental moved to dismiss, or, in the alternative, to transfer the action on the grounds of forum non conveniens.

The district court, per Bert W. Sweet, US DJ, granted Exel’s motion and stayed the action; it also dismissed Continental’s motion to dismiss or transfer. This latter part of the decision is not reproduced below.

The court noted at the outset that the Federal Arbitration Act (FAA) embodies a strong federal policy favoring arbitration, particularly in the case of international transactions. As a consequence, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Further, the 1975 Panama Convention, which applied here as both the United States and Peru are signatories, provides that a court may direct arbitration within or without the United States.

The parties however must have agreed to arbitrate. If they did, the court must then classify the clause as either broad or narrow in order to determine whether the dispute falls within the scope of the arbitration clause. If the clause is broad, there arises a presumption of arbitrability.

Here, the clause in the contract between Telefonica and Exel Peru was broad (“[a]ny dispute arising from the interpretation or execution [of the contract]”. By the present action, Telefonica sought to hold defendants liable on the contract, alleging that Exel failed to deliver the cargo. The claims thus involved disputes arising from the interpretation or execution of the contract and should be referred to arbitration in Peru, as intended by the parties.

Excerpt

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[2] “In the case of international transactions, the ‘bias in favor of arbitration … is even stronger’. Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., Ltd., 189 F.3d 289, 294 (2d Cir. 1999)(internal quotations and citation omitted; see also David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd., 923 F.2d 245, 248 (2d Cir. 1991) (‘Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.’).

[3] “Further, the Inter-American Convention on International Commercial Arbitration, to which both the United States and Peru are signatories, provides that ‘[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States’. 9 U.S.C. Sect. 303(a).

[4] “To determine whether a particular dispute is arbitrable, courts in this Circuit must first determine ‘(1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of [that] agreement encompasses the claims at issue’. Bank Julius Baer & Co., Ltd. v. Wasfield, Ltd., 424 F.3d 278, 281 (2d Cir. 2005) (internal quotations and citation omitted) (alteration in original). If the parties did agree to arbitrate, a three-part inquiry applies to determine whether the dispute falls within the scope of the arbitration clause.

[5] “First, ‘a court should classify the particular clause as either broad or narrow’. Louis Dreyfus Negoce S. A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001). If the clause is narrow, ‘the court must determine whether
the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause’. Id. (internal quotations and citation omitted). Where, however, ‘the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties’ rights and obligations under it’. Id. (internal quotations and citation omitted).

[6] “Here, the parties to the Contract, Telefonica and Exel Peru, expressly agreed to arbitrate ‘[a]ny dispute arising from the interpretation or execution’ of the Contract ‘in Lima [Peru] subject to the Arbitration Regulations of the National and International Arbitration and Conciliation Center of the Lima Chamber of Commerce’. The arbitration clause is therefore classified as broad because ‘the language of the clause, taken as a whole, evidences the parties’ intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause’, id. at 225, and the presumption of arbitrability arises and attaches even to collateral matters implicating ‘issues of contract construction or the parties’ rights and obligations under it’. Id. at 224 (internal quotations and citation omitted).

[7] “Through this action, Telefonica seeks to hold defendants liable on the Contract, which was executed between Telefonica and Exel Peru and governed these entities’ relationship with respect to the transportation and delivery of Telefonica’s cargo. Telefonica alleges that Exel failed to deliver the cargo. Thus, as the claims against Exel involve disputes arising from the interpretation and/or execution of the Contract, this matter should proceed through nonappealable arbitration in Lima, Peru, as intended by the parties.

[8] “Indeed, Telefonica itself has asked the Court to ‘accept the [attorney for Exel’s] Declaration and Motion as an application for a stay as to it, pending the Peruvian arbitration’…. Therefore, in view of the applicability of the arbitration agreement to this dispute, the on-going arbitration proceedings in Peru, and the parties’ apparent agreement over the validity of those proceedings, this action will be stayed. In the event that the arbitration is concluded or a settlement reached, this action will remain, if necessary, to enforce any award or settlement.”
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

674. United States Court of Appeals, Eleventh Circuit, 1 July 2009, No. 08-10613

Parties: Plaintiff/Appellant: Puliyurumpil Mathew Thomas (nationality not indicated)
Defendant/Appellee: Carnival Corporation, d/b/a Carnival Cruise Lines Inc. (nationality not indicated)

Published in: 2009 U.S. App. LEXIS 14406

Articles: II(3)

Subject matters: – requirements for referral to arbitration (in general)
– existence of contract containing arbitration clause (no)
– arbitration agreement “null and void” on public policy grounds by virtue of Seaman’s Wage Act


Facts

Puliyurumpil Mathew Thomas entered into a Seafarer’s Agreement (the Old Agreement) with Carnival Corporation (Carnival) to work as a head waiter on one of Carnival’s cruise ships, the IMAGINATION. The Old Agreement did not contain an arbitration clause. On 8 November 2004, Thomas slipped and fell on a wet substance in the dining room, dropping a coffeepot. He injured his spine and shoulder and burned his leg. He allegedly received little medical care and was signed off the vessel soon after, due to his injuries, on regular vacation leave.

In January 2005, Thomas again signed on to the IMAGINATION. However, he lost pay because he could not properly execute his duties because of his shoulder and neck pain and though he repeatedly visited the shipboard physician he was not given proper treatment. Eventually he was signed off the vessel, again due to injuries and again on vacation leave.

On 10 October 2005, Thomas again returned to the IMAGINATION. This time, the parties executed a new Seafarer’s Agreement (the New Agreement). The
New Agreement provided for the application of Panamanian law – the law of the vessel’s flag of convenience – and contained a clause for arbitration of disputes in the Philippines. In December 2005, the shipboard physician determined that Thomas’s previous injuries rendered him unfit for continuing with his duties. He was officially discharged with a US$ 700 payment and received maintenance and cure payments for the next three months.

Thomas filed an action against Carnival in Florida state court, seeking damages. Carnival removed the suit to the United States District Court for the Southern District of Florida under the 1958 New York Convention and moved to compel arbitration pursuant to the arbitration clause in the New Agreement. On 4 January 2008, the district court held that the New York Convention applied and that the dispute should be referred to arbitration. Thomas appealed the decision of the district court.

The United States Court of Appeals for the Eleventh Circuit, before Barkett and Fay, CJJ and Trager, US DJ for the Eastern District of New York, sitting by designation, per curiam, reversed the lower court’s decision. The Court first noted that Thomas brought four claims:

1. Carnival was negligent both in causing the accident resulting in his injuries and its immediate medical response;
2. the vessel was unseaworthy at the time of the accident;
3. Thomas did not receive the amount of maintenance and cure due to him from his injury and
4. did not receive all the wage payments due to him from his employment.

Of all these claims, only the fourth met, in part, all the jurisdictional prerequisites for referral to arbitration under the New York Convention.

It was undisputed that the arbitration clause provided for arbitration in a Convention state and that at least one of the parties to the agreement was not a US citizen, and the Eleventh Circuit had already held in Bautista (see below) that seaman employment contracts are commercial contracts. However, there was no arbitration agreement, “either in writing or otherwise”, between the parties in respect of the first and second claims, since those claims involved events stemming from the 2004 accident, when the parties had not yet concluded the New Agreement containing the arbitration clause. Nor was the maintenance and cure claim covered by the arbitration clause, as it was also based on the 2004 injury. The Court added that Thomas’s attempts to return to work, the last of which was governed by the New Agreement, did not create multiple maintenance and cure claims governed by different agreements.
Differently, the wage claim, which was brought under the Seaman’s Wage Act, was covered by the arbitration clause in the New Agreement to the extent that Thomas claimed wages for any period of time that occurred after the New Agreement was signed.

The Court of Appeals held however that referral of this claim should be denied on public policy grounds. Thomas argued that enforcing the arbitration clause would force him to have his claim heard in a forum that does not apply US law; this would effectuate a waiver of his rights under the Seaman’s Wage Act in violation of public policy. The Eleventh Circuit referred to two Supreme Court decisions, Mitsubishi and Vimar (see below), in which the Supreme Court held in respect of other statutes that arbitration clauses must be upheld if either US law will be applied in the arbitration or if there is a possibility that it might be applied and there will be the possibility to review the case once enforcement of the resulting award is sought. In the case at issue, the arbitration clause stated that only Panamanian law applied and, if Thomas were to receive no award in the arbitral forum – “a distinct possibility given the US-based nature of his claim” – he would have nothing to enforce in US courts and there could be no review.

The Court of Appeals therefore held that the arbitration clause was null and void in respect of Thomas’s Seaman’s Wage Act claim, despite its “general deference to arbitration agreements”.

Excerpt

[1] “Puliyurumpil Mathew Thomas appeals the district court’s Order granting Carnival Corporation’s Motion to Compel Arbitration and the Order denying his Motion to Remand this case to state court. Thomas originally brought suit against Carnival, his former employer which operated cruise lines in Florida waters, in Florida state court for damages arising from injuries he sustained in a slip-and-fall onboard a Carnival ship. He sued for negligence under the Jones Act (Count I),1 unseaworthiness of the ship and failure to provide prompt and adequate maintenance and cure2 under general maritime law of the United States (Counts

1. “The Jones Act confers on seamen the statutory right to sue their employers in an American court for the negligence of fellow crew members. 46 U.S.C. Sect. 30104.”
2. “Maintenance and cure” is an ancient common-law maritime remedy for seamen who are injured while in the service of a vessel. Our circuit has described the action as follows:

‘The seaman’s action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have been had he continued to work: the seaman receives a maintenance
II and III), and failure to pay wages under the Seaman’s Wage Act (Count IV). 1

[2] Relying on the arbitration clause of its most recent Seafarer’s Agreement with Thomas in conjunction with the [1958 New York Convention], Carnival filed to remove the suit to federal court and have the district court compel the parties to arbitrate. The district court granted these motions, finding that the Convention applied and that the arbitration provision of the Seafarer’s Agreement was enforceable.

[3] Thomas appeals this decision and argues that it should be reversed on several grounds. First, Thomas argues that the Convention does not apply in this case because two of its four jurisdictional prerequisites have not been met. Specifically, he argues that the requirement that any agreement to arbitrate must be in writing was not met because the governing Seafarer’s Agreement at the time of his injuries did not contain an arbitration clause. As to the Convention’s provision that it only applies to commercial contracts, he argues that seamen employment contracts are not considered commercial contracts.

[4] Alternatively, Thomas notes that even if all of the jurisdictional requirements are met, the Convention provides that courts need not enforce an arbitration clause when to do so ‘would be contrary to the public policy of that country’. Thomas invokes this affirmative defense, arguing that forcing him to arbitrate in a forum that would apply non-US law constitutes a prospective waiver of his US statutory rights and, thus, the Arbitration Clause violates US public policy.

[5] Finally, Thomas argues that his statutory claims (based on the Seaman’s Wage Act and Jones Act) are outside the scope of the Convention. He asserts that both statutes are at odds with the Convention and, as more recently passed and amended statutes, they supersede all prior inconsistent treaties including the Convention.”

(. . .) [6] “[The 1958 New York Convention] is a multi-lateral treaty that requires courts of a nation state to give effect to private agreements to arbitrate and to

remedy, because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to the maximum cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.”

Flores v. Carnival Cruise Lines, 47 F.3d 1120, 1127 (11th Cir. 1995).”


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enforce arbitration awards made in other contracting states. The United States, as a signatory to the Convention, enforces this treaty through Chapter 2 of the US Federal Arbitration Act (FAA), which incorporates the terms of the Convention (the Convention Act).

[7] “We review de novo a district court’s order to compel arbitration pursuant to the Convention Act. Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005). Unless there is an affirmative defense that prevents the application of the Convention Act, the Court should compel the parties to arbitrate, providing the following jurisdictional prerequisites are met:

‘(1) there is an agreement in writing to arbitrate the dispute;
(2) the agreement provides for arbitration in the territory of a signatory of the Convention;
(3) the agreement arises out of a legal relationship, whether contractual or not, that is considered commercial; and
(4) one party to the agreement is not a United States citizen, or the commercial relationship at issue has some reasonable relation with a foreign state.’

Id. at 1294-1295. There is no dispute that the second and fourth jurisdictional prerequisites of the Convention have been met. Accordingly, we first consider Thomas’s argument that the first and third jurisdictional prerequisites have not been met and then consider his affirmative defenses.”

4. “The Convention was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. It was signed by the President of the United States and ratified by Congress in 1970. As of January 2009, there were 144 parties to the Convention – 142 of the 192 United Nations Member States, the Holy See and the Cook Islands (a New Zealand Dependent Territory).”

5. “See 9 U.S.C. Sect. 205 (‘Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court … where the action or proceeding is pending’); 9 U.S.C. Sect. 206 (‘A court having jurisdiction under this chapter [9 U.S.C.S. Sect. 201 et seq.] may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.’)”

1. CONDITIONS FOR REFERRAL UNDER THE 1958 NEW YORK CONVENTION

1. Commercial Legal Relationship

[8] “Thomas argues that seaman employment contracts are not commercial contracts and therefore are expressly exempt from arbitration under the Convention. However, as Thomas has acknowledged, we have previously held that seaman employment contracts are commercial. Bautista, 396 F.3d at 1295-1296. While Thomas submits that this decision was wrong and should be reconsidered, we are bound by our prior precedent. Accordingly, we find that this jurisdictional requirement is met.”

2. Agreement in Writing

[9] “Thomas also argues that there is no agreement to arbitrate this dispute, in writing or otherwise, because the injuries that gave rise to all of his claims occurred before the New Agreement containing the Arbitration Clause was executed. In the alternative he argues that, even if some of the claims are subject to the Arbitration Clause, the court erred in ordering arbitration of all his claims, which included those clearly arising out of his first term of employment while his Old Agreement was in effect. Carnival responds that the Arbitration Clause governs because the suit was brought after the New Agreement was signed. Carnival also suggests that the Arbitration Clause is retroactive.

[10] “The Arbitration Clause at issue provides that:

‘Any and all disputes arising out of or in connection with this Agreement, including ... Seafarer’s service on this vessel shall be referred to, and finally resolved by arbitration....’ (Emphasis added)

The effective date of this provision stated that:

‘[T]he employment relations between [the parties] shall be governed by the terms of this Agreement commencing on the date the Seafarer first signs on board the assigned vessel after signing this Agreement [10 October 2005] and continuing for a period of time which shall not exceed a maximum service period of 10 months.’

[11] “Thomas brought four claims: (1) Carnival was negligent both in causing the accident resulting in his injuries and its immediate medical response; (2) the
vessel was unseaworthy at the time of the accident; (3) he did not receive the amount of maintenance and cure due to him from his injury; (4) he has not received all the wage payments due to him from his employment.

[12] “The district court ordered arbitration, noting that ‘Plaintiff’s claims all arise out of his employment on the IMAGINATION’ and interpreting the New Agreement to require arbitration of ‘all disputes arising out of Plaintiff’s services on the vessel’. We believe the district court erred in this analysis. There is no doubt that Thomas’s claims arose out of his employment on the IMAGINATION, but the relevant question is whether they arose ‘out of or in connection with this [New] Agreement’, as set forth in the Arbitration Clause. It is not enough that the dispute simply arose from his work on the IMAGINATION, or arose after the New Agreement was signed, for that matter. The disputes must have some actual relation to the New Agreement, irrespective of what ship the claims originated from and when suit was brought.

[13] “As is clear from the face of Thomas’s original complaint, his claim of negligence under the Jones Act (Count I) and unseaworthiness (Count II) are allegations that involve only the events stemming from the slip-and-fall in 2004 – prior to the existence of, and with no connection to, the New Agreement. He could have brought the exact same negligence and unseaworthiness claims had he never executed the New Agreement or signed back on to the IMAGINATION. In fact, had Thomas signed on to any vessel other than the IMAGINATION under an agreement with similar terms as the New Agreement, it would be patently clear that the Arbitration Clause – with its language referring to disputes arising from ‘this vessel’ – would not apply to his negligence and unseaworthiness claims originating from the IMAGINATION.

[14] “As to the maintenance and cure claim (Count III), the issue is slightly more complicated. Initially the claim clearly had no connection to the New Agreement because Thomas was owed maintenance and cure from the moment of his injury. However, the fact that he attempted to return to work multiple times, the last attempt of which was governed by the New Agreement, requires further analysis. Specifically, we must address whether his return to work at any point either (1) terminated Carnival’s maintenance and cure obligations or (2) created multiple maintenance and cure claims governed by different Seafarer’s Agreements. We believe it did neither.

[15] “In ascertaining the extent of the coverage of this claim, we have held that the touchstone inquiry to determine if an obligation has been terminated is whether the seaman has recovered to a ‘pre-accident condition’. See Brown v. Aggie & Millie, Inc., 485 F.2d 1293, 1296 (5th Cir. 1973) (‘Federal maritime law does not require an injured seaman to forfeit payments of either maintenance or
cure if there remains a reasonable possibility that further treatment will aid in restoring him to his pre-accident condition.\(^7\).\(^7\) We have subsequently explicitly ruled that ‘the cut-off point for maintenance and cure is not that at which the seaman recovers sufficiently to return to his old job but rather the time of maximum possible cure’. \(\text{Lirette v. K & B Boat Rentals, Inc., 579 F.2d 968, 969 (5th Cir. 1978).}\)

[16] “From this record, it does not appear that Thomas has reached maximum possible cure. The fact that Thomas (unsuccessfully) attempted to return to work during his employment or signed a new contract has no bearing on his pre-existing maintenance and cure claim arising from his initial injuries; it did not terminate Carnival’s existing obligations nor did it create multiple claims. Accordingly, the maintenance and cure claim does not ‘arise out of or in connection with the [New] Agreement’.

