Part V – A

Court Decisions on the New York Convention 1958

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 65 New York Convention decisions rendered in 21 countries, bringing the total to 1,890 decisions from 74 countries and 2 jurisdictions. According to the Treaty Section of the United Nations, there are, as of 15 November 2013, 149 Contracting States (and 28 extensions) to the New York Convention.

Since Volume XXXV (2010), the *Summary* of each decision, prefaced by a short recap, is published in print; a detailed *Excerpt* of the decision is available online at <www.kluwerarbitration.com>. A code provided with the Yearbook allows readers to access the relevant Volume online, as well as the preceding Volume. Readers who have purchased Volume XXXVIII (2013) can therefore access materials from both this Volume and Volume XXXVII (2012).

Information on how to access the online materials is provided in a **Note to the Reader** at the beginning of this Volume (p. xiii).

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 of 1961" by Dr. Dominique Hascher, which was originally published in Volume XX (1995), was published in Yearbook XXXVI (2011) at pp. 504-562. Volume 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".

A **Consolidated Commentary** on the 1958 New York Convention (Volume XXII (1997) – Volume XXVII (2002)) by Prof. Albert Jan van den Berg was published in Volume XXVIII (2003) of the Yearbook. This Commentary may be read in conjunction with the Consolidated Commentary on the 1958 New York Convention Volume XX (1995) – Volume XXI (1996) published in Volume XXI (1996).

An extensive commentary of court decisions applying the 1958 New York Convention will appear as the **second edition** of Prof. van den Berg's 1981 treatise *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*.

Information regarding the New York Convention is available at: <www.newyorkconvention.org>. This website contains the text of the Convention in the six authentic languages and unofficial translations in numerous other languages; the *travaux preparatoires*; the list of Contracting States; an Annotated List of Topics; court decisions per topic, hyperlinked to the decision published at <www.kluwerarbitration.com>; court decisions per country. In the course of 2014 this website will post all court decisions in their entirety as originally published.

The present Volume contains as usual an **Index of Cases**, which facilitates research of New York Convention cases by both article of the Convention and subject matter. A Consolidated Index of Cases reported in Volumes XXII (1997) – XXVIII (2003) was published in Volume XXVIII (2003). An Index of Cases was also provided in each Volume since 2004.

A Consolidated Index of Cases applying the New York Convention reported in the Yearbook since 1976 is available online on the ICCA website at <www.arbitration-icca.org>. The ICCA website also contains lists of all other court decisions and arbitral awards published in the Yearbook since Volume I (1976). All lists are updated each year with the materials published in the current volume of the Yearbook.

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 1,900 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.

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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.

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NEW YORK CONVENTION OF 1958

LIST OF CONTRACTING STATES

(*as of 11 November 2013*)[1]

State	*Ratification, Accession (a), Succession (s)*	*Reservation*[2]
Afghanistan	30 Nov. 2004a	1 - 2
Albania	27 June 2001a	–
Algeria	7 Feb. 1989a	1 - 2
American Samoa[3]	*3 Nov. 1970*	*1 - 2*
Antigua and Barbuda	2 Feb. 1989a	1 - 2
Argentina[4]	14 Mar. 1989	1 - 2
Armenia	29 Dec. 1997a	1 - 2
Australia	26 Mar. 1975a	–

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. I(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."

Australian Antartic Territory[5]	*26 Mar.*	*1975a*	–
Austria	2 May	1961a	–
Azerbaijan	29 Feb.	2000a	–
Bahamas	20 Dec.	2006a	–
Bahrain	6 Apr.	1988a	1 - 2
Bangladesh	6 May	1992a	–
Barbados	16 Mar.	1993a	1 - 2
Belarus[6]	15 Nov.	1960	1
Belgium	18 Aug.	1975	1
Belize[7]	*24 Feb.*	*1981*	*1*
Benin	16 May	1974a	–
Bermuda[7]	*12 Feb.*	*1980*	*1*
Bolivia	28 Apr.	1995a	–
Bosnia and Herzegovina[8]	1 Sep.	1993s	1 - 2
Botswana	20 Dec.	1971a	1 - 2
Brazil	7 June	2002a	–
Brunei Darussalam	25 July	1996a	1
Bulgaria[6]	10 Oct.	1961	1
Burkina Faso	23 Mar.	1987a	–
Cambodia	5 Jan.	1960a	–
Cameroon	19 Feb.	1988a	–
Canada[9]	12 May	1986a	2
Canton Island[3]	*3 Nov.*	*1970*	*1 - 2*
Cayman Islands[7]	*24 Feb.*	*1981*	*1*
Central African Republic	15 Oct.	1962a	1 - 2
Chile	4 Sep.	1975a	–
China, PR[10]	22 Jan.	1987a	1 - 2

5. Extension made by Australia upon acceding to the Convention.
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

Christmas Island[5]	*26 Mar.*	*1975a*	–
Cocos (Keeling) Island[5]	*26 Mar.*	*1975a*	–
Colombia[11]	25 Sep.	1979a	–
Comoro Islands[12]	*26 June*	*1959*	*1*
Cook Islands	12 Jan.	2009a	–
Costa Rica	26 Oct.	1987	–
Côte d'Ivoire	1 Feb.	1991a	–
Croatia[8]	26 July	1993s	1 - 2
Cuba[6]	30 Dec.	1974a	1 - 2
Cyprus	29 Dec.	1980a	1 - 2
Czech Republic[13]	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]	*3 Nov.*	*1970*	*1 - 2*
El Salvador	26 Feb.	1998	–
Estonia	30 Aug.	1993a	–
Faeroe Islands[14]	*10 Feb.*	*1976*	*1 - 2*
Fiji	27 Sep.	2010a	
Finland	19 Jan.	1962	–
France	26 June	1959	1
French Polynesia[12]	*26 June*	*1959*	*1*
Gabon	15 Dec.	2006a	–

apply to Macao, with the reservations made by China.

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.