[17] “As to the Seaman’s Wage Act claim (Count IV), the issue is the closest. This act, inter alia, provides that seamen are entitled to the balance of their wages by the earlier of twenty-four hours after the cargo has been discharged or four days after the seaman himself has been discharged. 46 U.S.C. Sect. 10313(f). Based on the briefs, it is unclear from what period of employment Thomas claims he is owed. If it is for his employment term on the ship before 10 October 2005 – which is governed by the Old Agreement – then this also does not ‘arise out of or in connection with the [New] Agreement’. However, to the extent he claims wages for any period of time that occurred after the New Agreement was signed, that aspect of the claim may be covered under arbitration. Unlike the other claims, such a component would fairly be said to be ‘in connection with’ the New Agreement because Thomas would not have been entitled to any further wages but for signing this contract.

[18] “Thus, no claim but this last meets the writing requirement of the Convention, unless, as Carnival argues, the arbitration clause is retroactive. However, we find that the New Agreement was not intended to be retroactive such that it supersedes any previous agreements. In contract interpretation, we can glean intent not only from what \emph{is} said but what \emph{is not} said. The New Agreement, which was quite thorough, notably did \emph{not} specify that ‘disputes arising out of or in connection with this or any previous Agreement, including … Seafarer’s service on this vessel shall be referred to, and finally resolved by arbitration’. We think if the parties had intended retroactivity, they would have avoided this language.

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7. "\(\text{In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on 30 September 1981.}\)"
explicitly said so. See, e.g., *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99, 106 (3d Cir. 2000)\(^8\) (‘Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect.’).

19. “Reading the contract on its face, as we must, we are required to separate Thomas’s claims into those that ‘arise out of or in connection with the [New] Agreement’ and those that do not. Although it would be more efficient to try all claims together, the Supreme Court has stated that efficiency does not trump resolution in the proper forum: ‘[The] Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.’ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). The corollary is that a court cannot shoehorn pendent *non-arbitrable* claims into arbitration based on ‘its own views of economy and efficiency’. Id.

20. “Because the Jones Act negligence claim, the unseaworthiness claim, the maintenance and cure claim, and part of the Seaman’s Wage Act claim (as it pertains to any obligations incurred before 10 October 2005) do not fall under the Convention, they are eligible to be litigated. Accordingly, the district court erred in compelling arbitration as to those claims.

21. “However, a claim for seaman’s wages under Thomas’s most recent term of employment *is covered* under the New Agreement. Thus, as to this portion of the claim, we must consider Thomas’s affirmative defense under the Convention that the enforcement of the Arbitration Clause should be precluded as a violation of public policy.”

II. PUBLIC POLICY

22. “Art. V of the Convention provides specific affirmative defenses to a suit that seeks a court to compel arbitration including [the public policy defense;
Citing to Supreme Court precedent, Thomas argues that the Arbitration Clause, which forces him to resolve any disputes in an arbitral forum that must apply non-US law, effectuates a waiver of his US statutory rights in violation of public policy and, therefore, should not be enforced. Both parties rely on the two cases from the Supreme Court that discuss the concerns expressed in this particular affirmative defense under the Convention.

[23] "In Mitsubishi Motor Corp. v. Soler Chrysler Plymouth, Inc., Mitsubishi, a Japanese car manufacturer, brought suit against its Puerto Rican distributor over a dispute related to their sales agreement and sought enforcement of the agreement’s arbitration clause. In the counterclaim, the Distributor included a count alleging Sherman Act violations. The Court found that enforcing such an agreement in the international context would not violate US public policy because the parties had agreed that American law would, in fact, be applied to the antitrust claims in the Japanese arbitration proceedings. The Court specifically noted that counsel for Mitsubishi conceded at oral argument that American law would apply to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. Id. at 637 n. 19. Thus, US statutory rights, while not being heard by a federal judge, were nonetheless not being ignored or violated but specifically protected."

10. “Thomas also argues that he is barred from bringing his Jones Act claim, but we need not address this aspect of the argument as we have already held that it does not fall under the Arbitration Clause.”


12. "The agreement at issue contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain Articles of the agreement or for the breach thereof."

13. "For support, the Distributor cited to a Second Circuit case that, in resolving a domestic arbitration dispute, distinguished between contractual and statutory rights and found that Sherman claims could never be arbitrated as they were an important part of the enforcement scheme of antitrust law. American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968)."

14. "Although the Distributor’s claim was based on the Second Circuit’s decision in American Safety rather than the affirmative defense provision of the Convention, the concerns relating to vindicating the public interest and policy of the United States are nonetheless similar."
To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

Id. at 636-637 (emphasis added). The Court did, however, note that if ‘the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies … we would have little hesitation in condemning the agreement as against public policy’. Id. at 637 n. 19.

[24] “The agreement’s choice of an arbitrable forum, by itself, is not a cause for concern. As the Supreme Court said, statutory rights can be vindicated in arbitration as well as in court:

‘By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’

_Mitsubishi_, 473 U.S. at 628.

[25] “The important question, however, is choice of law: What law will apply in that arbitral forum? As noted, in _Mitsubishi_, the party seeking to compel arbitration conceded that US law would apply in the arbitration of the antitrust claims there. In this case, however, there is no such assurance in either the New Agreement or the representations of Carnival’s counsel that US law will apply. On the contrary, the New Agreement explicitly states that Panamanian law will apply.

[26] “The Supreme Court revisited the question of whether an international arbitration clause could violate US public policy in _Vimar Seguros y Reaseguros v. M/V SKY REEFER_, which involved a dispute between a New York fruit
distributor and a Japanese carrier. 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). The Distributor had purchased oranges from a foreign supplier and contracted with the Carrier to transport them to the United States by cargo ship. The fruit arrived with significant damage and the Distributor sued the Carrier to recover its losses. The Carrier moved to stay the action and to compel arbitration in Japan pursuant to the arbitration clause in the bill of lading in conjunction with the enforcement provisions of the FAA. The Distributor argued that the arbitration clause was unenforceable under the FAA because, inter alia, it would violate the Carriage of Goods by Sea Act (COGSA) – the US enactment of the Hague Rules – and to compel arbitration would violate US public policy. Specifically, it claimed that the foreign arbitrators would apply the Japanese enactment of the Hague Rules, which would significantly lessen the Carrier’s liability in violation of the ‘central guarantee’ of COGSA. The Court noted that, ‘Whatever the merits of petitioner’s comparative reading of COGSA and its Japanese counterpart, its claim is premature. At this interlocutory stage it is not established what law the arbitrators will apply to petitioner’s claims or that petitioner will receive diminished protection as a result. The arbitrators may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls.’

16. "A bill of lading is document issued by a carrier to a shipper, acknowledging that specified goods have been received on board as cargo for conveyance to a named place for delivery to the consignee who is usually identified. The form bill of lading at issue contained a clause which provided that (1) the contract evidenced by or contained in the bill of lading was governed by Japanese law, and (2) any dispute arising from the bill of lading was to be referred to arbitration in Tokyo, Japan, by the Tokyo Maritime Arbitration Commission.”

17. "COGSA is a US statute governing the rights and responsibilities between shippers of cargo and ship operators regarding ocean shipments to and from the United States. It is the US enactment of the International Convention Regarding Bills of Lading, commonly known as the ‘Hague Rules’. Congress, concerned that the Hague Rules did not offer shippers enough protection against damage to cargo by shipowners, amended the Hague Rules to increase the protection to cargo owners. The central guarantee of Sect. 3(8) of COGSA is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by the Act. Namely, any clause in a contract of carriage relieving or lessening the liability of a carrier or ship for loss or damages arising from negligence, fault, or failure in the duties or obligations provided in Sect. 3 is null and void and of no effect.”
COURT DECISIONS ON THE NEW YORK CONVENTION 1958

Id. at 540.18 The Court again noted, however, that `[w]here there no subsequent opportunity for review and were we persuaded that “the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies ... we would have little hesitation in condemning the agreement as against public policy”’. Id. (quoting Mitsubishi, 473 U.S. at 637 n. 19).

[27] “Vimar presented a slightly different scenario than Mitsubishi. In the latter there was no doubt that American law would apply; in Vimar, although at the time of the appeal, it was unknown which country’s laws would govern, it was possible that US law might apply, and given that the proceedings were at an interlocutory stage, there would be another opportunity to review the case once the plaintiff sought enforcement of the award. In the case before us, however, it is undisputed that, regardless of the procedural posture of the case, US law will never be applied in resolving the resolution of Thomas’s claims.

[28] “The Court, then, has held that arbitration clauses should be upheld if it is evident that either US law definitely will be applied or if there is a possibility that it might apply and there will be later review. The arbitration clauses that provided the bases for these holdings are in direct contradistinction to the Arbitration Clause in the present case, which specifies ex ante that only foreign law would apply in arbitration. There is no uncertainty as to the governing law in these proposed arbitral proceedings – only Panamanian law will be applied. The New Agreement provides:

‘This Agreement shall be governed by, and all disputes arising under or in connection with this Agreement or Seafarer’s service on the vessel shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder. The parties agree to this governing law, notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.’

[29] “There is no dispute that the IMAGINATION’s flag of convenience is

18. “The Supreme Court reaffirmed Vimar’s emphasis on the procedural posture of the arbitration dispute in PacificCare Health Systems v. Book when it upheld arbitration of a claim because, as in Vimar, it was “mere speculation” that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt’. 538 U.S. 401, 407, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003) [reported in Yearbook XXIX pp. 238-242] (citing Vimar, 515 U.S. at 541).”

Panamanian nor that Thomas’s Seaman’s Wage Act claim is a US statutory remedy. Thus, under the terms of the Arbitration Clause, Thomas must arbitrate in the Philippines (choice-of-forum) under the law of Panama (choice-of-law). As the arbitrator is bound to effectuate the intent of the parties irrespective of any public policy considerations, these arbitration requirements have ‘operated in tandem’ to completely bar Thomas from relying on any US statutorily-created causes of action. This inability to bring a Seaman’s Wage Act claim certainly qualifies as a ‘prospective waiver’ of rights, including one of a private litigant’s ‘chief tools’ of statutory enforcement – the Act’s treble-damages wage penalty provision for late payments, see, e.g., Mitsubishi, 473 U.S. at 635 (‘The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.’). 19

[30] “Moreover, there is no assurance of an ‘opportunity for review’ of Thomas’s Seaman’s Wage Act claim. Although we are at an interlocutory stage, the possibility of any later opportunity presupposes that arbitration will produce some award which the plaintiff can seek to enforce. But, in accordance with our holdings above, in this case Thomas would only be arbitrating a single issue – the Seaman’s Wage Act claim, one derived solely from a US statutory scheme. If, applying Panamanian law, Thomas receives no award in the arbitral forum – a distinct possibility given the US based nature of his claim – he will have nothing to enforce in US courts, which will be deprived of any later opportunity to review.

[31] “Despite our general deference to arbitration agreements in an era of international trade expansion, see id. at 638-639, the possibility of such a result would counsel against being deferential in this circumstance, as it is exactly the sort that the Supreme Court has described as a ‘prospective waiver of parties’ rights to pursue statutory remedies’ without the assurance of a ‘subsequent

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19. “While the Supreme Court has not been confronted with an arbitration clause that would act as a prospective waiver, lower federal courts applying Vi Nam have. See Central National-Gottesman, Inc. v. M/V GERTRUDE OLDENDORFF, 204 F.Supp.2d 675, 679 (S.D.N.Y. 2002) (‘The court is persuaded that the forum selection clause at issue here essentially operates as a prospective waiver of Gottesman’s right to pursue statutory remedies under COGSA. If the case were decided in London instead of this district, there is a strong likelihood that English courts would give force to an exculpatory clause in the bill of lading, insulating parties other than the shipowner from liability, in violation of COGSA.’); Nippon Fire & Marine Ins. Co. v. M/V SPRING WAVE, 92 F.Supp.2d 574, 575 (E.D. La. 2000) (‘[T]he Court finds that the [foreign forum selection] clause is unreasonable under the circumstances by violating the strong public policy against limiting liability in contravention of Sect. 1303(8) of COGSA.’). But cf. Fireman’s Fund Ins. Co. v. Cho Yang Shipping Co., 131 F.3d 1336, 1340 (9th Cir. 1997) (compelling arbitration after finding ‘uncontroverted evidence that Korean law will be at least as favorable [to plaintiff] as COGSA’).
opportunity for review’. *Vimar*, 515 U.S. at 540. The Court explicitly stated that in such situations it ‘would have little hesitation in condemning the agreement as against public policy’. Id.

[32] “For the reasons expressed, we find the Arbitration Clause requiring arbitration in the Philippines under Panamanian law null and void as it relates to Thomas’s Seaman’s Wage Act Claim.”

(....)
675. United States Court of Appeals, Fifth Circuit, 9 July 2009, Case No. 07-60861

Parties:

Plaintiff/Appellee/Cross-Appellant: Northrop Grumman Ship Systems Inc., formerly known as Ingalls Shipbuilding Inc. (US)

Intervenor Plaintiffs/Appellees: (1) Scruggs Law Firm, P.A. (US); (2) Richard F Scruggs (US); (3) Podhurst Orseck, P.A. (US)


Published in: 575 Federal Reporter, Third Series (5th Cir.) p. 491 et seq.

Articles: II(3)

Subject matter: – arbitration clause “unenforceable” due to political unrest in country of arbitration seat

Commentary Cases: ¶ 220

Facts

In 1997, Northrop Grumman Ship Systems Inc. (Northrop) entered into an Agreement with the Republic of Venezuela (the Republic) to overhaul and retrofit two frigates of the Republic’s navy. The Agreement provided that any disputes in connection with the contract would be submitted to arbitration in Caracas, Venezuela (the arbitration-forum clause) and that unresolved disputes thereafter would be “resolved by the competent Courts of Venezuela” (the litigation-forum clause).

Disputes arose between the parties over cost overruns and other issues. In October 2002, Northrop filed a complaint against the Republic in the United States District Court for the Southern District of Mississippi, seeking damages.
The Republic did not appear in the proceedings for over a year. In November 2002, Northrop moved to compel arbitration pursuant to the Agreement, but requested that the district court order arbitration in Mississippi, arguing that arbitration in Venezuela would be unreasonable due to political unrest. In April 2003, the district court ordered arbitration in the United States because “the violently unstable political situation in Venezuela has rendered that country an unsuitable forum at this time” (the 2003 order). The court then appointed an arbitrator on the Republic’s behalf; a seat for arbitration was eventually selected in Mexico City and preliminary proceedings were held there without the Republic’s participation.

In November 2003, the Republic retained the Florida law firm Podhurst Orseck and the Mississippi attorney Richard F. Scruggs of the Scruggs Law Firm. In January 2004, the Republic appeared in the Mississippi litigation for the first time through Scruggs and moved, inter alia, to vacate the 2003 order because it conflicted with the Agreement’s arbitration-forum clause. In March 2005, the court issued an order staying the Mexican arbitration.

In September 2005, Northrop and Scruggs reached an out-of-court settlement of the dispute. The settlement was then rejected by the Republic on the grounds that Scruggs lacked authority. On 24 September 2007, the district court held that the 2005 settlement was valid and ordered its enforcement. The Republic appealed this order; it also appealed the district court’s 2003 refusal to compel arbitration in Venezuela. (In December 2008, while the US appeal was pending, the arbitral panel terminated the Mexico City arbitration, explaining that since the district court stayed proceedings in March 2005, “[t]his arbitral proceeding has been suspended for more than three years and eight months … which in fact exceeds any reasonable suspension term”.)

The United States Court of Appeals for the Fifth Circuit, before Reavley, Barksdale, and Garza, CJJ, in an opinion by Emilio M. Garza, reversed the lower court’s decision ordering enforcement of the 2005 settlement, finding that Scruggs lacked authority to bind the Republic. This part of the decision is not reproduced below.

In the reported part of the decision, the Court of Appeals first held that it did not need to reach a conclusion as to the merits of the district court’s 2003 order compelling arbitration outside Venezuela, because the Mexico City arbitration that resulted from the 2003 order was terminated in December 2008.

The Republic also requested that the Court of Appeals order arbitration in Caracas in compliance with the Agreement. In response, Northrop contended that Venezuela remained an unsuitable forum; it also argued that the Republic
The Court of Appeals reasoned that no case law suggests that failure to appear in earlier proceedings constitutes a waiver of contractual rights. Moreover, the Fifth Circuit generally holds that legal issues in disputes involving foreign sovereigns – such as here the parties’ dispute over the enforceability of the arbitration-forum clause – must be resolved on the merits where possible. However, the Court of Appeals concluded that the record provided insufficient information to determine whether the situation in Venezuela rendered the arbitration-forum clause unenforceable and remanded the case to the district court.

The Court of Appeals added that impossibility or impracticability can be a basis for finding that an arbitration clause is unenforceable and may be set aside.

Excerpt

(....)

[1] “The Republic also appeals the district court’s 2003 order compelling the parties to arbitrate in the United States instead of Caracas, Venezuela as required under the Agreement’s arbitration-forum clause. In 2002, when the Republic had yet to appear in the Mississippi litigation, Northrop moved for an order compelling arbitration in Mississippi instead of Venezuela. In April 2003, the court granted Northrop’s request, concluding that the Agreement’s ‘forum-selection clause should not be enforced because the violently unstable political situation in Venezuela has rendered that country an unsuitable forum at this time’. The district court did not provide any analysis of the conditions in Venezuela or make any specific findings to facilitate our review of this decision. See generally In re Air Crash Disaster Near New Orleans, LA., 821 F.2d 1147, 1166 (5th Cir. 1987) (instructing the lower court to ‘set out its findings and conclusions’ to facilitate the review of forum non conveniens orders), aff’d in relevant part, 883 F.2d 17 (5th Cir. 1989) (en banc).

[2] “However, we need not reach the merits of the district court’s ruling: … the Mexico City arbitration that resulted from the 2003 order was terminated without decision during the pendency of this appeal. Accordingly, the district court’s 2003 refusal to enforce the arbitration-forum clause – a refusal that was
presumably based on the conditions in Venezuela in 2002 and 2003— is now moot.

[3] “The Republic requests that this Court take a further step and order arbitration in Caracas in compliance with the Agreement. In response, Northrop contends that Venezuela remains an unsuitable forum. Northrop also suggests that the Republic has permanently waived its right to enforce the arbitration-forum clause by failing to appear in the 2002-2003 litigation.

[4] “We have found no authority suggesting that a party’s previous failure to appear constitutes absolute waiver of contractual rights. Moreover, in disputes involving foreign sovereigns, this Court has long favored the resolution of legal issues on the merits where possible. See MCI Telecommunications Corp. v. Alhadhood, 82 F.3d 658, 662 (5th Cir. 1996) (“[W]hen a defendant foreign state has appeared and asserts legal defenses, albeit after a default judgment has been entered, it is important that those defenses be considered carefully and, if possible, that the dispute be resolved on the basis of all relevant legal argument.” (quoting Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1552 (D.C. Cir. 1987))).

[5] “Accordingly, we conclude that the parties’ continued dispute over the enforceability of the arbitration-forum clause should be resolved on the merits.

[6] “Nonetheless, the record before us is insufficient to determine whether the present conditions in Venezuela render the arbitration-forum clause unenforceable. Accordingly, we remand to the district court for a proper determination of this issue.

[7] “Given the conclusory nature of the 2003 order, we reiterate the following governing principles: The Supreme Court has held that courts may generally set aside forum-selection clauses where enforcement would be ‘unreasonable’. M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 10-11 (1972). However, in several cases culminating in Nat’l Iranian Oil Co. v. Ashland Oil, Inc., this Court has applied a heightened standard to arbitration-forum clauses in particular. See Mitsui & Co., Ltd. v. Delta Brands, Inc., 2005 WL 1214603, at *12 (N.D. Yearbook Comm. Arb’n XXXIV (2009)

1. “Northrop explains that Venezuela was a particularly unreasonable forum in late 2002 and early 2003 because the nation ‘was embroiled in violent political turmoil involving a ‘military coup’ and a ‘violent, on-going general strike’. However, the district court did not specifically refer to such conditions in its 2003 order.”


3. “Northrop contends that Nat’l Iranian Oil has been implicitly overruled by the Supreme Court’s decision in Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 534 (1994) reported in Yearbook XXI (1996) pp. 773-783 (US no. 200)]. While the Vimar Seguros Court did state that ‘foreign arbitration clauses are but a subset of foreign forum selection clauses in general’, the Court was not addressing the rule in Nat’l Iranian Oil. Because there is nothing problematic about applying a heightened standard of enforceability to a ‘subset of foreign forum selection clauses’, Nat’l Iranian Oil remains good law. See Mitsui & Co., Ltd. v. Delta Brands, Inc., 2005 WL 1214603, at *12 (N.D.
F.2d 326, 332 (5th Cir. 1987) (holding that arbitration-forum clauses ‘must be enforced, even if unreasonable’). Under Nat’l Iranian Oil, a ‘forum selection clause establishing the situs of arbitration must be enforced unless it conflicts with an explicit provision of the Federal Arbitration Act’. Id. (internal quotation marks omitted). ‘Under the Act, a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or such grounds as exist at law or in equity for the revocation of the contract.’ Id. (internal quotation marks omitted). Within this framework, the contract doctrines of impracticability or impossibility ‘certainly suppl[y] an adequate predicate for finding the forum selection clause unenforceable’. Id. However, in order to assert these defenses, the complaining party must not have had reason to know about the complained-of conditions at the time of the contract. Id. at 333.

[8] “Accordingly, upon remand the district court should conduct such proceedings as necessary to determine the enforceability of the arbitration-forum clause pursuant to the aforementioned legal principles.

[9] “Finally, the Republic asks this Court to dismiss this action outright based on the Agreement’s separate litigation-forum clause, which provides that any controversies ‘that do not reach a friendly resolution shall be resolved by the competent Courts of the Republic of Venezuela’. However, the Republic did not move for dismissal based on the litigation-forum clause below, and this Court generally does not consider issues raised for the first time on appeal. Smith ex rel. Estate of Smith v. United States, 391 F.3d 621, 625 (5th Cir. 2004). Moreover, as explained previously, the record before us is insufficient to determine the present suitability of Venezuela as a forum. The Republic’s argument is more appropriately addressed on remand. See generally Practical Concepts, 811 F.2d at 1551-1552 (remanding for a determination of the defendant-sovereign’s alternative defenses).”

(....)
676. Court of Appeal of Florida, First District, 16 July 2009, Case No. 1D08-5432

Parties:
Appellants: Lloyds Underwriters (nationality not indicated);
(2) Osprey Underwriting Agency, Ltd. (nationality not indicated)
Appellees: (1) Rebecca Netterstrom (nationality not indicated);
(2) M/V or T/B JEFFERSON (nationality not indicated);
(3) Mar-K Towing, Inc. (nationality not indicated)

Published in: 2009 Fla. App. LEXIS 9709

Articles: II(3)

Subject matters:
– relationship between arbitration clause and service-of-suit clause
– arbitrability of insurance disputes
– 1958 New York Convention not reverse preempted by state law on insurance


Facts

Mar-K Towing, Inc. (Mar-K) insured the vessels it operated in an area between Georgia and Texas through a maritime insurance policy with Lloyds Underwriters (Lloyds) that it had negotiated with Osprey Underwriting (Osprey), Lloyds’ agent in London. The policy contained a clause for arbitration of disputes in London. It also contained a service-of-suit clause providing that Lloyds submit to the jurisdiction of the competent courts in the United States if it failed to pay any amount claimed under the insurance policy.

Lars Nettersom died in a marine accident while working aboard a tugboat owned and operated by Mar-K. His wife, Rebecca, filed a wrongful death suit against Mar-K in the Circuit Court for Bay County, Florida. Mar-K filed a third-party complaint against Lloyds and Osprey for indemnification, since Lloyds and
Osprey declined coverage, claiming that Mar-K had failed to comply with certain requirements in the policy. Lloyds and Osprey filed a motion to compel arbitration under the arbitration clause in the insurance policy.

The Circuit Court denied the motion, holding that the arbitration clause could not be enforced because it was in conflict with the service-of-suit clause. Also, Florida law prohibits the arbitration of insurance coverage disputes.

On appeal, the Court of Appeal of Florida, before Padovano, J, Barfield and Webster, JJ, in an opinion by Padovano, reversed the lower court’s decision, holding that the “clear and unambiguous” arbitration clause in the policy compelled arbitration and that the case law prohibiting arbitration of insurance coverage disputes must give way to the contrary requirements of the Federal Arbitration Act (FAA) and the 1958 New York Convention in respect of international arbitration agreements.

The court first noted that conflicting clauses in a contract must be interpreted in a manner that would reconcile them, if possible. If they can be reconciled, then the language of the contract controls. This was the case here, where the arbitration clause and the service-of-suit clause served different purposes and did not in fact conflict with each other. The arbitration clause provided a method for settling disputes between the insurer and the insured by arbitration in London. The service-of-suit clause set out a method of, inter alia, enforcing an award against the insurer in the United States.

The court added that even if there was a conflict between these clauses, the arbitration clause would prevail as it stated explicitly that “[i]n the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail”.

The court also disagreed with the trial court’s conclusion that arbitration could not be compelled in the present case because Florida law prohibits the arbitration of insurance coverage disputes. It reasoned that while it is generally correct that state laws regulating the business of insurance take precedence over the FAA (the so-called reverse preemption), this principle does not apply to international insurance contracts if the arbitration agreement or award is covered by the 1958 New York Convention.

The court then held that the arbitration agreement at issue was covered by the Convention as it met all the necessary requirements: (1) it was in writing; (2) it provided for arbitration in the territory of a signatory of the Convention; (3) the agreement arose out of a commercial legal relationship and (4) at least one party to the agreement was not an American citizen.

The court finally disagreed with the lower court’s finding that Osprey and Lloyds were not entitled to arbitrate the case in London because Mar-K
conducted its business exclusively in an area within the United States and the insurance policy only provided coverage in that area. The court reasoned that this argument focused incorrectly on the relationship between Mar-K and the companies that used its services rather than, correctly, on the relationship between the parties to the insurance coverage dispute, which was an international commercial transaction.

Excerpt

(...)

[1] “Lloyds and Osprey filed a motion to compel arbitration under the provisions of the insurance policy. The trial court denied the motion on two grounds. First, the court concluded that the arbitration clause in the policy could not be enforced because it was in conflict with another provision, known as the service of suit clause. Second, the court concluded that Florida law prohibits the arbitration of insurance coverage disputes and that the Florida law on this point takes precedence over contrary, but more general, provisions of the Federal Arbitration Act. Lloyds and Osprey appealed to this court to review the order.

[2] “A nonfinal order denying a motion to compel arbitration is subject to review by appeal to the district court of appeal. See Fla. R. App. P. 9.130(a)(3)(C)(iv); Cintas Corp. No. 2 v. Schwalier, 901 So.2d 307 (Fla. 1st DCA 2005). Because the outcome of the dispute in this case depends on an interpretation of the arbitration clause in the insurance policy and the effect of the applicable state and federal laws, the order is reviewable by the de novo standard. See Florida Title Loans, Inc. v. Christie, 770 So.2d 750 (Fla. 1st DCA 2000).

[3] “We conclude that the trial court erred as a matter of law in construing the insurance policy. An ambiguity exists only where contractual terms cannot be reconciled. See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1139 (Fla.1998); see Harris v. School Bd. of Duval County, 921 So.2d 725, 733 (Fla. 1st DCA 2006); Dune I, Inc. v. Palms N. Owners Ass’n, Inc., 605 So.2d 903, 905 (Fla. 1st DCA 1992); Thrasher v. Arida, 858 So.2d 1173, 1175 (Fla. 2d DCA 2003). But where the terms can be reconciled, the clear language of the contract controls. See Harris, 921 So.2d at 733; Dune I, 605 So.2d at 905; Thrasher, 858 So.2d at 1175. When a contract contains apparently conflicting clauses, we must interpret it in a manner that would reconcile the conflicting clauses, if possible. See Harris at 733; Dune I at 905; Thrasher at 1175.
“In the contract under consideration here, the arbitration and service of suit clauses serve different purposes and they do not conflict with each another. The arbitration clause provides a method of resolving a dispute between the insurer and the insured. This clause states,

‘Notwithstanding anything else to the contrary, this insurance is subject to English law and practice and any dispute arising under or in connection with this insurance is to be referred to Arbitration in London, one Arbitrator to be nominated by the Assured and the other by Osprey on behalf of Underwriters. The Arbitration shall be conducted pursuant to exclusive supervision of the English High Court of Justice. In case the Arbitrators shall not agree, then the dispute shall be submitted to an Umpire to be appointed by them. The award of the Arbitrators or the Umpire shall be final and binding upon both parties. In the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail and the right of either party to commence proceedings before any Court or Tribunal in any other jurisdiction shall be limited to the process of enforcement of any award hereunder.’

By this clause the parties plainly agreed to resolve a coverage dispute such as this in an arbitration proceeding in London.

“In contrast, the service of suit clause merely provides a method of obtaining a judgment against the insurer in the United States. This clause states:

‘It is agreed that in the event of the failure of the Underwriters severally subscribing this insurance (the Underwriters) to pay any amount claimed to be due hereunder, the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction within the United States of America.’

“An American company purchasing insurance from an international insurance company like Lloyds of London might find this clause to be useful. If a coverage dispute is resolved favorably to the American company in arbitration, the company will be able to sue Lloyds in the United States to enforce the award. Lloyds has subjected itself to a lawsuit in the United States for this purpose and presumably for any purpose other than to resolve a dispute regarding the obligations between the insurer and insured under the policy.

“Even if we were to accept the argument that there is a conflict between the service of suit clause and the arbitration clause, we would nevertheless be
compelled to hold that the arbitration clause prevails. The last sentence of the arbitration clause states,

‘In the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail and the right of either party to commence proceedings before any Court or Tribunal in any other jurisdiction shall be limited to the process of enforcement of any award hereunder.’

This provision plainly signifies that, in the event of a conflict, the arbitration clause should take precedence over the conflicting provision.

[8] “The trial court concluded that the arbitration clause would not be enforceable in any event, because Florida law prohibits the arbitration of insurance coverage disputes. The major premise of this conclusion was that state laws regulating the business of insurance take precedence over federal laws that would otherwise require the enforcement of an arbitration agreement. This statement is correct as a general principle, but the error in the trial court’s reasoning is that state laws regulating the business of insurance have a preemptive effect only as to insurance contracts within the United States, and not to international insurance contracts such as the one in this case.


[10] “As an exception to the general rule, a state law regulating the business of insurance can operate to preempt the federal law as set forth in the Federal Arbitration Act. This principle of state-law preemption has been referred to as ‘reverse preemption’. See United Ins. Co. of America v. Office of Ins. Reg., 985 So.2d 665 (Fla. 1st DCA 2008). It is derived from the McCarran-Ferguson Act, which was designed to ‘restore the supremacy of the states in the realm of insurance regulation’. United States Dept. of Treasury v. Fabe, 508 U.S. 491, 500 (1993). The Act provides in pertinent part that ‘[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of


[11] “If the insurance contract had been between a Florida resident and an insurance company within the United States, we would be required to consider the exception in the McCarran-Ferguson Act for laws regulating the business of insurance. But there is an exception to the exception that may apply to some international arbitration agreements. Depending on the legal status of the agreement in this case, the McCarran-Ferguson Act may have no effect on the arbitration clause.

[12] “An arbitration agreement between residents of different countries is governed by [the 1958 New York Convention], provided both countries are signatory nations to the Convention. The Convention was drafted in 1958 under the auspices of the United Nations and it has since been incorporated into the Federal Arbitration Act. See 9 U.S.C. Sects. 201-208. If the Convention applies, the issue is not merely whether state law prevails over federal law, but whether the right to arbitration is protected by international law.

[13] “We adopt the reasoning of the United States District Court for the Northern District of Georgia in Goshawk Dedicated Ltd. v. Portsmouth Settlement Co., 466 F.Supp.2d 1293 (N.D. Ga. 2006),2 and hold that the McCarran-Ferguson Act applies only to arbitration agreements within the United States and that it has no effect on an international arbitration agreement that is governed by the Convention. See also Antillean Marine Shipping Corp. v. Through Transport Mut. Ins. Ltd., 2002 WL 32075793 (S.D. Fla. 2002); Skuld v. Apollo Ship Chandlers, Inc., 847 So.2d 991 (Fla. 3d DCA 2003) [reported in Yearbook XXVIII (2003) pp. 1202-1205 (US no. 435)].3 The Federal Arbitration Act must give way to contrary provisions of state laws regulating the business of insurance but, to the extent that the Act incorporates an agreement the United States made with other nations, it prevails over state laws.

[14] “This leaves us to ascertain whether the arbitration agreement in the present case is protected by the Convention. The requirements are summarized in Bautista v. Star Cruises, 396 F. 3d 1289, 1294 (11th Cir. 2005).4 There the

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3. “The legal arguments supporting the view that the McCarran-Ferguson Act does not apply to international arbitration agreements governed by the Convention are set out in detail in ‘Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law’, 41 Vand. J. Transnat’l L. 1535 (November 2008).”
court held that an international arbitration agreement is enforceable under the Convention if (1) it is in writing; (2) it provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen. See also Polychronakis v. Celebrity Cruises, Inc., 2008 WL 5191104 (S.D. Fla. 2008).

[15] “All of these elements are satisfied in the present case. The parties made an agreement in writing to engage in a commercial relationship, that of insurer and insured, and they agreed to arbitrate any disputes under the agreement in England, a country that is a signatory to the Convention.

[16] “The trial court was persuaded that Osprey and Lloyds were not entitled to arbitrate the case in London, because Mar-K conducted its business exclusively within the United States. The court pointed out that Mar-K’s vessels operated in coastal ports from Georgia to Texas and that the insurance policy did not provide coverage beyond those areas. This analysis focuses on the relationship between Mar-K and the companies that used its services, not the relationship between the parties to the insurance coverage dispute. The agreement between Osprey and Lloyds in England to insure a risk borne by Mar-K in the United States was an international commercial transaction. Here, as in Benefit Association v. Mt. Sinai Comprehensive Cancer Center, 816 So.2d 164 (Fla. 3d DCA 2002), the Convention was triggered by the issuance of the insurance policy.

[17] “This conclusion is supported by the text of the Convention itself. It states in material part, ‘An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.’ 9 U.S.C. Sect. 202. As this passage reveals, the Convention is put into play by an international commercial transaction. It makes no difference that the business of one of the parties is otherwise a purely domestic operation.