Georgia	2 June	1994a	–
Germany[15]	30 June	1961	–
	(GDR: 20 Feb.	1975a)	
Ghana	9 Apr.	1968a	–
Gibraltar[7]	*24 Sep.*	*1975*	*1*
Greece	16 July	1962a	1 - 2
Greenland[14]	*10 Feb.*	*1976*	*1 - 2*
Guam[3]	*3 Nov.*	*1970*	*1 - 2*
Guatemala	21 Mar.	1984a	1 - 2
Guernsey[7]	*19 Apr.*	*1985*	*1*
Guinea	23 Jan.	1991a	–
Haiti	5 Dec.	1983a	–
Holy See	14 May	1975a	1 - 2
Honduras	3 Oct.	2000a	–
Hong Kong[16]	*21 Apr.*	*1977*	*1 - 2*
Hungary	5 Mar.	1962a	1 - 2
Iceland	24 Jan.	2002a	
India	13 July	1960	1 - 2
Indonesia	7 Oct.	1981a	1 - 2
Iran	15 Oct.	2001a	1 - 2
Ireland	12 May	1981a	1
Isle of Man[7]	*23 May*	*1979*	*1*
Israel	5 Jan.	1959	–
Italy	31 Jan.	1969a	–
Jamaica	10 July	2002a	1 - 2
Japan	20 June	1961a	1
Jersey[7]	*28 May*	*2002*	*1*
Jordan	15 Nov.	1979	–
Kazakhstan	20 Nov.	1995a	–
Kenya	10 Feb.	1989a	1
Korea, Republic of	8 Feb.	1973a	1 - 2
Kuwait	28 Apr.	1978a	1
Kyrgyzstan	18 Dec.	1996a	–

15. Extension made by FR Germany to West Berlin, 30 June 1961.
16. Extension made by PR China with effect from 1 July 1997. See fn. 10.

Lao People's Democratic Republic	17 June	1998a	–
Latvia	14 Apr.	1992a	–
Lebanon	11 Aug.	1998a	1
Lesotho	13 June	1989a	–
Liberia	16 Sep.	2005a	–
Liechtenstein	7 July	2011a	1
Lithuania[6]	14 Mar.	1995a	1
Luxembourg	9 Sep.	1983	1
Macao[17]	*12 Nov.*	*1999*	*1 - 2*
Madagascar	16 July	1962a	1 - 2
Malaysia	5 Nov.	1985a	1 - 2
Mali	8 Sep.	1994a	–
Malta[18]	22 Jun.	2000a	1
Marshall Islands	21 Dec.	2006a	–
Mauritania	30 Jan.	1997a	–
Mauritius	19 June	1996a	1
Mexico	14 Apr.	1971a	–
Moldova, Republic of[8]	18 Sep.	1998a	1
Monaco	2 June	1982	1 - 2
Mongolia	24 Oct.	1994a	1 - 2
Montenegro[19]	23 Oct.	2006s	1 - 2
Morocco	12 Feb.	1959a	1
Mozambique[20]	11 June	1998a	–
Myanmar	**16 Apr**	**2013a**	**–**
Nepal	4 Mar.	1998a	1 - 2
Netherlands	24 Apr.	1964	1
Netherlands Antilles[21]	*24 Apr.*	*1964*	*1*
New Caledonia[12]	*26 June*	*1959*	*1*

17. Extension made by PR China with effect from 19 July 2005. See fn. 10.
18. The Convention applies in Malta with respect to arbitration agreements concluded after the date of Malta's accession to the Convention.
19. On 3 June 2006, Montenegro became independent. In a letter to the Secretary-General dated 10 October 2006, the Government of the Republic of Montenegro notified its succession to, inter alia, the 1958 New York 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.

New Zealand	6 Jan.	1983a	1
Nicaragua	24 Sep.	2003a	–
Niger	14 Oct.	1964a	–
Nigeria	17 Mar.	1970a	1 - 2
Norfolk Island[5]	*26 Mar.*	*1975*	–
Norway[22]	14 Mar.	1961a	1
Oman	25 Feb.	1999a	–
Pakistan	14 Jul.	2005	1
Panama	10 Oct.	1984a	–
Paraguay	8 Oct.	1997a	–
Peru	7 July	1988a	–
Philippines	6 July	1967	1 - 2
Poland[23]	3 Oct.	1961	1 - 2
Portugal	18 Oct.	1994a	1
Qatar	30 Dec.	2002a	–
Puerto Rico[3]	*3 Nov.*	*1970*	*1 - 2*
Romania[6]	13 Sep.	1961a	1 - 2
Russian Federation[6,24]	24 Aug.	1960	1
Rwanda	31 Oct.	2008a	
San Marino	17 May	1979a	–
São Tomé and Principe	**20 Nov**	**2012a**	**–**
Saudi Arabia	19 Apr.	1994a	1
Senegal	17 Oct.	1994a	–
Serbia[8,25]	12 Mar.	2001	1 - 2
Singapore	21 Aug.	1986a	1

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.

Slovakia[13]	28 May 1993s	1
Slovenia[8]	6 July 1992s	1 - 2
South Africa	3 May 1976a	–
Spain	12 May 1977a	–
Sri Lanka	9 Apr. 1962	–
St. Pierre et Miquelon[12]	*26 June 1959*	*1*
St. Vincent and the Grenadines	12 Sep. 2000a	1 - 2
Surinam[26]	24 Apr. 1964	1
Sweden	28 Jan. 1972	–
Switzerland[2]	1 June 1965	–
Syrian Arab Republic	9 Mar. 1959a	–
Tajikistan	14 Aug. 2012a	1[27]
Tanzania, United Republic of	13 Oct. 1964a	1
Thailand	21 Dec. 1959a	–
The Former Yugoslav Republic of Macedonia[8]	10 Mar. 1994s	2
Trinidad and Tobago	14 Feb. 1966a	1 - 2
Tunisia	17 July 1967a	1 - 2
Turkey	2 July 1992a	1 - 2
Uganda	12 Feb. 1992a	1
Ukraine[6]	10 Oct. 1960	1
United Arab Emirates	21 Aug. 2006a	–
United Kingdom of Great Britain and Northern Ireland	24 Sep. 1975a	1
United States of America	30 Sep. 1970a	1 - 2
Uruguay	30 Mar. 1983a	–
Uzbekistan	7 Feb. 1996a	–
Venezuela	8 Feb. 1995a	1 - 2
Viet Nam[28]	12 Sep. 1995a	1 - 2

26. 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.
27. Tajikistan declared that it will apply the Convention to differences and arbitral awards arisen after the Convention entered into force in Tajikistan and made in the territory of another Contracting State; it will not apply the Convention with regard to differences related to immovable property.
28. 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.