[18] “For these reasons, we conclude that the insurance policy requires the parties to arbitrate the dispute, that the Federal Arbitration Act and the Convention apply, and that the provisions of the Act and the Convention are not preempted by state laws regulating the business of insurance. Therefore, we hold that Osprey and Lloyds are entitled to arbitrate the dispute under the insurance policy in London. Reversed.”
677. United States Court of Appeals, Fifth Circuit, 12 August 2009, Case No. 08-10451

Parties: 
Plaintiff/Appellee: ENSCO International Incorporated (nationality not indicated)
Defendants/Appellants: (1) Certain Underwriters at Lloyd’s and Insurance Companies Subscribing to Policy Numbers and Cover Notes PE0500247, LCD070105(B), LCD070105(A), and B0621ELOEN0105 (nationality not indicated); (2) BC Johnson Associates LLC (nationality not indicated); (3) Bryan Johnson (nationality not indicated)

Published in: 2009 U.S. App. LEXIS 18058

Articles: II(3) (by implication)

Subject matters: – remand from federal court to state court
– removal from state court to federal court of 1958 New York Convention case
– waiver of right to arbitration by entering into forum selection clause

Commentary Cases: ¶ 217 + ¶ 220

Facts

The facts of this case are also reported in Yearbook XXXIII (2008) at pp. 1144-1147 (US no. 640). ENSCO International Incorporated (ENSCO) entered into insurance policies with Certain Underwriters at Lloyd’s and Insurance Companies Subscribing to Policy Numbers and Cover Notes PE0500247, B0621ELOEN0105, LCD070105(A), LCD070105(B) (Underwriters). The policies contained a choice-of-law and forum selection clause providing that Texas law applied and that disputes would be “subject to the exclusive jurisdiction of the Courts of Dallas County, Texas”. They also contained an arbitration clause providing for arbitration of disputes by three arbitrators.
In August 2005, Hurricane Katrina hit the Gulf of Mexico. ENSCO’s oil and gas platforms off the coast of Louisiana were damaged; a derrick broke off and fell to the bottom of the seabed. Underwriters indemnified ENSCO for its property damage but denied coverage for the removal of the derrick.

ENSCO commenced an action in the 191st District Court of Dallas County. Underwriters removed the action to the United States District Court for the Northern District of Texas, Dallas Division, under the 1958 New York Convention. ENSCO moved to remand the case to state court based on the forum selection clause in the policies. On 8 April 2008, the district court granted ENSCO’s motion to remand, holding that Underwriters waived their right to remove disputes arising out of the insurance policies to federal court under the Convention because of the forum selection clause in the policies, which contained express language unambiguously establishing the exclusive jurisdiction of the Dallas County courts. This decision is reported in Yearbook XXXIII (2008) pp. 1144-1147 (US no. 640).

The United States Court of Appeals for the Fifth Circuit, before Jolly, Smith and Owen, CJJ, in an opinion by Jerry E. Smith, affirmed the lower court’s decision, holding that the forum selection clause in the Policies constituted a waiver of the right to removal to federal court under the Convention.

The court first examined the standard for waiver, noting that there are three ways in which a party may waive its removal rights: (1) by explicitly stating that it is doing so, (2) by allowing the other party the right to choose venue, or (3) by establishing an exclusive venue within the contract. Underwriters claimed that under the 1991 decision of the Fifth Circuit in McDermott (see below), only the first of those methods is applicable in a New York Convention context.

The Court disagreed, holding that this “heightened standard for Convention removal” had no basis in law. The Court examined the “actual reasoning” in McDermott and concluded that the court in that case did not hold that Convention removal waivers must contain “magic words”, but merely that the language of the service-of-suit-clause at issue there was insufficient to waive the right of removal to federal court of the particular question being litigated.

The Court of Appeal then examined the case at issue under the applicable standard and held that the forum selection clause in the Policies met the third basis for waiver by fixing “exclusive” venue for litigation in “the Courts of Dallas County, Texas”.

Judge Owen filed a concurring opinion; Judge Jolly filed a dissenting opinion. These opinions are not reported below.
“The parties disagree as to whether the Convention applies, but we need not decide that. The district court evidently assumed it applies. ENSCO, which contends in a footnote that it does not apply, cites only its own motion to remand and has therefore not adequately briefed the issue. See United States v. Jackson, 549 F.3d 963, 972 n. 6 (5th Cir. 2008) (stating that ‘argument by reference is not permitted’) (citing Yohey v. Collins, 985 F.2d 222, 224-225 (5th Cir. 1993)), petition for cert. filed (12 Feb. 2009) (No. 08-8714). Although the forum selection clause adopts Texas law as ‘the proper and exclusive law of this insurance’, neither party argues that this court should consider the applicability of the Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE Sect. 171.001 et seq.”

[1] “During Hurricane Katrina, an offshore drilling rig owned by ENSCO and insured by the Underwriters sustained serious damage. The Underwriters paid for the constructive total loss of the rig but not for the removal of debris from the rig that fell to the sea floor near a platform owned by another company. ENSCO, asserting that the Policies covered that removal, sued the Underwriters in state court in Dallas County, consistent with the Policies’ forum selection clause (titled ‘Choice of Law & Jurisdiction’), which provides,

‘The proper and exclusive law of this insurance shall be Texas law. Any disputes arising under or in connection with it shall be subject to the exclusive jurisdiction of the Courts of Dallas County, Texas.’


[3] “This appeal hinges on construction of the Policies’ forum selection clause. We consider first, the relevant standard for waiver, and second, the application of that standard.”

I. STANDARD FOR WAIVER

COURT DECISIONS ON THE NEW YORK CONVENTION 1958

F.2d 1199 (5th Cir. 1991), 2 one of very few federal cases addressing waiver of removal rights under the Convention, for the clear-and-unequivocal standard. Id. 3 There are three ways in which a party may clearly and unequivocally waive its removal rights: ‘(1) by explicitly stating that it is doing so, (2) by allowing the other party the right to choose venue, or (3) by establishing an exclusive venue within the contract’. New Orleans, 376 F.3d at 504.

[5] “The Underwriters claim, however, that under McDermott only the first of those methods is applicable in the Convention context. In effect, they propose a ‘magic words’ approach to waiver. The McDermott court, however, never stated that it would reject purported waivers that do not incant the specific words that the Underwriters claim are required. The Underwriters rely instead on a literal reading of the McDermott court’s use of the words ‘explicit’ and ‘express’ in explaining its waiver standard. Because all waivers that do not use the term ‘waive’ or ‘remove’ are by definition ‘implicit’, the Underwriters say, there is no waiver here. 4

[6] “The McDermott court’s choice of terms does not bear the weight that the Underwriters apply. Contrary to the Underwriters’ reading, the court actually formulated its waiver test in several ways, using a number of terms and phrases. In fact, the McDermott court used the terms ‘explicit’, ‘express’, ‘unambiguous’, and ‘clear and unequivocal’ almost interchangeably. 5 These words, of course,

4. “At oral argument, the Underwriters took this argument to its logical conclusion:

‘Q: Well, suppose you had a contract that said: ‘And we agree that there shall be no litigation in this matter that shall occur anywhere else, ever, anywhere else, except in the state courts of Dallas County’?
A: I don’t think that would suffice, your Honor… [T]he problem is, it doesn’t call the parties’ attention to what they are doing.’”

5. “One section of the McDermott opinion is titled ‘The Express Waiver Rule’, but two paragraphs into that section, the court said that ‘we will give effect only to explicit waivers’. McDermott, 944 F.2d at 1209. It then stated twice that it was adopting ‘the express waiver rule’. Id. The McDermott court also mentioned the ‘clear and unequivocal’ standard. First, it referred to courts holding that Foreign Sovereign Immunities Act (FSIA) cases are to be tried ‘in federal court unless the parties unequivocally choose otherwise’. Id. at 1212 (citing In re Delta Am. Re Ins. Co., 900 F.2d 890 (6th Cir. 1990)). The court then said that it found ‘this reasoning persuasive and applicable to Convention Act cases’. Id. The Delta court, though, used the terms ‘explicit’ and ‘unequivocal’ interchangeably. Compare Delta, 900 F.2d at 893 (‘Against the backdrop of the FSIA, however, the principle that waiver must be clear and unequivocal assumes even greater significance.’); with id.
mean different things, and none of them demands the reading that the Underwriters urge. To understand the McDermott standard, we must therefore consider the McDermott court’s actual reasoning, and a close reading of McDermott shows that the Underwriters misunderstand the standard it articulates. Although waiver must be clear and unequivocal, it may be implicit where necessary to give effect to all contractual provisions.

6. “McDermott’s precise holding is not that Convention removal waivers must contain magic words, as the Underwriters claim, but merely that the following language from the contract’s ‘service of suit clause’ was insufficient to waive the right of removal to federal court of the particular question being litigated:

‘It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.’

at 894 (‘[W]e hold that any claimed waiver of the right of removal stemming from contractual language must be explicit.’). The McDermott court later referred to the Delta rule as an ‘express waiver rule’. McDermott, 944 F.2d at 1213. Second, when explaining that ‘precedent’ supported its holding, the McDermott court observed that ‘[e]ven in cases that do not involve the Convention or the FSIA, many federal courts have refused to find a contractual waiver of removal rights absent a “clear and unequivocal” expression of intent to waive those rights’. Id. at 1212. In particular, it explained that City of Rose City v. Nutmeg Insurance Co., 931 F.2d 13 (5th Cir. 1991), a non-Convention case that we discuss at length infra, was ‘conceptually consistent with the “unequivocal expression rule”’. McDermott, 944 F.2d at 1212-1213. The McDermott court, in other words, used cases discussing the ‘clear and unequivocal’ standard as support for its express (or explicit) waiver standard. The Third Circuit’s language in Suter is similar. That court used the terms ‘clear and unambiguous’ and ‘express’ interchangeably in describing waiver of removal in Convention cases. See Suter, 223 F.3d at 158 (‘[T]here can be no waiver of a right to remove under the Convention Act in the absence of clear and unambiguous language requiring such a waiver[.]’); id. at 159 (‘An express waiver requirement will serve the various purposes of the Convention Act[.]’); id. (‘Our adoption of the “clear and unambiguous language” standard is supported ... also by ... [McDermott]. In McDermott, the Fifth Circuit found that an express-waiver rule served the Convention Act’s goals of reciprocity, uniformity, and speed and was consistent with circuit precedent.’).

6. “This court, sitting en banc more than a year before McDermott was decided, held that ‘express’ can mean ‘implied’. See Kelly v. Lee’s Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220 (5th Cir. 1990) (per curiam) (en banc) (concluding that the Federal Rule of Civil Procedure 54(b) ‘express determination’ rule is satisfied whenever ‘the district court’s unmistakable intent’ is discernable and that the district court therefore need not ‘mechanically recite’ any particular words); id. at 1222 (Smith, J., joined by Clark, C.J., and Gee, Johnson, Williams, Jolly, and Barksdale, JJ., dissenting) (‘[T]he en banc majority ... has declared that “express” means “implied.”’).
McDermott, 944 F.2d at 1200 (citations omitted). That provision – because it allowed one party to select a venue – superficially appears consistent with the second of the three New Orleans bases for waiver, but it is not explicit.

[8] “If the McDermott court had required actual reference to ‘waiver’ and ‘removal’, the analysis of the McDermott contract would have been straightforward: The court could merely have decided that because no such reference was present, there was no waiver. But the McDermott court did not do so; quite to the contrary, it began its analysis by observing that ‘[w]hen a policy’s service-of-suit clause applies, its probable effect is to waive the insurer’s removal rights’. Id. at 1204-1205 (citing Nutmeg, 931 F.2d at 15-16). The McDermott court, in other words, would have considered accepting a waiver based on the second ground used in New Orleans, notwithstanding the fact that such a waiver would have been implicit.

[9] “Other aspects of the contract, however, persuaded the McDermott court that the service-of-suit clause did not in fact constitute a waiver and that the contract’s apparent consistency with the second New Orleans basis was illusory. The venue question in McDermott was venue for ‘disputes concerning the proper forum to decide arbitrability questions’. Id. at 1205. That question, though, was covered not only by the service-of-suit clause but by a potentially ‘co-equal forum selection clause’ governing venue for arbitration. The McDermott contract was therefore ambiguous, and the service-of-suit clause did not answer the venue question. Id.

[10] “The court also observed that the service-of-suit clause could be read as a waiver of personal jurisdiction only, therefore leaving open the possibility of subsequent removal.” The court reasoned as follows:

‘Underwriters’ exercise of its federal removal right is not necessarily inconsistent with any of its obligations under the service-of-suit clause. Underwriters may remove a case after submitting to the jurisdiction of Louisiana’s courts and complying with all necessary requirements to give Louisiana’s courts power over the suit. There would be no final decision in that court for Underwriters to abide by if it exercised its removal right. All matters would be determined in accordance with the practice and law

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7. “‘Consent to personal jurisdiction is of value especially with respect to defendants that are incorporated and have their principal place of business abroad.’ McDermott, 944 F.2d at 1205-1206 & n. 10. Because the underwriters in McDermott fit that description, the court found that interpretation especially likely.”
of the court chosen by McDermott in the sense that all state courts follow the removal law established by Congress."

Id. at 1206. Not only was the McDermott contract’s service-of-suit clause ambiguous with respect to venue, but the venue selected in accordance with it would not be exclusive.

[11] “In short, instead of merely relying on the contract’s lack of explicit references to waiver and venue, the McDermott court showed, in great detail, that the contract did not plainly set a venue at all and could in fact permit invocation of federal removal from a state venue. The Underwriters’ proposed rule would treat that discussion as redundant. It is evident, nonetheless, that the McDermott court found no waiver – not because the other bases for waiver later set out in New Orleans were inapplicable, but because they were not satisfied."

[12] “The McDermott court then considered and rejected an analogy to Nutmeg – a case not involving the Convention – in which a similar contractual provision was deemed to waive removal. The Nutmeg contract had only a single forum selection clause reading:

‘[W]e, at your request agree to submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.’

Nutmeg, 931 F.2d at 14. That language, of course, also resembles the second of the three New Orleans bases for waiver of removal, but it is neither ‘explicit’ nor ‘express’. The McDermott court – if it had adopted the rule that the Underwriters urge – could easily have distinguished Nutmeg just by pointing this out and explaining that although an implied waiver was adequate in Nutmeg, it could never be enough in the context of the Convention. Instead, the court demonstrated that although the Nutmeg contract was unambiguous, the McDermott contract was not.

[13] “The McDermott court, 944 F.2d at 1207, pointed out that the Nutmeg decision resulted partly from the rule that contracts are to be construed against the drafter and that that rule was inapplicable to the McDermott contract.”

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8. “This interpretation of McDermott is consistent with Waters v. Browning-Ferris Industries, Inc., 252 F.3d 796, 797-798 (5th Cir. 2001).”

9. “The parties have not briefed the application of that rule to the present case.”
McDermott court also observed that the Nutmeg contract had only a single relevant venue provision instead of two potentially conflicting ones. Id. McDermott suggested only one way in which the Convention affected waiver of removal rights: The Convention applies to arbitration agreements and arbitration awards involving United States citizens and at least one foreign citizen. That was the case in McDermott. 10 In McDermott, though – as explained above – the presence of international defendants made the personal jurisdiction explanation more plausible. Id. at 1205-1206 & n. 10. In Nutmeg, all the parties were domestic, and it therefore seemed less likely to the McDermott court that the parties would have specifically waived objections to personal jurisdiction. See id. at 1207. Thus the applicability of the Convention gave the McDermott court another reason to find ambiguity. 11 In New Orleans, 376 F.3d at 504-505, the court adopted this interpretation of Nutmeg. Though the McDermott court distinguished Nutmeg in many ways, it never said that the Convention affected the waiver standard. 12

[14] “Having shown that neither the contractual language itself nor an analogy to interpretations of similar language in other cases compelled a conclusion that removal rights had been waived, the McDermott court concluded that the parties had ‘executed an ambiguous contract and disavowed any expressed intent regarding waiver of Convention removal rights’, meaning that no waiver existed. Id. at 1209. If the McDermott contract had been unambiguous, or if the parties to it had somehow expressed intent to waive removal rights, the court presumably would have found a waiver despite the Convention’s applicability and the lack of magic words.

[15] “Given the law described above, the two implicit bases for clear-and-unequivocal waiver in the New Orleans formulation work as well as the explicit basis does, even in cases involving the Convention. It is difficult, given the McDermott court’s approach, to imagine that panel’s coming to the same conclusion if it had been presented with language such as, e.g., ‘Underwriters hereon, at the request of the Assured will submit to the exclusive jurisdiction of any court of competent jurisdiction’. Nor does McDermott give us any reason to

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10. "See McDermott, 944 F.2d at 1208 (‘The parties recognize that this suit concerns an arbitration agreement and is not entirely between United States citizens, so the Convention Act governs this case.’) (citing 9 U.S.C. Sect. 202, part of the Convention’s implementation act)."

11. “See id. at 1206-1207 (‘The existence of alternate possible meanings for the service-of-suit clause in the policy here at issue distinguishes Nutmeg.’).”

12. “Later in its opinion, in fact, the McDermott court, 944 F.2d at 1212-1213, marshaled Nutmeg as support for the ‘unequivocal expression rule’ on the ground that the Nutmeg court found the contract before it to be unambiguous.”
think that its waiver rule would be applied in ways that render contractual terms meaningless.

[16] “No decision interpreting *McDermott* requires the contrary conclusion urged by the Underwriters. In *Beiser v. Weyler*, 284 F.3d 665, 672 (5th Cir. 2002), the court explained:

‘[In *McDermott* w]e established a clear statement rule for waivers of a litigant’s rights under Sect. 205. A party may only waive his right to remove under the [Convention] by clearly and explicitly saying so in the agreement.’

That language, though, is not unambiguous support for the Underwriters’ position. A ‘clear statement rule’ does not mean the same thing as an ‘explicit statement rule’. *Beiser*, at any rate, did not involve an application of the *McDermott* rule, so the quoted language is at best *dictum*. Nor did the *Beiser* court explain what it means for a waiver to be ‘clear and explicit’.

[17] “Moreover, the *New Orleans* court made no effort to distinguish its approach to waiver from *McDermott*’s; the *New Orleans* court gave no indication of a special explicit waiver requirement that applies only in Convention cases. *McDermott*’s discussion of waiver in the Convention context seems almost indistinguishable from the explanation of waiver by forum selection in *New Orleans*.

‘A party’s consent to jurisdiction in one forum does not necessarily waive its right to have an action heard in another. For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties’ intent to make that jurisdiction exclusive.’