Virgin Islands[3]	*3 Nov. 1970*	*1 - 2*
Wake Island[3]	*3 Nov. 1970*	*1 - 2*
Wallis and Futuna Islands[12]	*26 June 1959*	*1*
Zambia	14 Mar. 2002a	–
Zimbabwe	29 Sep. 1994a	–

NEW YORK CONVENTION OF 1958 INDEX OF CASES REPORTED IN VOLUME XXXVIII (2013)

Prof. Albert Jan van den Berg

All 1958 New York Convention cases reported in the Yearbook since Volume I (1976) are indexed according to a **list of topics** (¶ 001 to ¶ 914, attached below) that facilitates information retrieval.[1] Topics also link the court decisions to numbered sections of the (Consolidated) **Commentary** on the New York Convention, published in the Yearbook in the following years:

- *Yearbook Key*, accompanying Yearbook XV (1990):
  Cumulative Indexes of Commentaries and Cases Volumes I (1976) – XV (1990);
- Yearbook XVI (1991):
  Consolidated Commentary Cases Reported in Volumes XV (1990) – XVI (1991);
- Yearbook XIX (1994):
  Consolidated Commentary Cases Reported in Volumes XVII (1992) – XIX (1994);
- Yearbook XXI (1996):
  Consolidated Commentary Cases Reported in Volumes XX (1995) – XXI (1996);
- Yearbook XXVIII (2003):
  Consolidated Commentary Cases Reported in Volumes XXII (1997) – XXVII (2002).

An extensive commentary of court decisions applying the 1958 New York Convention – using the same list of topics – will appear as the **second edition** of Prof. Albert Jan van den Berg's 1981 treatise *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*.

1. These topics can also be used as a search tool for New York Convention materials in the KluwerArbitration database <www.kluwerarbitration.com>, where all Yearbook materials are posted.

The list of topics below is annotated in <www.newyorkconvention.org>, where each topic is hyperlinked to the relevant decision at <www.kluwerarbitration.com>.

LIST OF TOPICS

ARTICLE V(2) – PUBLIC POLICY AS GROUND FOR REFUSAL OF ENFORCEMENT *EX OFFICIO*

¶ **518** DISTINCTION DOMESTIC – INTERNATIONAL PUBLIC POLICY

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GROUND *b*: PUBLIC POLICY
¶ **520** *Default of a party*
¶ **521** *Lack of impartiality of arbitrator*
¶ **522** *Lack of reasons in award*
¶ **523** *Irregularities in the arbitral procedure*
¶ **524** *Other cases*

ARTICLE VI

ADJOURNMENT OF DECISION ON ENFORCEMENT (¶ **601**)

ARTICLE VII(1) – MORE-FAVORABLE-RIGHT PROVISION AND COMPATIBILITY PROVISION

¶ **701** MORE-FAVORABLE-RIGHT PROVISION IN GENERAL
¶ **702** DOMESTIC LAW ON ENFORCEMENT OF FOREIGN AWARD
¶ **703** BILATERAL AND MULTILATERAL TREATIES IN GENERAL
¶ **703(A)** MULTILATERAL TREATIES
¶ **704** EUROPEAN CONVENTION OF 1961
¶ **704(A)** PANAMA CONVENTION OF 1975
¶ **704(B)** BILATERAL TREATIES
¶ **704(C)** ROME TREATY OF 1958 AND COUNCIL REGULATION (EC) NO. 44/2000

ARTICLE VII(2)

RELATIONSHIP WITH GENEVA TREATIES OF 1923 AND 1927 (¶ **705**)

ARTICLE XI

FEDERAL STATE CLAUSE (¶ **911**)

ARTICLE XIV

GENERAL RECIPROCITY CLAUSE (¶ **914**)

INDEX OF CASES

¶ 001 INTERPRETATION OF THE CONVENTION
Index Volume XXXVIII (2013): Belize 2 (sub 51, 59-75 and 78); Portugal 3; Romania 4

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.

¶ 101 AWARD MADE IN THE TERRITORY OF ANOTHER (CONTRACTING) STATE (PARAGRAPHS 1 AND 3 – FIRST RESERVATION OR "RECIPROCITY RESERVATION")
Index Volume XXXVIII (2013): Australia 38 (sub 8-12 and 23-28)

¶ 113 IMPLEMENTING LEGISLATION
Index Volume XXXVIII (2013): Belize 2

¶ 114 IRAN-US CLAIMS TRIBUNAL
Index Volume XXXVIII (2013): 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 XXXVIII (2013): No new decisions are reported.

¶ 202 *Contents of arbitration agreement*
Index Volume XXXVIII (2013): No new decisions are reported.

PARAGRAPHS 1 AND 2: AGREEMENT IN WRITING

¶¶ 203-204 *Formal validity, uniform rule and municipal law*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 205 *Signatures*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 206 *Exchange of letters or telegrams*
Index Volume XXXVIII (2013): 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.

B. REFERRAL TO ARBITRATION

¶ 217 *In general*
Index Volume XXXVIII (2013): Israel 7; Israel 8; US 781; US 794

¶ 218 *Referral is mandatory*
Index Volume XXXVIII (2013): India 49

¶ 219 *There must be a dispute*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 220 *"Null and void", etc.*
Index Volume XXXVIII (2013): China 8; India 49; Israel 9; Jamaica 1; Russian Federation 35; US 784

¶ 221 *Law applicable to "null and void", etc.*
(For formal validity and applicable law, see ¶¶ 203-204 above)
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 222 *Arbitrator's competence and separability of the arbitration clause*
Index Volume XXXVIII (2013): Argentina 4

¶ 223 *Arbitrability*
(See also Article V(2), sub Ground *a*. "Arbitrability", ¶ 519 below)
Index Volume XXXVIII (2013): Jamaica 1

¶ 224 C. DECLARATORY JUDGMENT ON VALIDITY ARBITRATION AGREEMENT
Index Volume XXXVIII (2013): No new decisions are reported.

D. MULTI-PARTY DISPUTES

¶ 225 *Related arbitrations (consolidation, etc.)*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 226 *Third parties*
(See also Article I, sub "Problems Concerning the Identity of a Party", ¶ 106 above)

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.

¶ 303 ESTOPPEL/WAIVER
Index Volume XXXVIII (2013): Belize 2 (sub 136-138); Brazil 30; China 7; Germany 146 (sub 3-14); Germany 147 (sub 21-27); Spain 73 (sub 12 and 25-26); Spain 74 (sub 29-30); Spain 75 (sub 18-19); US 782 (sub 6-15); US 783 (sub 26-27)

¶ 304 SET-OFF/COUNTERCLAIM
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 305 ENTRY OF JUDGMENT CLAUSE
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 306 PERIOD OF LIMITATION FOR ENFORCEMENT
Index Volume XXXVIII (2013): Ukraine 3

¶ 307 INTEREST ON AWARD
Index Volume XXXVIII (2013): US 789

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.

ARTICLE V

GROUNDS FOR REFUSAL OF ENFORCEMENT IN GENERAL

¶ 501 GROUNDS ARE EXHAUSTIVE
Index Volume XXXVIII (2013): Australia 38 (sub 12 and 29-30); France 54 (sub 1-2); Ukraine 5 (sub 10); US 779 (sub 9-10); US 783 (sub 4); US 787 (sub 4); US 791 (sub 3)

¶ 502 NO RE-EXAMINATION OF THE MERITS OF THE ARBITRAL AWARD
Index Volume XXXVIII (2013): Austria 24 (sub 40-41 and 45-53); Belize 2 (sub 106 and 110-113); Brazil 27 (sub 15-16); Brazil 28 (sub 3 and 13-28); Brazil 30; Brazil 31 (sub 14); Czech Republic 2; India 50; Lithuania 2 (sub 11); Netherlands 46 (sub 16-17); Netherlands 47 (sub 3, 14 and 17); Spain 75 (sub 16-17); Ukraine 5 (sub 14); US 780 (sub 12-15); US 782 (sub 22-23); US 783 (sub 14-23); US 792 (sub 29 and 31-33)

¶ 503 BURDEN OF PROOF ON RESPONDENT
Index Volume XXXVIII (2013): Australia 38 (sub 12 and 29-30); Netherlands 46 (sub 9-10); Spain 73 (sub 4-5); Spain 74 (sub 5-6); Spain 76 (sub 5); Ukraine 5 (sub 11); US 780 (sub 2); US 791 (sub 3); US 792 (sub 13 and 33)

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.

GROUND *a*: INVALIDITY OF THE ARBITRATION AGREEMENT

¶ 504 *Agreement referred to in Article II*
Index Volume XXXVIII (2013): Brazil 29; Brazil 31 (sub 8); Spain 73 (sub 6 and 9-13); Spain 74 (sub 7-16)

¶ 505 *Incapacity of party*
Index Volume XXXVIII (2013): Ukraine 5 (sub 21-26)

¶ 506 *Law applicable to the arbitration agreement*
Index Volume XXXVIII (2013): Spain 73 (sub 15-17); Spain 74 (sub 18-20); Spain 76 (sub 12-14); US 788 (sub 6-12)

¶ 507 *Miscellaneous*
Index Volume XXXVIII (2013): Austria 24 [sub 30 (illegible signature)]; Brazil 28 [sub 9-28 (adhesion contract)]; China 9 (arbitral institution separated from institution chosen by parties); Croatia 1 (arbitral institution ceased to exist; no arbitration agreement for new arbitral institution); France 55 (no arbitration agreement); Germany 147 [sub 13-17 (non-signatory) and 53-54 (no arbitration agreement)]; Russian Federation 36 (lack of arbitration agreement); Spain 73 [sub 8 and 14-20 (adhesion contract)]; Spain 74 [sub 9 and 17-23 (adhesion contract)]; Spain 76 [sub 11-19 (adhesion contract)]; US 783 [sub 5-13 (invalid agreement)]; US 788 [sub 6-12 (novation)]; US 791 (non-signatory)

GROUND *b*: VIOLATION OF DUE PROCESS

¶ 508 *In general*
Index Volume XXXVIII (2013): Czech Republic 6; Netherlands 46 (sub 8-12); US 779; US 780 (sub 16)

¶ 509 *"Proper notice"*
Index Volume XXXVIII (2013): Brazil 28 (sub 29-35); Brazil 31 (sub 15-18); China 7; Spain 73 (sub 21-24); Spain 74 (sub 14-15 and 24-31); Ukraine 2; Ukraine 4; Ukraine 5 (sub 15-20); US 792 (sub 14-27)

¶ 510 *Time limits and notice periods*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 511 *"Otherwise unable to present his case"*
Index Volume XXXVIII (2013): Austria 25 (questions to expert report); France 54 [sub 3-10 (no proof of receipt of communications)]; Netherlands 44 [sub 9-13 (opportunity to deal with expert report)]; US 780 [sub 17-19 (failure to hear witness) and 20-22 (disregard of evidence)]; US 782 [sub 16-20 (misconstruction of evidence)]; US 783 [sub 14-23 (refusal to accept evidence)]

GROUND *c*: EXCESS BY ARBITRATOR OF HIS OR HER AUTHORITY

¶ 512 *Excess of authority*
Index Volume XXXVIII (2013): Czech Republic 1; Netherlands 47 (sub 6-13); US 780 (sub 12-15); US 782 (sub 6-15); US 787 (sub 6-11); US 788 (sub 13-20); US 790 (sub 9-14)

¶ 512A *Partial enforcement*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 513 GROUND *d*: IRREGULARITY IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL OR ARBITRAL PROCEDURE
Index Volume XXXVIII (2013): Brazil 27 (sub 14); Portugal 5 (sub 13-17); Romania 3; US 779; US 783 (sub 24-33)

GROUND *e*: AWARD NOT BINDING, SUSPENDED OR SET ASIDE

¶ 514 *"Binding"*
Index Volume XXXVIII (2013): Austria 24 (sub 31-35); Brazil 27 (sub 24); Brazil 31 (sub 12-13); Germany 147 (sub 3 and 19)

¶ 515 *Merger of award into judgment*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 516 *"Set aside"*
Index Volume XXXVIII (2013): Brazil 30; France 55 (sub 2-3); Netherlands 45; US 793

¶ 517 *"Suspended"*
Index Volume XXXVIII (2013): No new decisions are reported.

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 XXXVIII (2013): Austria 24 (sub 39-42); Belize 2 (sub 101-109); Czech Republic 5; Germany 146 (sub 19-20); India 50; Jamaica 1; Lithuania 2 (sub 29); Netherlands 44 (sub 8); Spain 76 (sub 22-24); US 783 (sub 35)

¶ 519 GROUND *a*: ARBITRABILITY
(See also Article II(3) "Arbitrability", ¶ 223 above)
Index Volume XXXVIII (2013): Brazil 28 (sub 36-41); Brazil 29 (sub 12); Jamaica 1; Lithuania 1; Lithuania 2 (sub 15-16); Spain 75 (sub 5-10); Spain 76 (sub 10); US 791

GROUND *b*: PUBLIC POLICY

¶ 520 *Default of party*
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 521 *Lack of impartiality of arbitrator*
Index Volume XXXVIII (2013): Spain 76 (sub 20-31); US 779; US 783 (sub 34-38)

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 XXXVIII (2013): Austria 24 (sub 55-56); Germany 147 (sub 39-42); Portugal 4

ARTICLE VII(1)

MORE-FAVORABLE-RIGHT PROVISION AND COMPATIBILITY 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-FAVORABLE-RIGHT PROVISION IN GENERAL
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 702 DOMESTIC LAW ON ENFORCEMENT OF FOREIGN AWARD
Index Volume XXXVIII (2013): Germany 146 (sub 4); Germany 147 (sub 23)

¶ 703 BILATERAL AND MULTILATERAL TREATIES
[All decisions concerning bilateral and multilateral treaties were listed under ¶ 703 in Volumes I (1976) - XXIII (1998). Individual entries, see below, were introduced in 1999. Decisions reported in Volumes I (1976) - XXIII (1998) have been re-listed under the new entries.]
Index Volume XXXVIII (2013): No new decisions are reported.