*New Orleans*, 376 F.3d at 504.

[18] “*New Orleans*, then, explains why the *McDermott* contract was not deemed a waiver. In fact, the *McDermott* court could have used this very language when it explained that the forum selection clause it interpreted was a waiver only of personal jurisdiction. The *McDermott* contract allowed McDermott to select venue, but not an exclusive venue; *New Orleans* explains that such a venue-selection provision would not be sufficient as a waiver in any case, Convention or not.

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[19] “It follows that the Underwriters’ proposed heightened standard for Convention removal has no basis in law. McDermott permits waiver by means other than express waiver, and the New Orleans three-part synthesis, which accurately incorporates the McDermott standard, applies in the context of the Convention.”

II. WHETHER THERE WAS WAIVER

[20] “The question whether the Policies meet the McDermott waiver standard is properly answered under the ‘clear and unequivocal’ test explicated in New Orleans. We consider whether the Policies, by any of the means the New Orleans court mentioned, necessarily exclude continued exercise of removal rights. The Underwriters have effectively conceded, in their briefs and at oral argument, that our rejection of their proposed interpretation of McDermott disposes of their appeal.

[21] “The third New Orleans basis for waiver – contractual specification of jurisdiction in a way that ‘clearly demonstrates the parties’ intent to make that jurisdiction exclusive’ – is the one that is relevant here. New Orleans, 376 F.3d at 504. The Policies’ forum selection clause fixes ‘exclusive’ venue for litigation in ‘the Courts of Dallas County, Texas’. This, prima facie, satisfies New Orleans.14 It is far more definite than was the provision construed in McDermott. Removal may not be inconsistent with a party’s ‘submit[ting] to the jurisdiction’ of state court, or with all matters being decided in accordance with state court ‘law and practice’, see McDermott, 944 F.2d at 1206, but it is inconsistent with a situation in which the state courts in Dallas County would have ‘exclusive’ jurisdiction. No party has suggested, and we see no reason to think, that the Policies’ language

14. “In Argyll Equities LLC v. Paolino, 211 F. App’x 317, 318 (5th Cir. 2006), this court correctly stated that a contract providing that ‘[b]orrower hereby consents to the exclusive jurisdiction of the courts sitting in Kendall County, Texas, United States of America’ is an unambiguous waiver. Contractual references to the courts of a particular county are to state courts, not to federal courts that happen to sit there. ‘Federal district courts may be in Texas, but they are not of Texas. Black’s Law Dictionary defines “of” as “denoting that from which anything proceeds; indicating origin, source, descent”. Federal courts indisputably proceed from, and find their origin in, the federal government, though located in particular geographic regions. By agreeing to litigate all relevant disputes solely in “the Courts of Texas”, TSE waived its right to removal.’ Dixon v. TSE Int’l, Inc., 330 F.3d 396, 398 (5th Cir. 2003) (per curiam) (footnote omitted). See also Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997) (‘Because the language of the clause refers only to a specific county and not to a specific judicial district, we conclude venue is intended to lie only in state district court.’); Ondova Ltd. Co. v. Manila Indus., Inc., 513 F.Supp.2d 762, 773 (N.D. Tex. 2007).”
could be a waiver of personal jurisdiction only. In short, permitting removal would read the word ‘exclusive’ out of the contract.  

[22] “Nor, unlike the contract provisions in McDermott, do other provisions of the Policies compromise the plain directive of the forum selection clause. In McDermott, we found that the litigation could be governed by either of two independent and coequal forum selection clauses, Id. at 1204-1206. The Policies, though, contain an arbitration provision setting venue in London and the forum selection clause setting venue in Dallas County. The Underwriters have not suggested that these provisions conflict, as did the analogous provisions in McDermott. Where there is no such ambiguity, the McDermott court’s analysis permits the Policies’ ‘exclusive jurisdiction’ language to mean what it says.

[23] “The Underwriters have waived their right to remove. The order of remand is affirmed.”

(....)

15. “In Suter, 223 F.3d at 158, which interchangeably referred to a “clear and unambiguous language” standard’ and to an ‘express waiver requirement’, the Third Circuit explained that it would ‘resolve[e] any ambiguity in contract language against waiver’. Regardless of Suter’s references to ‘express waiver’, apparently no court has recommended disregarding unambiguous contractual terms merely because they lack magic words.”

16. “That is the best way to make sense of — and give effect to — the forum selection clause’s reference to ‘disputes arising under or in connection with’ the Policies.”
678. United States District Court, District of Maryland, 28 August 2009, Civil Action No. AW-08-1521

Parties:
- Plaintiff: AO Techsnabexport (Russian Federation)
- Defendant: Globe Nuclear Services and Supply, Limited (US)

Published in: 2009 U.S. Dist. LEXIS 77419

Articles:
- I(1); III; IV(1)(a); V; V(1)(a); V(1)(c); V(1)(d); V(2)(b)

Subject matters:
- limited review of award
- grounds for refusal of enforcement are exhaustive
- enforcement of partial award (no)
- estoppel (collateral) and res judicata of partial award
- waiver of defense
- due process as ground for violation of public policy
- partial and final award in conflict (no)


Facts

On 31 January 2000, Globe Nuclear Services and Supply, Limited (GNSS) and AO Techsnabexport (Tenex), a joint stock company fully owned by the Ministry of Property Relations of the Russian Federation, executed a framework contract (the Contract) for the supply of natural uranium hexafluoride by Tenex to GNSS, a US company whose principal officers and executives were at the relevant time Russian nationals and which was owned in part by Tenex. The parties concluded a further agreement providing, inter alia, that Tenex was entitled to sell uranium to GNSS only as long as Tenex owned at least 25 percent of GNSS shares (the 25 percent provision). The Contract provided that it was governed by Swedish law. It also contained a clause for arbitration of disputes at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).
A dispute arose between the parties when, on 3 November 2003, Tenex informed GNSS that it would no longer deliver uranium to GNSS as of 1 January 2004, because such deliveries were “inimical to the interests of the Russian Federation”. GNSS opposed Tenex’s decision. On 20 November 2003, it filed a request for arbitration with the SCC.

On 11 November 2005, a panel of three arbitrators issued a procedural order dividing the arbitration in two phases (the Order): the tribunal would first issue a partial award on liability and then a final award on damages. The Order also stated that the arbitrators would decide at a later stage whether to allow evidence resulting from ongoing criminal investigations in the Russian Federation and the United States against Dr. Dmitrievich Pismenny, who controlled GNSS through a company called TKST or Texi, Inc. (TKST). Pismenny was thought to have purchased GNSS’s share with stolen international assistance funds and on behalf of an organized criminal group. Such evidence, if admitted, would be heard at a hearing on 18-20 December 2006.

On 31 August 2006, the SCC arbitral tribunal issued a Partial Award holding that Tenex was liable for breach of the Contract. In the subsequent proceedings on damages, Tenex raised the objection that the Contract was invalid on grounds of fraud. On the basis of the evidence obtained in the criminal proceedings, it claimed that Pismenny had fraudulently induced Tenex to enter into the Contract by representing that GNSS was ultimately owned by the Russian State through TRINITI, a state-owned organization that was acting in Tenex’s interest. This turned out not to be the case. On 11 June 2007, the arbitral tribunal issued a Final Award in favor of Tenex, dismissing all of GNSS’s claims and awarding Tenex damages and compensation for its legal expenses. The tribunal found that (1) as TKST could not be deemed the legitimate owner of the GNSS shares, it did not have the authority to appoint GNSS representatives; as a consequence, the arbitration had been commenced by unauthorized GNSS representatives, GNSS’s counsel did not have the requisite authority and GNSS lacked standing in the arbitration. The tribunal also found (2) that GNSS fraudulently induced Tenex to enter into the Contract by representing that TKST, which owned 62 percent of GNSS shares, was ultimately owned by the Russian State and was acting in the interest of Tenex, whereas there was a secret arrangement that TKST would act in the interest of other companies. As a consequence, the Contract was invalid.

GNSS sought annulment of the Final Award in Sweden. Tenex in turn sought enforcement of the Final Award in the United States; GNSS moved to confirm the Partial Award holding that Tenex was liable for breach of contract.
The United States District Court for the District of Maryland, per Alexander Williams, Jr., US DJ, granted enforcement of the Final Award and denied enforcement of the Partial Award.

The court first agreed with Tenex’s argument that the Partial Award did not deal with the same issues as the Final Award, did not address the validity of the Contract and did not award damages. In the Final Award, the arbitrators clearly stated that GNSS claims were dismissed in their entirety, that GNSS lacked standing to participate in the arbitration and that the Contract was invalid. The court therefore dismissed GNSS’s “convoluted” argument that it was nevertheless entitled to enforcement of the Partial Award because of the statement in the Final Award that the Final Award “presupposes a detailed knowledge of the Partial Award on Liability Issues and the two Awards should be read together”.

The district court then rejected all of GNSS’s objections to enforcement of the Final Award under the 1958 New York Convention. It found, inter alia, that although Tenex did not file a duly certified copy of the Final Award when requesting its enforcement, it did so later in the proceedings, thereby meeting the conditions in Art. IV(1)(a) Convention. The court also held that there was no conflict between the Partial Award and the Final Award, which dealt with different issues, and that the arbitrators did not become functus officio after the Partial Award. It further denied GNSS’s argument that the Final Award relied on witness statements submitted in violation of the parties’ agreed arbitration procedures, that is, written statements of witnesses who were not subject to cross-examination. Though finding that there was a violation of procedure in this respect, the court held that GNSS clearly waived this defense by insisting on going forward with the hearing and never requesting an adjournment in order to cross-examine the witnesses. The court finally dismissed GNSS’s public policy argument, concluding that it was not persuaded that the arbitration had been “in any way fundamentally unfair”.

Excerpt

(...) [1] “As a result of the criminal enterprise between Dr. Pismenny and others, the Tribunal found that:

(1) TKST/Texi, Inc. could not be considered legitimate owners of the shares in GNSS. The Tribunal stated that they did not have the authority to appoint executive bodies of GNSS and/or other representatives of GNSS;
(2) The arbitration proceedings were initiated by unauthorized representatives of GNSS and therefore the proceedings should be terminated; 
(3) GNSS’s counsel did not have the requisite authority to represent GNSS in the arbitration and thus GNSS lacked standing in the arbitration; 
(4) GNSS fraudulently induced Tenex to enter into the GNSS-Tenex Contract because Pismenny and the others led Tenex to believe that TKST, which owned 62% of GNSS shares, was a company ultimately owned by the state and controlled by Minatom (Ministry for Atomic Energy of the Russian Federation) and that TKST was acting in the interest of Tenex. Dr. Pismenny’s group concealed the fact that there was a secret arrangement that TKST would act in the interests of Omeka and Texi, two companies controlled by the group; 
(5) The GNSS-Tenex Contract was invalid or unenforceable as a matter of Swedish law and international public policy.

The Tribunal dismissed all of GNSS’s claims and awarded Tenex US$ 5,000,000.00 and EUR 800,000.00 with interest, as compensation for its legal representation and other expenses for presenting its case to the Arbitral Tribunal.

[2] “Tenex now seeks entry of a Final Order and Judgment in its favor pursuant to Sects. 9 and 13, Title 9 of the United States Code. GNSS filed an appeal with the SVEA Court of Appeals in Stockholm, an intermediary court of appeals. As of the date of the hearing before this Court, the appeal before the SVEA Court of Appeals was still pending, and the parties were scheduled to appear before the SVEA Court in October 2009. The Court inquired whether the parties requested for the Court to stay the instant case pending the outcome of the hearing before the SVEA Court. The parties indicated that they did not file such a request.”

I. STANDARD OF REVIEW

[3] “Judicial review of an arbitration award in federal court is ‘substantially circumscribed’. Three S Delaware, Inc. v. Dataquick Information Systems, Inc., 492 F.3d 520, 527 (4th Cir. 2007). In fact a district court’s authority to review an arbitration decision ‘is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all …’. Id. Arbitration awards are governed by the Federal Arbitration Act, (FAA) and when an arbitration award is issued by a foreign authority, its confirmation is governed by the FAA under the framework set forth in the [1958 New York
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II. PARTIAL AWARD

[4] “GNSS argues that the Court must confirm the 31 August 2006 award because it was made in accordance with the terms and provisions of the parties’ agreement and is, in all respects, proper. It argues that the 31 August 2006 award is final and binding with regard to all issues addressed in that award, and therefore the Court should confirm the award, and pursuant to 9 U.S.C. Sect. 207 the Court should enter an order confirming the Partial Award judgment for GNSS.

[5] “In response, Tenex contends that the motion to confirm the Partial Award should be seen for what it is – a litigation tactic. The reality is that the Partial and Final Awards dealt with completely different issues. Tenex maintains that the Partial Award addressed the following: (i) whether a provision entitling Tenex to sell uranium to GNSS only as long as Tenex owned at least 25% of GNSS, had become a part of the Contract; and (ii) Tenex’s objection that the breach of the transparency provision in the HEU-agreement permitted Tenex to unilaterally terminate the Contract. On the other hand, Tenex avers that the Final Award addressed whether it would be inequitable for GNSS to invoke the Contract in light of the fact that GNSS was aware of a fraudulent scheme surrounding the execution of the Contract. In contrast to the Final Award, the Partial Award does not address the validity of the GNSS-Tenex Contract. Moreover, Tenex argues that GNSS’s delay tactic is clear given the fact that GNSS made no efforts to confirm the Partial Award for two years after it was issued.

[6] “The Court agrees with Tenex, and declines to confirm the Partial Award. The Partial Award was issued almost a year before the Final Award, and almost

a year before that, the Tribunal issued a procedural order in which they stated that the issues of liability and damages were bifurcated and if deemed necessary they would hear evidence regarding the validity of the GNSS-TENEX contract after the hearing on the partial award, and that is just what the Tribunal did. Moreover, although the hearing on damages was held, the Tribunal never awarded any damages to GNSS. They reserved issuing any award until they heard arguments regarding the validity of the contract. Also of significant importance, in the Final Award the Tribunal clearly stated that (1) GNSS’s claims were dismissed in their entirety; (2) GNSS lacked standing to participate in the arbitration process; and (3) the GNSS-TENEX contract was invalid or unenforceable. GNSS wants the Court to believe that despite these clear pronouncements by the Arbitration Tribunal, it is somehow nevertheless entitled to the Partial Award.

[7] “GNSS points to no case law to support this proposition and instead makes a convoluted argument that because the Final Award states, ‘this Final Award presupposes a detailed knowledge of the Partial Award on Liability Issues and the two Awards should be read together’, that means they are entitled to have the Partial Award confirmed. Id. GNSS also has inundated the Court with documents and exhibits in an attempt to have the Court conduct a somewhat de novo review of the arbitration process that was held. It asks the Court to review much of the evidence and testimony that was put before the Arbitration Tribunal and find that there were procedural irregularities during the process, and even though all parties were represented by counsel throughout, the process was somehow unfair and should be set aside.

[8] “As the Court stated from the outset, judicial review of an arbitration award in federal court is ‘substantially circumscribed’. Three S Delaware, Inc., 492 F.3d at 527. The confirmation process does not give the opposing party another bite at the apple to re-litigate all the issues that were properly presented to and decided by the Arbitral Tribunal. And even if the Court were inclined to confirm the Partial Award, which it is not, such a confirmation would not entitle GNSS to any monetary damages because the Tribunal never awarded any. For these reasons, GNSS’s Motion to Confirm the 31 August 2006 Partial Award is denied.”

III. FINAL AWARD

[9] “The Final Award is governed by the FAA. The FAA provides that upon the application of a party to an arbitration award made pursuant to the New York
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Convention, a district court shall enter ‘an order confirming the award’, unless the court ‘finds one of the [seven] grounds for refusal or deferral of recognition or enforcement of the award specified in the ... Convention’. 9 U.S.C. Sect. 207. The public policy in favor of international arbitration is strong, thus, in opposing the award, GNSS faces a high burden.

“GNSS raised the following defenses under the Convention in their opposition to Tenex’s Motion to Confirm the Final Arbitration Award: 3

(1) Tenex Has Failed to Comply with the Jurisdictional Requirements for Recognition of the Final Award;
(2) A conflict exists between the Partial Award and the Final Award that renders the Final Award unenforceable pursuant to Art. V(1)(a) and (c) and Art. V(2)(b) of the New York Convention;
(3) The Final Award was based on arguments not submitted by the parties, thereby rendering the Final Award unenforceable pursuant to Art. V(1)(c);
(4) The Final Award was issued to protect the interest of a third party which was not subject to the arbitration agreement, thereby rendering the Final Award unenforceable pursuant to Art. V(1)(a) and (c);
(5) The Final Award relies on witness statements submitted in violation of the parties’ agreed arbitration procedures, thereby rendering the Final Award unenforceable pursuant to Art. V(1)(d); and;
(6) The Arbitration Tribunal improperly imported into the arbitration a sham criminal prosecution from the Russian Federation, thereby rendering the Final Award unenforceable as contrary to the public policy of the United States pursuant to Art. V(2)(b)....

The Court will address each of GNSS’s defenses in turn.

“GNSS first argues that Tenex has failed to comply with the jurisdictional requirements for recognition of the Final Award, because Tenex had not, at the time GNSS filed its response, furnished the Court with a ‘duly certified’ copy of the Final Award, and therefore the Court must decline to confirm the Final Arbitration Award. Art IV(1) of the Convention states that ‘to obtain the recognition and enforcement [of a foreign arbitration award], the party applying for the recognition and enforcement shall, at the time of application supply: (a)

3. "In its Answer, as an Affirmative Defense, GNSS claimed that it was precluded from meaningfully presenting its case and thus the Court should decline to confirm the Final Arbitration Award. Although GNSS cites Art. V(1)(b) in support of this defense, in substance the defense is not one of the enumerated defenses under the Convention, and accordingly the Court will not address it.”
the duly authenticated original award or a duly certified copy thereof; (b) the original agreement … or a duly certified copy thereof. Failure to comply with the requirements of Art. IV(1) constitutes grounds for refusal or deferral of the request. See Czarina, LLC v. W.E. Poe Syndicate, 358 F.3d 1286, 1292 (11th Cir. 2004). In its Reply to the Motion to Confirm Final Arbitration Award, Tenex supplied the Court with a certified copy of the Final Arbitration Award. Therefore, the Court finds that Tenex has satisfied the jurisdictional requirements of the Convention, and will not refuse to confirm the award on this basis.

[12] “Second, GNSS contends that a conflict exists between the Partial Award and the Final Award that renders the Final Award unenforceable pursuant to Art. V(1)(a) and (c) and Art. V(2)(b) of the Convention. GNSS makes several different points to support this proposition. GNSS bases its position upon the argument that the Final Award is to be ‘read together’ with the Partial Award, and that the Partial Award must be confirmed before confirmation of the Final Award can be considered. Specifically, GNSS points to the language in the introduction of the Final Award that states, ‘this Final Award presupposes a detailed knowledge of the Partial Award on Liability Issues and the two Awards should be read together’. Given this supposed conflict, GNSS then argues that confirming the Final Award would violate the doctrines of res judicata and collateral estoppel.

[13] “While GNSS’s argument is creative, it still must fail. The Court fully comprehends the process this arbitration proceeding took, and what the Tribunal sought to accomplish when it rendered the Partial Award and the Final Award. The two awards are different. The Partial Award found that Tenex breached its obligations under the GNSS-Tenex contract and was liable for that breach. The Final Award addressed unethical conduct and fraud which, the Tribunal believed, vitiated or caused the contract to be invalid or unenforceable. Moreover, because the Court has already addressed GNSS’s Motion to Confirm the Partial Award, and because the Court does not find any conflict or inconsistency between the Partial Award and the Final Award, the doctrines of res judicata and collateral estoppel are inapplicable.

[14] “Next, GNSS contends that the Final Award was based on arguments not submitted by the parties, thereby rendering the Final Award unenforceable pursuant to Art. V(1)(c). GNSS advances two arguments on this point. GNSS first argues that the arbitrators’ mandate was defined by the grounds invoked by the parties, and the arbitration agreement itself, and once the Tribunal decided
the issues placed before it by the parties, its mandate was extinguished, and the Tribunal became functus officio, or without authority, to readdress those issues. GNSS maintains that, in the Final Award, the Tribunal addressed the same issues that were addressed in the Partial Award, and thus the Final Award was issued after the Tribunal’s mandate was extinguished.

[15] “While Tenex agrees that the doctrine of functus officio has some application under Swedish law, it maintains that its application is analogous to the doctrines of res judicata and collateral estoppel. With that in mind, Tenex argues, the issues addressed under the Partial Award were wholly different than those addressed in the Final Award, because the Final Arbitration Award dealt with the validity of the GNSS-Tenex contract, and not the breach of the contract, as the Partial Award did, and therefore neither res judicata nor collateral estoppel apply. Tenex also contends that the procedural history of the arbitration proceedings makes clear what issues were properly before the Tribunal. When Tenex learned of the pending criminal charges against Mr. Adamov, Tenex raised the issue with the Tribunal and reserved the right to bring forth any evidence relevant to the arbitration proceedings made available to it by the criminal proceedings. Because the Tribunal granted Tenex’s request, the issue of invalidity was properly before the Tribunal when Tenex raised it at a later date.

[16] “The Court finds that the tri-furcated order of the arbitration proceedings was clearly set from the beginning. The Tribunal indicate that it would address the issue of breach first, any damages as a result of the breach, second, and if necessary, any arguments regarding the invalidity of the GNSS-Tenex contract based on evidence generated by the parallel criminal proceedings. And by agreeing to the procedural order, GNSS cannot now argue that when the Tribunal issued the Partial Award, it was without the authority to address the validity of the contract. From the outset, the parties placed a number of issues on the table for the Tribunal to address, and the Tribunal established a procedural order in which to address all the issues. It is true that the procedural process by which the arbitration was conducted was somewhat unusual, but that was due to the unique facts and surrounding circumstances underlying the parties’ dispute. Thus, the Court does not find that the Final Award was unenforceable pursuant to Art. V(1)(c).

[17] “Secondly, GNSS maintains that the Final Award is based on grounds not invoked by Tenex because the Tribunal specifically stated that, ‘the claim [made by Tenex] that this contract was signed as part of a fraudulent scheme doesn’t work under Swedish Law, because they’re all on the inside of the so-called scheme’. Id. This statement was made by the Tribunal after Tenex argued that the contract was invalid under ‘both’ Sect. 30 and Sect. 33 of the Swedish
Contract Act (SCA). But then GNSS contends that the Tribunal contradicted itself because it then considered Tenex’s argument under Sect. 33, and took a broader view of the invalidity question than was put to it. GNSS argues that the grounds Tenex invoked for applying Sect. 33 were not the same as the grounds the Tribunal invoked for applying Sect. 33.

[18] “The Court does not find any impropriety or irregularity on the part of the Tribunal justifying avoidance of the award. Tenex raised both Sect. 30 and Sect. 33 as a basis for arguing that the GNSS-Tenex contract should be declared invalid and unenforceable. Perhaps the explanation given by the Tribunal regarding Sect. 33 did not mirror the argument presented by Tenex; however, the Court does not find that the Tribunal contrived its own independent basis for invalidating the contract. The Tribunal’s reasoning was based on an argument presented by Tenex.

[19] “As a fourth basis to support its argument that the Court should not confirm the Final Award, GNSS argues that the Final Award was issued to protect the interest of a third party which was not subject to the arbitration agreement, thereby rendering the Final Award unenforceable pursuant to Art. V(1)(a) and (c). In particular, GNSS argues that the Tribunal found that it would be inequitable to enforce the GNSS-Tenex contract because ‘other persons’ in Tenex and Minatom were unaware that Tenex did not control GNSS…. This conclusion, GNSS argues, exceeds that Tribunal’s mandate, because it was ‘based on the interests of the government of the Russian Federation’, which was neither a party to the GNSS-Tenex contract nor a participant in the arbitration proceedings, and therefore it constitutes a decision on a matter beyond the scope of the parties’ submission to the Arbitration Tribunal. Id.

[20] “In substance, the Court finds that this argument is not among the seven defenses enumerated in the Convention, and even if it were, the argument still fails. Nowhere in the Final Award did the Tribunal address the interests of any party beyond Tenex and GNSS, and in finding in favor of Tenex, the Tribunal reached its conclusion based on what ‘Tenex believed’, not on what the Russian Federation or any other entity believed…. Therefore, this fourth basis must also fail.

[21] “As a fifth basis to oppose the confirmation of the Final Award, GNSS contends that The Final Award relies on witness statements submitted in violation of the parties’ agreed arbitration procedures, thereby rendering the Final Award unenforceable pursuant to Art. V(1)(d). GNSS argues that at the December 2006 hearing, Tenex submitted, over its objections, written statements of individuals who were not subject to cross-examination. GNSS states that the Tribunal improperly admitted these statements into evidence and
then relied on these improper statements in reaching its decision on the Final Award. In its briefs and at the hearing, GNSS argued that this was improper because the rules the parties adopted prior to the commencement of the arbitral proceeding required that "any person submitting a "written statement" to the Tribunal must "appear to testify and subject itself to oral examination by the party calling the witness, the other party and the Tribunal".".

[22] "At the hearing, the Court inquired as to whether these alleged violations were brought to the attention of the Tribunal. In response, counsel for GNSS informed the Court that it did not raise the issue, and when asked why not, counsel for GNSS stated, 'because we generally objected to the entire proceeding and all of their evidence and all of their exhibits, which included witness statements ...'. GNSS never made any specific objection to the witness statements. Thereafter, GNSS then went ahead with the hearing.

[23] "The Court finds that it does appear that there was a violation of procedure with respect to witness statements that were considered and not admitted in accordance with evidentiary rules requiring cross-examination. But, the Court is still constrained to rule against GNSS on this issue because GNSS insisted on going forward with the hearing, never requested an adjournment or continuance in order to cross-examine the witnesses. Thus, the Court finds that this constituted a clear waiver on the part of GNSS, and GNSS cannot now assert what they failed to raise before the Tribunal.

[24] "Finally, GNSS contends that the Arbitration Tribunal improperly imported into the arbitration a sham criminal prosecution from the Russian Federation, thereby rendering the Final Award unenforceable as contrary to the public policy of the United States pursuant to Art. V(2)(b). GNSS aggregates all of its previous arguments and asks the Court to find that the Final Award is contrary to the 'rule of law' and thus also contrary to the public policy of the United States.... GNSS references the Tribunal's consideration of facts extracted from the parallel criminal proceedings at length as a basis for its argument. It contends that the Tribunal improperly credited conclusions of Russian prosecutors, and 'issued a Final Award on contractual liability in favor of Tenex -- precisely the opposite of its liability finding in favor of GNSS in the Partial Award'.... GNSS also argues that the Tribunal 'sanctioned ... [the] gathering [of evidence for the purpose of using it in the commercial arbitration']....

[25] "Again, the Court disagrees with GNSS’s account of what the Tribunal found at each stage of the process. Furthermore, at the hearing, when asked what proof he had to support his contention about documents being intentionally
gathered for the purpose of subverting the commercial arbitration, counsel for GNSS conceded, ‘we do not have documentation’. Id.

[26] “Perhaps GNSS’s public policy is better understood as a lack of due process argument, whereby GNSS cannot point to anything specific but yet wants the Court to believe that the arbitration proceeding was somehow fundamentally unfair. The Court understands this argument, given the complexity of the facts and circumstances surrounding the GNSS-Tenex contract dispute. But the Court is not persuaded that the process was in any way fundamentally unfair. Each party chose an arbitrator to sit on the Tribunal. Each party, with the assistance of counsel, agreed to the procedure by which the arbitration proceeding would be governed. Each party had the opportunity to be heard by the Tribunal. While no hearing is ever perfect or free from any irregularities, the Court finds that nothing in the record suggests that GNSS did not get a fair hearing and have an opportunity to make a meaningful presentation of its case.”

IV. CONCLUSION

[27] “Accordingly, the Court will grant the Motion to Confirm the Final Arbitration Award, and will deny the Motion to Confirm the Partial Award.”
679. United States Court of Appeals, Second Circuit, 28 September 2009, Case No. 07-1815-cv

Parties: Petitioner/Appellant: Frontera Resources Azerbaijan Corporation (Cayman Islands)  
Respondent/Appellee: State Oil Company of the Azerbaijan Republic

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Articles: III

Subject matter: – personal jurisdiction over foreign State

Commentary Cases: ¶ 301; [9] = ¶ 501

Facts

In November 1998, Frontera Resources Azerbaijan Corporation (Frontera) and the State Oil Company of the Azerbaijan Republic (SOCAR) entered into an agreement under which Frontera developed and managed oil deposits in Azerbaijan and delivered oil to SOCAR. The agreement contained an arbitration clause. A dispute arose between the parties when SOCAR did not pay for certain oil deliveries. Frontera sought to sell the oil to parties outside of Azerbaijan, but SOCAR seized it. In 2003, Frontera commenced arbitration against SOCAR in Sweden. In January 2006, an arbitral tribunal found in favor of Frontera, awarding approximately US$ 1.24 million plus interest. Frontera sought enforcement of the Swedish award in the United States.

In 2007, the United States District Court for the Southern District of New York denied enforcement for lack of personal jurisdiction, holding that SOCAR had insufficient contacts with the forum; it also declined to find quasi in rem jurisdiction over SOCAR, because Frontera had not identified specific SOCAR assets within the court’s jurisdiction (479 F.Supp.2d 376, 388 (S.D.N.Y. 2007)). Frontera appealed.

The United States Court of Appeals for the Second Circuit, before Walker, Parker, and Raggi, CJJ in an opinion by John M. Walker, Jr., reversed the decision denying enforcement and remanded the action to the court below.
The Court of Appeals first noted that it had never decided in earlier cases whether personal or quasi in rem jurisdiction is required to enforce foreign awards under the 1958 New York Convention – a question answered in the affirmative by other courts. It now held that federal courts, which are courts of limited jurisdiction, must have a specific basis for jurisdiction in respect of both the subject matter of the action and the parties. Frontera’s argument that the grounds for denying enforcement under the Convention are exhaustively listed in Art. V and that courts cannot impose a further, jurisdictional requirement was unfounded. The Second Circuit reasoned that the exclusivity of Art. V limits the substantive defenses a party can raise against enforcement, but “it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought”.

As a consequence, the district court correctly examined whether it had jurisdiction over either SOCAR or SOCAR’s property as a prerequisite to the enforcement of the Swedish award sought by Frontera.

The Court of Appeals disagreed however with the district court’s holding that it was compelled under Second Circuit precedent to find that SOCAR had minimum contacts with the forum as a prerequisite to the enforcement action. The Due Process Clause in the US Constitution states that no person shall be deprived of life, liberty or property without due process of law; the Supreme Court interpreted this Clause to demand that a defendant who is not present in the forum have certain minimum contacts with it, so that the suit does not offend “traditional notions of fair play and substantial justice”. In its 1981 decision in *Texas Trading* (see below), the Second Circuit held that a foreign state was a “person” within the meaning of the Due Process Clause – hence, the minimum-contacts requirement applied in respect of foreign states (this holding was later extended to state instrumentalities). The district court applied this precedent to the present case and concluded that the enforcement petition should be denied because SOCAR had no minimum contacts with the forum.

The Court of Appeals noted that “the case law has marched in a different direction” since *Texas Trading* was decided. In particular, the Supreme Court held in *Weltover* in 1992 that the States of the Union are not “persons” for purposes of the Due Process Clause – thus, they cannot avail themselves of the Clause’s safeguards. The Circuit concluded that there is no reason why foreign states should be in a more favorable position than the States of the Union. As a consequence, they do not enjoy the protection of the Due Process Clause.

However, overruling *Texas Trading* did not necessarily mean that SOCAR was excluded from the minimum-contacts requirement, because SOCAR was not a sovereign state and it had not been determined in the district court proceedings –
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because *Texas Trading* rendered the question unnecessary – whether it was an agent of Azerbaijan and should be treated in the same manner as the state. The Court of Appeals therefore remanded the case to the district court to determine in first instance (1) whether SOCAR was an agent or instrumentality of Azerbaijan and, if not, (2) whether it was entitled to the protections of the Due Process Clause.

Excerpt

[1] “Frontera contends (1) that a court does not need personal jurisdiction over a party in order to confirm a foreign arbitral award against that party, and (2) that *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981)] should be overruled, because the Due Process Clause’s protections should not apply to foreign states or their instrumentalities. Frontera also challenges the district court’s denial of jurisdictional discovery.”

I. JURISDICTION OVER SOCAR

[2] “When considering a district court’s dismissal for lack of personal jurisdiction, we review its factual findings for clear error and its legal conclusions de novo. See *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 22 (2d Cir. 2004).

[3] “Generally, personal jurisdiction has both statutory and constitutional components. A court must have a statutory basis for asserting jurisdiction over a defendant, see *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005), and the Due Process Clause typically also demands that the defendant, if not present within the territory of the forum … have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

“The district court dismissed Frontera’s petition because it concluded that SOCAR’s contacts with the United States were insufficient to meet the Due Process Clause’s demands for personal jurisdiction. Frontera contends that this was in error both because personal jurisdiction is not necessary for the requested relief, and because SOCAR is not entitled to the Due Process Clause’s protections. We address each argument in turn.”

1. Personal Jurisdiction

Frontera argues that a district court does not need personal jurisdiction over a respondent to confirm a foreign arbitral award against that party. Yet, Frontera contends, the district court’s dismissal of its petition ‘necessarily rest[ed] upon an assumption’ that personal jurisdiction over SOCAR was indispensable.

“We read the district court’s decision differently. Although the district court considered whether it could assert personal jurisdiction over SOCAR, it did not make that question dispositive. Instead, after finding SOCAR’s contacts with the United States insufficient to establish personal jurisdiction, the district court examined whether it had jurisdiction over any of SOCAR’s assets, because ‘in the absence of minimum contacts, quasi in rem jurisdiction may be exercised to attach property to collect a debt’. Frontera, 479 F.Supp.2d at 387. Thus, by suggesting that the district court required personal jurisdiction, Frontera misunderstands the framework of the court’s analysis. And to the extent that Frontera’s challenge is to the district court’s requirement of either personal or quasi in rem jurisdiction, it is without merit.

“We have previously avoided deciding whether personal or quasi in rem jurisdiction is required to confirm foreign arbitral awards pursuant to the [1958] New York Convention. See Dardana Ltd. v. A.O. Yuganskneftegaz, 317 F.3d 202, 207 (2d Cir. 2003). However, the numerous other courts to have addressed the issue have each required personal or quasi in rem jurisdiction. See, e.g., Telcordia Tech Inc. v. Telkom SA Ltd., 458 F.3d 172, 178-179 (3d Cir. 2006); Glencore Grain Rotterdam B.V. v. Shivanath Rai Harnanain Co., 284 F.3d 1114, 1120-1122 (9th Cir. 2002); Base Metal Trading, Ltd. v. OJSC ‘Novokuznetsky Aluminum Factory’, 283 F.3d 1114, 1120-1122 (9th Cir. 2002).
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[9] “Frontera contends that none of these courts addressed the precise argument it advances here: that there is no ‘positive statutory or treaty basis’ for such a jurisdictional requirement. The federal statute that implements the New York Convention requires a court to confirm an award ‘unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention’. 9 U.S.C. Sect. 207. Art. V of the New York Convention ‘provides the exclusive grounds for refusing confirmation’, Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997), and specifies seven grounds for refusing to enforce an arbitral award, none of which include a lack of jurisdiction over the respondent or the respondent’s property, see New York Convention at Art. V, 21 U.S.T. at 2517. Frontera accordingly argues that we cannot impose a jurisdictional requirement if the Convention does not already have one.