¶ 703(A) MULTILATERAL TREATIES
Index Volume XXXVIII (2013): No new decisions are reported.

ARTICLE VII(2)

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 XXXVIII (2013): 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 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 XXXVIII (2013): 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 XXXVIII (2013): No new decisions are reported.

ARGENTINA

Ratification: 14 March 1989
1st and 2nd Reservation

4. Cámara Nacional de Apelaciones en lo Civil y Comercial Federal [Federal Court of Appeal in Civil and Commercial Matters], Chamber IV, 1 March 2011, case no. 2553/10

Parties:	Claimant: Smit International (Argentina) SA (Argentina) Defendant: Puerto Mariel SA (Argentina)
Published in:	Available online at <www.cij.gov.ar/buscador-de-fallos.html>
Articles:	II(3)
Subject matter:	– separability of arbitration clause
Topics:	¶ 222

Summary

In a domestic context, the Court referred the parties to arbitration in Argentina, finding that it was irrelevant that the validity of the main contract was disputed. The Court could fill the gap in the law on domestic arbitration, which does not provide expressly for the separability of the arbitration clause, by reference to this principle as recognized in the New York Convention and by courts deciding international commercial arbitration cases.

On 30 October 2005, Smit International (Argentina) SA (Smit) and Puerto Mariel SA (Puerto Mariel) entered into several charterparties providing for ad hoc arbitration of disputes in Buenos Aires.

A dispute arose between the parties when Smit terminated two charterparties. Smit sought to commence arbitration and applied to an Argentinian court to compel Puerto Mariel to participate in the proceedings. The court denied the

request, holding that the validity of the charterparties – and therefore of the arbitration clause therein – was disputed.

The Federal Court of Appeal reversed the decision of the lower court by a majority decision. The Court found that the principle that the arbitration clause is autonomous from the main contract in which it is contained is recognized in international instruments such as the 1958 New York Convention and the 1988 MERCOSUR Treaty, as well as being widely accepted by doctrine and applied by the courts in the field of international commercial arbitration. The lack of a corresponding provision in the Argentinian law on domestic arbitration merely shows that this legislation is "out of date". Separability, held the Court, should apply to domestic cases by analogy. The Court also noted that the Bill presented to the Argentinian Parliament in 2010 expressly provides for the separability of the arbitration clause from the main contract.

Judge Martín Diego Farell filed a dissenting opinion. Only the relevant parts of the decision are reported.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345020-n>.

Excerpt

[1] "The dispute between Smit International (Argentina) S.A. and Puerto Muriel S.A. concerns contractual rights which can be the subject matter of a settlement [*transacción*] (Arts. 736 and 737 Code of Civil Procedure). In this respect, there is no exclusive-jurisdiction provision of law hindering the validity of a clause referring to arbitration all disputes arising from a contractual relationship. Just as the parties may settle their disputes, they can refer them to arbitrators (see the decision of this Court, Chamber III, 26 May 1994 in *Mollo Vicente E. v. Yacimientos Petrolíferos Fiscales et al.*), whose function is jurisdictional by nature but is based on contract.

[2] "The arbitration clause is a means by which the parties – in the exercise of their autonomy as is allowed by the legal system – decide to give to an arbitrator or an arbitral tribunal the jurisdiction over their disputes. This a contractual agreement which must be respected (see C.E. Fenochietto, *Código Procesal Civil y Comercial de la Nación*, Volume 3 (Editorial Astrea 1999), note to Art. 739, p. 716).

[3] "In the contracts signed on 30 October 2005, the parties agreed on ad hoc arbitration in the City of Buenos Aires.

[4] "The Argentinian law applicable to domestic or national arbitration does not expressly contain a provision referring to the principle of the autonomy of the arbitration clause. This shows how the rules in Book VI of the Argentinian Code of Civil and Commercial Procedure are out of date and how their contents are insufficient to meet the needs of domestic and, certainly, international commerce satisfactorily. We do not need to dispute a provision of the legislator but rather to fill a gap in the law, in line with jurisprudence, Argentinian doctrine and the concept of domestic commercial arbitration in the most recent Bill dated March 2010.

[5] "Thus, in principle, an arbitration clause is an autonomous contract within the [main] contract and the fate of the latter – if its invalidity, non-existence or termination is invoked – does not necessarily lead to the invalidity of the arbitration agreement, as long as it is not proved that the consent to arbitration is vitiated by invalidity, which is not the case here.

[6] "This premise, which is positively accepted in the international instrument in force for Argentina in the field of international arbitration – the 1958 New York Convention – and in its most recent regional instrument – the MERCOSUR Treaty of 1988, ratified by Law 24.353 – also applies in purely domestic arbitration, as is accepted by the most prestigious national doctrine (see C. Colombo/C. Kiper, *Código Procesal Civil y Comercial de la Nación Anotado y*

Comentado, Volume VI (La Ley 2006) commentary to Art. 742, p. 703; M.E. Uzal, *Solución de controversias en el comercio internacional* (ed. Ad-Hoc 1992) p. 64; R. Caivano, *El control judicial en el arbitraje. Apuntes para una futura reforma de la legislación argentina* (La Ley 2008) D-1274 et seq.).

[7] "The nullity or termination of the [main] contract does not affect the validity and effect of the arbitration clause – which is formally contained in the body of the contract but constitutes an autonomous manifestation of contractual will – which receives its force from Art. 1197 of the Civil Code.[1] This concept is accepted in Art. 12 of the Bill presented to the House of Representatives (file no. 0014-D-2010), which reflects in respect of this subject matter the shared view of national doctrine and the arbitration laws of the Region:

> 'The arbitration agreement is independent of the contract of which it is a part or to which it refers. The nullity or termination of the contract does not necessarily imply the [nullity or termination] of the arbitration agreement.'"[2]

(….)