[10] “We disagree. Unlike ‘state courts[,] [which] are courts of general jurisdiction[,] … federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction’. Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd., 156 F.3d 432, 435 (2d Cir. 1998) (citing Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850)). ‘The validity of an order of a federal court depends upon that court’s having jurisdiction over both the subject matter and the parties.’ Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982). While the requirement of subject matter jurisdiction ‘functions as a restriction on federal power’, id. at 702, the need for personal jurisdiction is fundamental to ‘the court’s power to exercise control over the parties’, Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979). ‘Some basis must be shown, whether arising from the respondent’s residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court’s power.’ Glencore Grain, 284 F.3d at 1122 (quoting Transatl. Bulk Shipping, 622 F.Supp. at 27).

6. “This position is not as novel as Frontera suggests. The Ninth Circuit rejected an identical argument in Glencore Grain. See 284 F.3d at 1121 (‘[I]t is not significant in the least that the … [New York] Convention lacks language requiring personal jurisdiction over the litigants. We hold that neither the Convention nor its implementing legislation removed the district courts’ obligation to find jurisdiction over the defendants in suits to confirm arbitration awards.’).”
“Because of the primacy of jurisdiction, ‘jurisdictional questions ordinarily must precede merits determinations in dispositional order’. Sinochem Int’l Co. v. Malay. Int’l Shipping Corp., 549 U.S. 422, 431 (2007). ‘[T]he items listed in Art. V as the exclusive defenses … pertain to substantive matters rather than to procedure.’ Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 496 (2d Cir. 2002)…. Art. V’s exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought.

Frontera argues that the Supreme Court suggested otherwise in Shaffer v. Heitner, 433 U.S. 186 (1977), in the following footnote:

‘Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.’

But while this footnote indicated, in dicta, that a court might not need jurisdiction over a respondent’s person when enforcing a debt – ‘the Shaffer principle’ that Frontera makes much of … – it nonetheless assumed that such a court would still have jurisdiction over the respondent’s property. And in this regard, the district court’s approach in no way conflicted with Shaffer. The district court did not view its lack of personal jurisdiction over SOCAR as fatal to Frontera’s petition; instead, the court then appropriately considered whether it could assert jurisdiction over SOCAR’s property.

We therefore hold that the district court did not err by treating jurisdiction over either SOCAR or SOCAR’s property as a prerequisite to the enforcement of Frontera’s petition. The district court may, however, have given the Constitution’s Due Process Clause an unwarranted place in its analysis, which we discuss next.”

2. Due Process Clause

The district court recognized that our precedent Texas Trading compelled it to hold that SOCAR possessed rights under the Due Process Clause, thus...
requiring that jurisdiction over SOCAR meet the minimum contacts requirements of International Shoe. The district court, however, questioned Texas Trading’s soundness. These doubts were well-founded.

[16] “The Due Process Clause famously states that ‘no person shall be ... deprived of life, liberty or property without due process of law’. U.S. Const. amend. V.... In Texas Trading, we held that a foreign state was a ‘person’ within the meaning of the Due Process Clause, and that a court asserting personal jurisdiction over a foreign state must – in addition to complying with the FSIA – therefore engage in ‘a due process scrutiny of the court’s power to exercise its authority’ over the state. 647 F.2d at 308, 313 (‘[T]he [FSIA] cannot create personal jurisdiction where the Constitution forbids it.’). Texas Trading reached this conclusion without much analysis, while also noting that cases on point were ‘rare’. Id. at 313. The FSIA had been enacted only five years earlier, and pre-FSIA suits against foreign states were generally supported by quasi in rem jurisdiction. Id. Subsequently, we applied Texas Trading not only to foreign states but also to their agencies and instrumentalities. See, e.g., Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 579-580 (2d Cir. 1993)9 (applying Texas Trading to a foreign trading company wholly owned by Romania that ‘promoted ship sales through its governmental office in Manhattan’).

[17] “Since Texas Trading, however, the case law has marched in a different direction. In Republic of Argentina v. Weltover, Inc., the Supreme Court ‘assum[ed], without deciding, that a foreign state is a “person” for purposes of the Due Process Clause’, 504 U.S. 607, 619 (1992), but then cited South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966), which held that ‘States of the Union are not “persons” for purposes of the Due Process Clause’, 504 U.S. at 619. Weltover did not require deciding the issue because Argentina’s contacts satisfied the due process requirements, see id. at 619 and n. 2, but the Court’s implication was plain: If the ‘States of the Union’ have no rights under the Due Process Clause, why should foreign states? After Weltover, we noted that ‘we are uncertain whether [Texas Trading] remains good law’. Hanil Bank v. PT Bank Negara Indon., 148 F.3d 127, 134 (2d Cir. 1998). But we went no further in Hanil Bank because the due process requirements were satisfied in that case. See id.

[18] “The instant case is different, however, as only the Due Process Clause prevented the district court from asserting personal jurisdiction over SOCAR.

In **Price v. Socialist People’s Libyan Arab Jamahiriya**, 294 F.3d 82 (D.C. Cir. 2002), the D.C. Circuit reasoned that because ‘the word “person” in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union’, *Katzenbach*, 383 U.S. at 323, ‘absent some compelling reason to treat foreign sovereigns more favorably than “States of the Union”, it would make no sense to view foreign states as “persons” under the Due Process Clause’, 294 F.3d at 96. The Price court found no such reason, see id. at 95-100, and we find that case’s analysis persuasive.

As the Price court noted, the States of the Union ‘both derive important benefits [from the Constitution] and must abide by significant limitations as a consequence of their participation [in the Union]’, id. at 96, yet a “foreign State lies outside the structure of the Union”, id. (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934)).

If the States, as sovereigns that are part of the Union, cannot ‘avail themselves of the fundamental safeguards of the Due Process Clause’, *Price*, 294 F.3d at 97, we do not see why foreign states, as sovereigns wholly outside the Union, should be in a more favored position. This is particularly so when the Supreme Court has ‘[n]ever ... suggested that foreign nations enjoy rights derived from the Constitution’, and when courts have instead ‘relied on principles of comity and international law to protect foreign governments in the American legal system’. Id. For the reasons discussed by the Price court in its thorough opinion, we ‘are unwilling to interpret the Due Process Clause as conferring rights on foreign nations that States of the Union do not possess’. Id. at 99. Thus, we hold that the district court erred, albeit understandably in light of *Texas Trading*, by holding that foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause.

SOCAR argues otherwise by defending not Texas Trading’s reasoning but its significance as precedent. And, to be sure, our court’s decisions are binding until overruled by us sitting en banc or by the Supreme Court, *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004), neither of which has happened to

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10. “Price compared U.S. Const. Article I, Sect. 10 (prohibiting specific acts by the States), with id. at Article IV, Sect. 4 (‘The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.’), and id. at art. VI, cl. 2 (‘This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of the State to the Contrary notwithstanding.’). 294 F.3d at 96.”
Texas Trading. ‘We do, however, recognize an exception to this general rule where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent.’ Gelman v. Ashcroft, 372 F.3d 495, 499 (2d Cir. 2004) (internal quotation marks omitted). Although Weltover arguably casts sufficient doubt on Texas Trading to justify its overruling by this panel, see Hanil Bank, 148 F.3d at 134, we have nonetheless circulated this opinion to all active members of our court, and none has objected to our departure from Texas Trading. See United States v. Parkes, 497 F.3d 220, 230 n. 7 (2d Cir. 2007) (describing our ‘mini-en banc’ process).

[23] “Accordingly, to the extent that Texas Trading conflicts with our holding today that foreign states are not ‘persons’ entitled to rights under the Due Process Clause, it is overruled. Simply overruling Texas Trading, however, and holding that a sovereign state does not enjoy due process protections does not decide the precise question in this case, because SOCAR is not a sovereign state, but rather an instrumentality or agency of one. Frontera contends that, because the FSIA treats foreign states and their agencies and instrumentalities identically, see Kensington Int’l Ltd. v. Itoua, 505 F.3d 147, 153 (2d Cir. 2007) (citing 28 U.S.C. Sect. 1603(a)), we should treat SOCAR just as we would treat Azerbaijan for constitutional purposes. The simple fact that SOCAR is deemed a foreign state as a statutory matter, however, does not answer the constitutional question of SOCAR’s due process rights. SOCAR may indeed lack due process rights like a foreign state, but similar statutory treatment will not be the reason.

[24] “However, if the Azerbaijani government ‘exerted sufficient control over’ SOCAR ‘to make it an agent of the State, then there is no reason to extend to [SOCAR] a constitutional right that is denied to the sovereign itself’. TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C. Cir. 2005).11 Although ‘government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such’, this presumption can be overcome if the state so ‘extensively control[s]’ the instrumentality ‘that a relationship of principal and agent is created’, or if ‘adher[ing] blindly to the corporate form … would cause … injustice’. First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba (‘Bancec’), 462 U.S. 611, 626-627, 629, 632 (1983); see also Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 252 (2d Cir. 2000) (‘While the presumption of separateness is a strong one, it may be overcome if a corporate entity is so extensively controlled by the sovereign that the latter is effectively the agent of


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the former, or if recognizing the corporate entity as independent would work a fraud or injustice."

[25] “Although Bancce asked when a state instrumentality can be treated like its state for ‘the attribution of liability’, id. at 622 n. 11, we think, as the D.C. Circuit did in TMR Energy, that Bancce’s analytic framework is also applicable when the question is whether the instrumentality should have due process rights to which the state is not entitled. See TMR Energy, 411 F.3d at 301; see also, e.g., Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil., 965 F.2d 1375, 1382 (5th Cir. 1992) (‘The broader principles upon which Bancce was based ... are undoubtedly relevant whenever a plaintiff seeks to disregard a foreign government instrumentality....’). Accordingly, if SOCAR is an agent of the Azerbaijani state, as recognized in Bancce and subsequent cases, then, like Azerbaijan, SOCAR lacks due process rights.

[26] “The district court did not decide whether SOCAR is an agent of the state because Texs Trading rendered the question unnecessary and, unsurprisingly, there was scant briefing on the issue. SOCAR suggests that the parties’ lack of focus on the question should be fatal to Frontera’s position, because Frontera ‘bears the burden of proving that the corporate entity should not be presumed distinct from a sovereign or sovereign entity’. Zappia, 215 F.3d at 252. But the Bancce analysis and Frontera’s related burden were not relevant until our decision today, nor did Frontera argue that Bancce should apply. Cf. 1 Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 232 (2d Cir. 2006) (‘It is our role to ensure that in making factual findings, the district court applies the proper legal test and applies it correctly.’). Moreover, using the parties’ inattention to SOCAR’s relationship with Azerbaijan to decide that SOCAR is not an agent of the state would still not resolve this appeal. We would then have to determine whether SOCAR, as a corporation owned by a foreign state but not the state’s agent, was entitled to the Due Process Clause’s protections.

[27] “In TMR Energy, the D.C. Circuit called this last question ‘far from obvious’. 411 F.3d at 302 n.*. The TMR Energy court observed that “aliens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country”. Id. (quoting United States v. Verdugo-Urguidez, 494 U.S. 259, 271 (1990)) (alteration in TMR Energy). The Supreme Court has gone so far as to accord due process protections to privately owned foreign corporations. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418-419 (1984); see also, e.g., Bank Brussels Lambert v. Fidler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999); Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 571 (2d Cir. 1996). Whether, and to what extent, it would do so for state-owned
foreign corporations has not been decided. And, given the present posture of this litigation, it would be premature for us to address this question without hearing first from the court below. See Farricielli v. Holbrook, 215 F.3d 241, 246 (2d Cir. 2000) (per curiam) (‘It is our settled practice to allow the district court to address arguments in the first instance.’).

[28] “Accordingly, we choose to remand so that in the first instance the district court can determine, in light of Texas Trading’s demise and Bancec’s new relevance to this context, (1) whether SOCAR is an agent of Azerbaijan, and if not, (2) whether SOCAR is entitled to the protections of the Due Process Clause.”

II. JURISDICTIONAL DISCOVERY

[29] “Frontera also argues that the district court erred by rejecting its request for limited discovery of SOCAR’s contacts with the United States. We review the district court’s decision for an abuse of discretion. See Jazini v. Nissan Motor Co., 148 F.3d 181, 186 (2d Cir. 1998). This issue is relevant only if the Due Process Clause protects SOCAR, which is for the district court to determine on remand.

[30] ‘A district court has wide latitude to determine the scope of discovery’, In re Agent Orange Prod. Liab. Litig., 517 F.3d 76, 103 (2d Cir. 2008), and is typically within its discretion to deny jurisdictional discovery when ‘the plaintiff has not made out a prima facie case for jurisdiction’, Best Van Lines, Inc. v. Walker, 490 F.3d 239, 255 (2d Cir. 2007) (citing cases). Assuming for the moment that SOCAR has the jurisdictional protections of the Due Process Clause, to establish jurisdiction Frontera must show that SOCAR had ‘continuous and systematic general business contacts’ with the United States, Metro. Life Ins. Co., 84 F.3d at 568 (quoting Helicopteros, 466 U.S. at 416), a highly fact-sensitive ‘contextual inquiry’ with no one factor having ‘talismanic significance’, id. at 570-571.

[31] “Frontera argued that SOCAR’s production-sharing contracts with several U.S. oil companies and loan agreement with ‘a syndicate that included [a] U.S. bank’ brought it within the district court’s jurisdiction. Frontera, 479 F.Supp.2d at 386. Frontera also alleged that ‘it is highly likely that at least a portion of [SOCAR’s] oil and gas revenues are processed through US-based banks’. Id. at 386-387 (alteration in original). The district court dismissed this latter allegation as ‘conclusory’, and then found the rest of Frontera’s claims insufficient to demonstrate a prima facie case for jurisdiction, reasoning that ‘[t]he fact that American oil companies and one bank have entered into contracts with SOCAR
for oil production in Azerbaijan does not demonstrate a continuous and systematic presence in the United States’. Id. ‘In the absence of any prima facie showing of personal jurisdiction’, the district court found it ‘inappropriate to subject SOCAR to the burden and expense of discovery’ and denied Frontera’s request. Id. at 387.

[32] “Frontera contends that our decision in Seetransport demonstrates that the district court’s denial was erroneous. In Seetransport, we held that a foreign company’s ‘deliberate[]’ solicitations of business through US-based representatives ‘with a fair measure of permanence or continuity’ met the minimum requirements for general personal jurisdiction. 989 F.2d at 580. Frontera argues that SOCAR’s contracts with US oil and financial companies ‘were likely the product of the type of “deliberate solicitations”’ found sufficient in Seetransport, see id., and that the district court should therefore have granted jurisdictional discovery.... But this is pure speculation on Frontera’s part.

[33] “Seetransport addressed solicitations that were ‘deliberate[,] and not occasional[,] or casual[,]’, with the record establishing the defendant’s use of a New York office. 989 F.2d at 580. Here, the fact that SOCAR has relationships with American companies, without more, could just as easily be the result of occasional or casual solicitations, or solicitations outside the United States. Thus, because Frontera has not pointed to anything in the record that suggests otherwise, we will not disturb the district court’s discretionary decision not to allow discovery. See Best Van Lines, 490 F.3d at 255 (‘We conclude that the district court acted well within its discretion in declining to permit discovery because the plaintiff had not made out a prima facie case for jurisdiction.’). The district court is free to consider further discovery requests in light of the questions it must decide on remand.”

III. FORUM NON CONVENIENS

[34] “Finally, SOCAR asks us to affirm the district court’s dismissal on the alternate basis of forum non conveniens. Having dismissed for want of jurisdiction, the district court expressly declined to address this argument. Following ‘our settled practice’ of allowing district courts to address arguments in the first instance, Farricielli, 215 F.3d at 246, we express no view on SOCAR’s forum non conveniens argument, which it is free to raise again on remand.”
3. Tribunal Supremo de Justicia [Supreme Court of Justice], Political-Administrative Chamber, 21 May 2009, Case No. 2009-0188

Parties: Claimant: Astivenca Astilleros de Venezuela, C.A. (Venezuela)  
Defendant: Oceanlink Offshore III AS (Norway)

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Articles: II(3)

Subject matters: – (tacit) waiver of arbitration  
– invalidity of arbitration clause concerning future disputes (no)  
– arbitrability of disputes under Venezuelan law

Commentary Cases: ¶ 220; [26]-[30] = ¶ 223

Facts

On 14 February 2008, Astivenca Astilleros de Venezuela, C.A. (Astivenca) concluded a contract with PDVSA Petróleo, S.A. (PDVSA) under which Astivenca was to supply three logistical support vessels for PDVSA’s drilling activities. On 22 March 2008, Astivenca entered into a Memorandum of Agreement (MOA) with Oceanlink Offshore III AS and other Oceanlink entities (collectively, Oceanlink) for the bareboat charterparty of the M/N NOBLEMAN and the purchase of the M/N NORSEMAN to be employed as support vessels for PDVSA. Clause 16 of the MOA contained a London arbitration clause.

A dispute arose between the parties when Astivenca requested Oceanlink to finalize the two contracts as a condition for Astivenca’s payment of the last
installment of the agreed price. In reply, Oceanlink ordered the vessels to leave the site where they had been working for PDVSA.