1. Art. 1197 of the Argentinian Civil Code reads:

   "The stipulations made in a contract are binding on the parties, who must comply with them as they must with the law."

2. "*El acuerdo arbitral es independiente del contrato del que forma parte o al cual se refiere. La nulidad o extinción del contrato, no implica necesariamente la del acuerdo arbitral*."

AUSTRALIA

Accession: 26 March 1977
No Reservations

38. Federal Court of Australia, New South Wales District Registry, General Division, 19 April 2013, NSD 549 of 2013

Parties:	Applicant: Eopply New Energy Technology Co Ltd (nationality not indicated) Respondent: EP Solar Pty Ltd (nationality not indicated)
Published in:	Available online at <www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2013/356.html?stem=0&synonyms=0&query=title%28eopply%20%29>
Articles:	I(1); IV; V(1)
Subject matters:	– award falling under the 1958 New York Convention – documents for requesting enforcement supplied – grounds for refusal of enforcement are exhaustive – burden of proof on respondent
Topics:	[8]-[12] + [23]-[28] = ¶ 101; [21] = ¶ 402; [22] = ¶ 403; [21]-[22] = ¶ 406; [12] + [29]-[30] = ¶ 501 + ¶ 503

Summary

A CIETAC award was granted enforcement. The award fell within the scope of the International Arbitration Act and the 1958 New York Convention. Applicant supplied all the necessary documents and defendant did not raise any ground for refusal.

On 3 May 2010, Eopply New Energy Technology Co Ltd (Eopply) and EP Solar Pty Ltd (EP Solar) entered into a Co-operation Agreement for the supply of solar cell modules. Clause 16 of the Co-operation Agreement provided for the application of Chinese law and for arbitration of disputes at the China International Economic and Trade Arbitration Commission (CIETAC), Shanghai Sub-Commission, as follows:

> "Arbitration. This Contract is governed by the laws of the People's Republic of China. All disputes arising from the implementation of, or in connection with this Contract, shall be settled through friendly negotiation. In case no settlement can be reached through negotiation, the dispute shall be submitted to the CIETAC Shanghai Commission in accordance with its Provisional Rules of Procedure. The decision made by this commission shall be regarded as final and binding upon both parties. Arbitration fees shall be borne by the losing party, unless otherwise awarded. Both parties shall continue to perform their obligations specified in the Contract except for those under arbitration."

Eopply and EP Solar subsequently entered into two specific sales contracts within the framework of the Co-operation Agreement. Both contracts contained an arbitration clause in substantially the same terms as Clause 16 of the Co-operation Agreement.

A dispute arose between the parties when EP Solar failed to pay under one of the specific sales contracts, Contract No. EPm-S100731. Eopply commenced CIETAC arbitration, seeking payment of the unpaid purchase price of the solar cell modules; since Contract No. EPm-S100731 provided for a late delivery penalty of 0.1 percent of the delayed payment for every day of delay, Eopply also sought payment of the contractual penalty. By an award of 15 February 2012, a CIETAC arbitral tribunal found in favor of Eopply, directing EP Solar to pay the purchase price, the contractual penalty and the costs of the arbitration. On 28 March 2013, Eopply filed an application for leave to enforce the award in Australia and an order that judgment be entered against EP Solar in the amount owed under the award.

On 5 April 2013, the sole shareholder of EP Solar (Source Co Limited) issued a resolution appointing two liquidators for the purpose of winding up EP Solar. By letter of 9 April 2013 sent to Eopply's solicitors, the liquidators informed Eopply that they would not oppose enforcement, pointing out however that under Australian law no action may be proceeded with or commenced against a company in liquidation except by leave of the court.

The Federal Court of Australia, New South Wales District Registry, per Foster J, granted leave to proceed against EP Solar in liquidation and entered judgment in favor of Eopply in the terms of the CIETAC award.

The Court first delimited the statutory framework for its decision. It referred to the provisions in the International Arbitration Act 1974 (Cth) (IAA) according to which a foreign award is binding on the parties to the arbitration agreement in pursuance of which it was made (Sect. 8(1)) and a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of the Court (Sect. 8(3)). Both these provisions, noted the Court, are "subject to Part II" of the IAA, which defines "foreign award" as an award made abroad and falling under the 1958 New York Convention, and "arbitration agreement" as an agreement in writing of the kind referred to in Art. II(1) of the Convention. The Court referred to Art. I(1)-(2) of the Convention for a definition of an award falling thereunder.

Having granted leave to proceed against the defendant in liquidation, holding that there was no consideration against this conclusion, the Federal Court examined and granted Eopply's application to enforce the CIETAC award.

The Court first noted that Eopply supplied the necessary documents – the duly certified copy of the award and arbitration agreement, both accompanied by a certified translation. There was no doubt in the Court's opinion that the CIETAC award was an arbitral award made pursuant to an arbitration agreement within the meaning of Part II of the IAA, and that it was a foreign (Chinese) award to which the New York Convention applied.

Since EP Solar, which had the burden to raise and prove any grounds for refusal of enforcement, did not appear in the proceeding, the Court concluded that there was no reason not to enforce the award.

The Court reduced the amount to be paid to Eopply, noting that the arbitrators directed EP Solar to pay 80 percent of the arbitrators' fee in their award, while Eopply was claiming the whole 100 percent in the enforcement proceeding.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345021-n>.

Excerpt

I. BACKGROUND

[1] "The applicant commenced this proceeding on 28 March 2013. In its Originating Application, the applicant sought the following relief:

(1) An order pursuant to Sect. 8(3) of the International Arbitration Act 1974 that the plaintiff be granted leave to enforce the arbitral award made on 15 February 2012 by the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission at Shanghai China and published and notified to the parties that day;
(2) An order that judgment be entered against the Defendant for the sum of:
(a) US$ 634,666.00,
(b) RMB 311,305 and
(c) interest on the amount in (a) above from 14 October 2010 to the date of judgment at the rate of 0.1 percent per day, i.e., US$ 643.67 per day and
(d) costs.