On 6 October 2008, Astivenca commenced an action in the National Maritime Court of First Instance in Caracas against Oceanlink, seeking performance of the contract and damages. It also sought as an interim measure of protection that the M/N NOBLEMAN be prohibited from setting sail. On 7 October 2008, the court admitted the action against Oceanlink “and/or through the ship agents of the vessel” OCAMAR (Oficina Coordinadora de Apoyo Marítimo de la Armada); it also granted the interim measure. On 9 December 2008, counsel for Oceanlink filed a formal appearance in the proceeding and contested the summons to OCAMAR (which were the ship agents designated by Astivenca). On 12 February 2009, he “preliminarily and jointly” raised certain preliminary objections and defenses on the merits, arguing in particular that the court lacked jurisdiction because of the arbitration clause in the MOA.

On 17 February 2009, the court granted Oceanlink’s preliminary objection and held that it lacked jurisdiction. Astivenca appealed that decision by requesting a ruling on jurisdiction from the Supreme Court of Justice.

The Supreme Court affirmed the lower court’s decision, finding that there was a valid arbitration clause between the parties and that Oceanlink did not tacitly waive its right to arbitration.

The Court reasoned at the outset that the MOA undisputedly contained an arbitration clause, that the Venezuelan Law on Commercial Arbitration expressly provides that parties may refer the resolution of disputes to arbitration by an arbitration agreement in writing that may be contained either in the contract or in a separate document, and that under the 1958 New York Convention disputes falling within the scope of an arbitration agreement must be referred to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed.

Astivenca argued that the arbitration agreement was invalid because Oceanlink tacitly waived its right to arbitration. The Court reasoned that there can be tacit waiver of arbitration (1) when the party does not raise the preliminary objection of lack of jurisdiction but rather discusses the merits of the case or (2) when it does raise that objection through an inappropriate means, that is, other than by raising a preliminary objection of lack of jurisdiction. Neither was the case here. Oceanlink’s first actions in the proceeding – claiming that the summons was defective and opposing the interim measure – did not amount to a discussion of the merits of the case, and Oceanlink properly objected to the jurisdiction of the Venezuelan court by raising an objection of lack of jurisdiction.
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The Court then denied Astivenca’s argument that the arbitration clause was null and void because it was concluded before the dispute arose, holding that arbitration clauses in contracts are expressly allowed.

Finally, Astivenca argued that the jurisdiction of the Venezuelan courts could not be derogated from because under Venezuelan law actions concerning a vessel in Venezuelan waters must be heard by the Venezuelan courts. The Court held that the parties validly derogated from this provision by stipulating an arbitration clause. Also, there was no exclusive jurisdiction of the Venezuelan courts on public policy grounds.

Excerpt

[1] “We must decide on the ruling on jurisdiction [regulación de jurisdicción] sought on 20 February 2009 by [Astivenca] against the decision issued by the National Maritime Court of First Instance on 17 February 2009, which granted the preliminary objection of lack of jurisdiction raised by [Oceanlink].

[2] “We must examine the argument made by the defendant, when raising the preliminary objection, that (1) the Venezuelan courts lack jurisdiction because the [MOA] signed by the parties contains an arbitration clause and (2) that the hierarchical order established in Art. 1 of the Private International Law Act applies because of the existence of foreign elements; in the defendant’s opinion, this leads to the application of the Implementing Law [Ley Aprobatoria] of the [1958 New York Convention], as well as the Law on Commercial Arbitration and the Law on Maritime Commerce.

[3] “In respect of the request for a ruling on jurisdiction, the claimant in turn objects that in the present case ‘Oceanlink tacitly submitted to the jurisdiction of the Venezuelan courts’, because ‘the first action of the defendant on 9 December 2008 was to oppose the attachment ordered by the National Maritime Court of First Instance while objecting in the main action that the party summoned lacked capacity’. The claimant also points out that ‘Art. 11 of the Law on Maritime Commerce does not permit the voluntary derogation of Venezuelan jurisdiction in the present case’ and that ‘the Venezuelan courts have exclusive jurisdiction’.  

1. Art. 1 of the Venezuelan Private International Law Act reads:

“Factual issues related to foreign legal systems shall be governed by the relevant rules of public international law, in particular, those set out in the international treaties in force in Venezuela; lacking these, the Venezuelan private international law rules shall apply; lacking these, analogy shall be resorted to and, finally, generally accepted principles of private international law shall govern.”

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jurisdiction to decide this dispute because the vessel that is the object of the present action is in Venezuelan waters’.

[4] “The case at issue certainly has substantial foreign elements, such as the domicile of the defendant (Oslo, Norway) [and the fact that] the object of the sale contract contained in the MOA is the vessel NOBLEMAN, which is registered in Douglas, the capital city of the Isle of Man. Hence, Art. 39 et seq. of the Private International Law Act, which provide for the jurisdiction of the Venezuelan courts, would apply.

[5] “However, since the defendant relies on the existence of an arbitration clause that prevents the Venezuelan courts from hearing the claim, we must take into account the provisions of the MOA signed on 22 March 2008 between Oceanlink and Astivenca … duly translated by a sworn translator. Clause 16 [MOA] provides:

‘16. Arbitration
(a)* This agreement shall be governed by and interpreted in accordance with English law and any dispute out of this agreement shall be referred to arbitration in London.
* 16(a), 16(b) and 16(c) are alternatives; those that are not applicable are excluded. If none is excluded, alternative 16(a) applies.’

[6] “The clause reproduced above provides that the contracting parties shall refer the resolution of disputes that may arise under the MOA to arbitration. In fact, Art. 5 of the Law on Commercial Arbitration expressly provides that parties may refer the resolution of controversies or disputes to arbitration, by means of an agreement called ‘arbitration agreement’. This provision reads:

‘An “arbitration agreement” is an agreement by which the parties agree to refer to arbitration all or some of the disputes that have arisen or may arise between them in respect of a contractual or non-contractual legal relationship. The arbitration agreement can be a clause contained in a contract, or a separate agreement.

By an arbitration agreement the parties undertake to refer their disputes to the decision of arbitrators and waive their right to file their claims before the courts. The arbitration agreement excludes ordinary court jurisdiction.’ (Emphasis by the Chamber)
Thus, if the arbitration agreement is contained in a contractual provision, it becomes binding on the parties who signed the contract, and by that provision [the parties] waive their right to refer their disputes to the ordinary courts.

Art. 6 further provides:

‘The arbitration agreement shall be evidenced in writing in any document or set of documents which express the parties’s intention to submit to arbitration. The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if it is in writing and the reference implies that the clause is part of the contract.…’

Based on the provisions reproduced above, we note that in the present case the parties intended to include an arbitration clause [in their contract], with the purpose of referring possible disputes to institutional arbitration and ruling out the jurisdiction of the courts to hear any dispute relating to the contract of sale of the vessel. We also note that the dispute at issue arose in respect of an alleged breach of contract. Since this is not a non-arbitrable dispute, such as the disputes indicated in Art. 3 of the Law on Commercial Arbitration, the parties may indeed refer their dispute to arbitration.

Further, we must rely on the Implementing Law of the [1958 New York Convention], published in Official Gazette [Gaceta Oficial] no. 4.832 Extraordinary of 29 December 1994. This Convention was ratified by Venezuela and Norway and applies, as its name indicates, to

‘the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. ’ [Quotation of Art. II omitted.]

The Article reproduced above binds the States that have signed the Convention to refer disputes between parties who have provided for an arbitration agreement in a contract to arbitration, unless it is proved that the agreement is null and void, inoperative or incapable of being performed. In this sense, we have repeatedly held that the court must consider the following essential elements for the objection of [the existence of] an arbitration agreement to be valid in respect of the jurisdiction of the courts:
'(a) The validity and efficacy of the arbitral agreement or clause, that is, compliance with and respect of the requirements and conditions set by the law for such agreements to have full substantive and procedural legal effect, so that as a consequence the jurisdiction to settle conflicts and disputes between citizens, which the courts of the Republic have by constitutional mandate, is weakened. Among the requirements are those relating to the stipulations contained in the arbitration clause or agreement (no vacillations or contradictions as to the (non-)submission to arbitrators), as well as those relating to the capacity of those who agree to arbitration by concluding the agreement or the contract in which it is contained. 

(b) A procedural conduct of the parties showing the unequivocal, indisputable and non-fraudulent intention to submit to arbitration. This conduct must demonstrate the undisputable intention not to submit to the jurisdiction of the ordinary courts but rather to the arbitral award that the appointed arbitrators shall issue. 

These elements must be necessarily examined in order to ascertain whether the exception of arbitration is or is not valid and legitimate in respect of the jurisdiction of the ordinary courts. Hence, consideration of two situations which together are decisive for this examination is also mandatory: 

(b)(1) The said “tacit waiver of arbitration”, when court proceedings have been commenced and the other party has made a formal appearance and has not invoked in “[due form: ex Art. 346 no. 1 of the Code of Civil Procedure” the arbitration clause and has submitted to the jurisdiction of the ordinary court, by either requesting dismissal of the claim (by contesting the merits thereof), filing a counter-claim (mutual claim) or recognizing the claim (confesión fícta). It shall also be deemed that there is tacit waiver when the existence of an arbitration clause has not been invoked in “due form”, that is, through the appropriate procedural mechanism according to the special procedural legislation (in our system, the preliminary objection under Art. 346 no. 1 of the Code of Civil Procedure). (See, among others, decisions no. 1209 and no. 832 of 20 June 2001 and 12 June 2002 in the cases Hoteles Doral C.A. and Inversiones San Ciprian, C.A., respectively).’

[12] “The decision partially reproduced above defines two cases where it is deemed that there has been ‘a tacit waiver of arbitration’: (1) when the defendant makes a formal appearance and does not raise the preliminary objection of lack of jurisdiction but rather discusses the merits, either by contesting the claim or
by filing a counterclaim; (2) ... when the defendant makes a formal appearance and relies on the existence of an arbitration clause but does not do so through the appropriate procedural mechanism, such as the preliminary objection of lack of jurisdiction.

[13] “As to the first case – that is, that the defendant, having made a formal appearance, discusses the merits and does not raise the preliminary objection of lack of jurisdiction – we note that the first actions of counsel for ... Oceanlink, on 9 December 2008, were to ... claim that the summons of [Oceanlink] was defective as it was done through ship agents OCAMAR, which had been indicated by Astivenca as the charterer of the vessel ... to oppose the interim measure prohibiting [the vessel] to set sail issued on 7 October 2008 and subsidiarily to ask that the prohibition be lifted against a guarantee. According to the claimant, these actions prove the defendant’s intention to submit to the jurisdiction of the Venezuelan courts, because the defendant did not raise the preliminary objection of lack of jurisdiction at the first opportunity in which it made a formal appearance.

[14] “We note in this respect that, although raising the preliminary objection of lack of jurisdiction was not counsel for the defendant’s first action, his actions did in no way amount to a discussion of the merits, such as contesting the claim or filing a counterclaim. On the contrary, his first action was to make a formal appearance and argue that there was a mistake in the summons of the defendant, which mistake was recognized by the Maritime Court of First Instance.... Rather, he filed his preliminary defenses and defenses on the merits on 12 February 2009, in accordance with the provisions in Art. 865 CCP, which applies pursuant to Art. 8 of the Decree with Force of Law on Maritime Procedure.

[15] “Nor is the defendant’s 9 December 2008 opposition to the interim measure of prohibition to set sail a tacit waiver of the arbitration clause, since it was simply aimed at enervating that measure’s possible effect on the vessel that was the object of the contract. In no manner can this be deemed a discussion of the merits.

[16] “The [considerations] above have a legal basis in Art. 45 of the Private International Law Act, which provides:

‘Tacit submission shall result, for the claimant, from filing the claim and, for the defendant, from performing any action in the proceedings, either personally or through counsel, other than moving for dismissal for lack of jurisdiction or opposing an interim measure of protection.’
“As to the second case for a tacit waiver of arbitration – that is, where the defendant, having made a formal appearance, does not rely on the existence of the arbitration clause through the appropriate procedural mechanism – we note that in the present case counsel for the defendant duly raised the preliminary objection of lack of jurisdiction, which is the appropriate procedural means by which to rely on the existence of an arbitration clause.

Hence, we conclude that there is no proof that in the present case the defendant intended to renounce, either tacitly or expressly, to this alternative means of dispute resolution.

Furthermore, we note that it appears from the file of the case that the defendant, when raising the preliminary objection of lack of jurisdiction, said:

‘In execution of the said arbitration agreement dated 1 December 2008, [Oceanlink] informed Astivenca that it intended to resort to arbitration pursuant to Clause 16 of the MOA, validly signed by the parties, in respect of its claim for the loss suffered as a result of the failure of Astivenca to pay US$ 2,500,000 ... consequently inviting [Astivenca] to jointly appoint an arbitrator to deal with the dispute.... Subsequently, [Oceanlink] filed a formal request for arbitration (“Claims submissions” [English original]) on 30 January 2009, in which it claimed over US$ 15,000,000.00 from Astivenca. Reception thereof was confirmed by the arbitrators of both parties, that is, Robert Gaisford and Alec J. Kazantzis....’

In fact, there are communications in the file, duly translated by a sworn translator, in which counsel for [the parties] took the necessary steps to appoint the arbitrators who would carry out the arbitration in London, in accordance with the MOA; this was not contested by [Astivenca] when seeking the ruling on jurisdiction. From all the above it can be inferred that in fact the parties have already decided to submit to arbitration.

Counsel for the claimant argues however that in the present case there was an ‘express submission to the jurisdiction of the Venezuelan courts’ on the part of the defendant because [the defendant] stated that ‘at the appropriate procedural opportunity it shall submit evidence [proving] its agreement that the action be heard by the court’.

We note in respect of this argument that the claimant relies on the statement filed by counsel for the defendant on 9 December 2008, which says:

‘To the extent that [Oceanlink], as owner of the M/N NOBLEMAN, has designated Antillana de Transporte, C.A. as ship agents – in accordance
with Art. 32 of the Law on Maritime Commerce and prior to the alleged summons – to represent the vessel in the Water District [Circunscripción Acuática] of Guanta-Puerto La Cruz, those ship agents consequently have active and passive standing, and we will prove their appointment at the appropriate procedural opportunity."

[23] “We do not deduce in any way from the text reproduced above an intention to expressly submit the dispute to the jurisdiction of the Venezuelan courts, the more so since such (express) submission must be in writing pursuant to Art. 44 of the Private International Law Act. It is rather an intention to submit to arbitration and take the dispute away from the jurisdiction [of the courts] that can be evinced from the actions of counsel for the defendant.

[24] “Another aspect that calls for an analysis is the argument made by the claimant in its statement on the ruling on jurisdiction that the arbitration clause is invalid ‘because it was of an earlier date of the non-performance by the defendant and the action commenced by [Astivenca]’.

[25] “We must make clear in this respect that arbitration as a means of procedural self-settlement [of disputes] can be provided for in an arbitration clause contained in a contract, [that is,] an agreement by which the parties agree beforehand to take disputes arising between them away from the jurisdiction of the Judiciary. Hence, the fact that it is concluded beforehand in no manner invalidates the arbitration clause. (See decision of this Chamber no. 01356 of 31 July 2007 in SAFEC SANTANDER.)

[26] “As to the argument that the Venezuelan courts have exclusive jurisdiction under Art. 12 of the Law of Maritime Commerce ‘because the vessel object of the present action is in Venezuelan waters’, we note that … [Art. 12] grants jurisdiction to the Special Waters Jurisdiction [Jurisdicción Especial Acuática] over the actions indicated in that Article, concerning foreign vessels in waters on which [Venezuela] has exclusive sovereignty. In the case at issue there is a vessel in Venezuelan waters, on which [Venezuela] has exclusive sovereignty, which could in principle imply that Venezuelan courts, specifically the Jurisdicción Especial Acuática, have jurisdiction. However, by stipulating the arbitration clause the parties provided that they would refer their disputes to arbitration. In any event, Venezuelan public policy is not affected.

[27] “Equally, we must note, as concerns the appellant’s argument that the Venezuelan courts have exclusive jurisdiction, that Art. 47 of the Private International Law Act establishes the principle that jurisdiction may not be derogated from [inderogabilidad de jurisdicción], or exclusive jurisdiction. This provision reads:
‘There can be no derogation by agreement from the jurisdiction of the Venezuelan courts, as provided for in the provisions above, in favor of foreign courts or arbitrators deciding abroad, when the claim concerns rights relating to immovable goods located in the Republic or the subject matter cannot be the objection of a transaction or affects the fundamental principles of Venezuelan public policy.’

[28] “The present case does not concern any of the cases in [Art. 47], in respect of which the parties may not, by agreement, submit to arbitration.

[29] “As to the claimant’s argument that in the present case there is no provision ‘allowing’ agreements derogating from the jurisdiction of the Venezuelan courts within the meaning of Art. 11 of the Law on Maritime Commerce, we must first consider [Art. 11], which reads:

‘Where allowed, once the fact underlying the action has arisen, the jurisdiction of the Venezuelan courts can be derogated in favour of courts or arbitration.’

[30] “This provision confirms the reasoning in the present decision, that when a court of the Jurisdicción Especial Acuífera is hearing a claim, that claim can be referred to arbitration, if (1) this is allowed, that is, in those cases where, for example, there is no exclusive jurisdiction, which is not the case here, as already explained, and (2) the arbitration clause is valid (as it is here, as we indicated above). Hence, the claimant’s reasoning that the arbitration clause is invalid is unfounded, since the provision itself (Art. 11) allows for a derogation of jurisdiction in arbitration proceedings.…

[31] “As a consequence, we hold that the ruling on jurisdiction sought by counsel for the claimant is inadmissible and consequently declare that the Venezuelan Judiciary lacks jurisdiction over the case at issue. For this reason, we affirm the decision issued by the Maritime Court of First Instance on 17 February 2009, which granted the preliminary objection of lack of jurisdiction raised by counsel for [Oceanlink]…. So we decide.”

(….)