[2] "The substantive relief sought by the applicant is the enforcement of an arbitral award made by China International Economic and Trade Arbitration Commission (CIETAC) Shanghai Sub-Commission on 15 February 2012 (the award). The applicant is the award creditor under the award. The respondent is the award debtor under the award.
[3] "The applicant's claim for final relief is supported by the affidavit of Gang Sun affirmed on 28 March 2013.
[4] "I am satisfied that the applicant's Originating Application and the affidavit of Gang Sun were served upon the respondent and came to its notice some time between 28 March 2013 and 9 April 2013.
[5] "On 5 April 2013, by resolution of the sole shareholder of the respondent (Source Co Limited) passed on that day, Mark William Pearce and Michael Dullaway were jointly and severally appointed as liquidators of the respondent for the purpose of winding up the respondent. Source Co Limited did not pass a separate resolution that the respondent be wound up voluntarily pursuant to Sect. 491(1) of the Corporations Act 2001 (Cth) (the Corporations Act) but such a resolution is implicit in the resolution which that corporation did pass on 5 April 2013. I will proceed upon the basis that, on 5 April 2013, the respondent was wound up voluntarily pursuant to Sect. 491(1) of the Corporations Act by resolution of its sole shareholder, Source Co Limited. However, there was no

evidence before me as to whether, prior to 5 April 2013, the directors of the respondent, or a majority of them, made a declaration of solvency pursuant to Sect. 494 of the Corporations Act.

[6] "On 9 April 2013, the day before the first return of the proceeding before the Court, Mr Pearce transmitted by facsimile transmission to the solicitors for the applicant and to the Registry of the Court a letter dated the same day. Omitting formal parts, that letter is in the following terms:

> '*EP Solar Pty Ltd (In Liquidation)*
> *A.C.N. 138 556 304 ("the Company")*
> *Federal Court of Australia Claim NSD 549/2013 ("the Proceeding")*
> On 5 April 2013, Michael Dullaway and I, Mark William Pearce were appointed as joint and several Liquidators of the Company by virtue of a resolution of the Company's sole member under Sect. 490 of the Corporations Act 2001 (Cth) ("the Act"). I have *enclosed* a copy of the Resolution of Sole Member for Voluntary Winding Up.
>
> I note that you act for Eopply New Energy Technology Co Ltd in an application which it has commenced against the Company.
> I advise as follows:
>
> 1. Pursuant to Section 500(2) of the Act "*no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes*."
> 2. I do not intend to take any steps in relation to the Proceeding or instruct solicitors to appear on my behalf at the forthcoming directions hearing in the Proceeding.
> 3. Whilst I have not been provided with satisfactory material to consider your client's claim in the Proceeding, I do not oppose your client's claim, nor do I oppose leave being granted to it to proceed with its claim under Sect. 500(2) of the Act.
> 4. Your client's claim against the company ranks as a provable debt in the liquidation. In this regard I have *enclosed* a Proof of Debt form which your client should complete and return to me in order to formally lodge its claim in the liquidation.
>
> I am currently conducting investigations into the Company's affairs and the prospects of any recovery actions being pursued in the liquidation. In this regard, I will write to you further in due course (or directly to your client, should you instruct me to do so) and provide an update on the conduct of

> the winding up of the Company. I will also issue an initial Report to Creditors and convene a meeting of creditors in due course as required under the Act.
>
> Would you please advise whether you request that I issue further correspondence to you, or directly to your client. If you wish for me to issue further correspondence directly to your client, please advise your client's contact details, including e-mail address.
>
> Should you have any queries please don't hesitate to contact either Michael Dullaway or myself.'

[7] "The matter was first returned before the Court on 10 April 2013. On that occasion, the applicant was represented by Counsel. Consistent with the liquidators' letter extracted at [[6]] above, there was no appearance either by or on behalf of the respondent or its liquidators. In those circumstances, I proceeded to deal with the applicant's claim for final relief on that day in the absence of the respondent."
(....)

II. STATUTORY FRAMEWORK

[8] "Sect. 8(1) of the International Arbitration Act 1974 (Cth) (the IAA) provides that, subject to Part II of the IAA, a foreign award is binding by virtue of the IAA for all purposes on the parties to the arbitration agreement in pursuance of which it was made. Sect. 8(3) of the IAA provides that, subject to Part II of the IAA, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of this Court (see also Sect. 54 of the Federal Court of Australia Act 1976 (Cth)).

[9] "In Part II of the IAA, unless the contrary intention appears

> '*foreign award* means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the [1958 New York Convention] applies.'

In Part II of the IAA, unless the contrary intention appears, *arbitration agreement* means an agreement in writing of the kind referred to in Art. II(1) of the Convention and *arbitral award* has the same meaning as in the Convention.

[10] "For the purposes of Part II of the IAA, *arbitration agreement* is an agreement in writing (formal or informal) 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 (as to which, see Art. II(1) of the Convention).

[11] "Art. I(1)-(2) of the Convention define *arbitral award* for the purposes of the Convention and thus for the purposes of Part II of the IAA as follows: [Quotation of Art. I(1)(-(2) Convention omitted.]

[12] "Sect. 8(3A) provides that this Court may only refuse to enforce a foreign award in the circumstances mentioned in Sect. 8(5) and (7)."

III. THE PRESENT CASE

[13] " The liquidators of the respondent have informed the Court that they do not oppose leave to proceed being granted to the applicant pursuant to Sect. 500(2) of the Corporations Act nor do they oppose the making of the other orders sought by the applicant. In those circumstances, subject to being satisfied that leave to proceed is required and should be granted, subject to being satisfied of the matters specified in Sect. 9 and Sect. 10 of the IAA and subject to being satisfied that the award is a foreign award within the meaning of Sect. 8(1) and (3) of the IAA and thus binding on the applicant and the respondent, the Court should enforce the award."

1. Leave to Proceed

[14] "Sect. 500(2) of the Corporations Act provides that, after the passing of a resolution for the voluntary winding up of a corporation, no action or other civil proceeding is to be proceeded with against that corporation except by leave of the Court and subject to such terms as the Court imposes.

[15] "The winding up of the respondent purports to be a members' voluntary winding up. There is authority for the proposition that Sect. 500(2) only operates in relation to a creditors' voluntary winding up and does not have effect in relation to a members' voluntary winding up where the directors, or a majority of them, have made a declaration of solvency (*Catto v. Hampton Australia Ltd (In Liq)* (1998) 29 ACSR 225).

[16] "I do not know whether a declaration of solvency was made in the present case. For that reason, and for more abundant caution, I propose to consider the question of leave under Sect. 500(2) of the Corporations Act.

[17] "In *Executive Director of the Department of Conservation and Land Management v. Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484, Lee J discussed the relevant considerations which should ordinarily guide the exercise of the discretion to grant leave to proceed against a corporation in liquidation. The following considerations may be extracted from his Honour's judgment:

(a) The purpose of having a requirement for leave is to prevent a corporation in liquidation being subjected to actions that are expensive and, therefore, carried on at the expense of the creditors of the company and, perhaps, unnecessarily.
(b) In determining whether leave should be granted, the Court considers whether the balance of convenience lies in allowing the applicant to proceed by way of action to judgment, or whether the applicant should be left to pursue his or her claim by lodging a proof of debt with the liquidator. The matter is one of discretion and the onus is on the applicant to demonstrate why it is more appropriate in respect of the particular claim, to proceed by way of action.
(c) For leave to be granted, it must be shown that there is a serious or substantial question to be tried and a real dispute between the parties. Leave will not be granted where the applicant does not have a genuine claim or where the claim would be futile.

[18] "In the present case, the following considerations point to the grant of leave:

(a) If leave is granted, virtually no additional expense or inconvenience will be visited upon the respondent. If leave is granted, judgment will be entered immediately.
(b) The applicant's claim is based upon a foreign award. Although that award is binding upon the parties to it without any further step needing to be taken (Sect. 8(1) of the IAA), if the award is to be enforced in Australia, steps must be taken either in an appropriate State or Territory court or in this Court to obtain a judgment in order to give effect to the award. When appropriate regard is had to Sect. 2D of the IAA which specifies the objects of the IAA and to Sect. 39 of the IAA, there is good reason to make the path to recovery by the award creditor easier by granting leave and allowing judgment to be entered rather than leave the award creditor to the vagaries of the proof of debt process.
(c) There is no opposition to leave being granted.

[19] "Although there is no evidence before the Court as to the financial position of the respondent and thus no basis upon which the Court can make an

assessment as to whether the award creditor is likely to recover any part of the amount awarded to it, the above considerations weigh heavily in favour of the grant of leave. In my judgment, there is no consideration of any moment which would weigh in the balance against the grant of leave.

[20] "For these reasons, to the extent that it is necessary to do so, I propose to grant leave to the applicant to proceed against the respondent in respect of the claims which it has made in this proceeding pursuant to Sect. 500(2) of the Corporations Act."

2. Enforcement of Award

[21] "The applicant has produced to the Court a duly certified copy of the award (in Chinese) (Sect. 9(1)(a)) and an English translation of the award duly certified to be a correct translation (Sect. 9(3)). The original award in Chinese has been certified by CIETAC and the translation has been certified by Yan Qian, a NAATI-certified translator. I am satisfied that the applicant has produced to the Court a true copy of the original award in Chinese and an accurate translation of that award into English.

[22] "The applicant has also produced a duly certified copy of the relevant arbitration agreement. The arbitration agreement is found in a commercial contract styled 'Co-Operation Agreement' dated 3 May 2010 (the Co-Operation Agreement) (Sect. 9(1)(b)). The applicant has also produced an English translation of that agreement certified to be a correct translation (Sect. 9(3)). The copy Co-Operation Agreement has been certified by CIETAC. I am satisfied that the applicant has produced to the Court a true copy of the Co-Operation Agreement.

[23] "The applicant has also established that the People's Republic of China is a Convention country for the purposes of Part II of the IAA.

[24] "Clause 16 of the Co-Operation Agreement provides:

> 'Arbitration. This Contract is governed by the laws of the People's Republic of China. All disputes arising from the implementation of, or in connection with this Contract, shall be settled through friendly negotiation. In case no settlement can be reached through negotiation, the dispute shall be submitted to the CIETAC Shanghai Commission in accordance with its Provisional Rules of Procedure. The decision made by this commission shall be regarded as final and binding upon both parties. Arbitration fees shall be borne by the losing party, unless otherwise

awarded. Both parties shall continue to perform their obligations specified in the Contract except for those under arbitration.'

[25] "Two specific sales contracts were subsequently entered into between the applicant, as vendor/supplier, and the respondent, as purchaser, under the umbrella of the Co-Operation Agreement. Under those contracts the applicant agreed to supply solar cell modules to the respondent. The applicant and the respondent also entered into a 'Supplementary Agreement' dated 9 September 2010. Each of the specific sales contracts provided for the arbitration of disputes in connection with those contracts upon substantially the same terms as were specified in clause 16 of the Co-Operation Agreement. The relevant sales contract (Contract No. EPm-S100731) provided for a late delivery penalty of 0.1 percent of the delayed payment for every day of delay.

[26] "In the arbitration, the applicant claimed the unpaid purchase price of the solar cell modules under the relevant sales contract referred to above plus the agreed contractual penalty.

[27] "The decision of the Arbitral Tribunal is found in Section III (Decision) of the award. There, the Tribunal said:

'III. Decision

The Arbitral Tribunal has in accordance with law decided as follows:

1. The Respondent shall pay the remaining sum of 634,666 US dollars under the Sale Contract EPm-S100731 to the Claimant within 30 days of the date of this decision;
2. The Respondent shall pay the penalty on the overdue payment under the Sale Contract EPm-S100731 within 30 days of the date of this decision, with the penalty calculated at a daily rate of 0.1 percent of the US$ 643,666, starting from 14 October 2010 to the day when the Respondent makes the payment;
3. The Respondent shall pay the legal fee of RMB 140,000 to the Claimant within 30 days of the date of this decision;
4. Other claims of the Claimant are denied;
5. The arbitration fee for this case is RMB 171,305. The Claimant shall bear 20 percent of it, namely RMB 34,261. The Respondent shall bear 80 percent, namely RMB 137,044. The Respondent shall pay the Claimant the amount of RMB 137,044 arbitration fee.

The decision of the Arbitral Tribunal is final and is effective from the date it is made.'

[28] "There is no doubt that the award is an *arbitral award* within the meaning of Part II of the IAA nor is there any doubt that it was made pursuant to an *arbitration agreement* within the meaning of that Part. It is also an *arbitral award* in relation to which the Convention applies. It was made in China. The award is, therefore, a *foreign award* within the meaning of Sect. 8(1) and (3) of the IAA.
[29] "I am satisfied that the applicant has established that it is entitled to have the award enforced. Once a claimant establishes the matters required to be established by Sects. 8(2), 9 and 10 of the IAA, the Court may only refuse to enforce the foreign award in the circumstances mentioned in Sect. 8(5) and (7). The onus of establishing one or more of the grounds upon which enforcement may be refused under Sect. 8(5) and (7) rests upon the party resisting enforcement (*IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* [2011] VSCA 248; (2011) 282 ALR 717 at 729-730 [43]-[45] per Warren CJ and at 759-762 [153]-[173] per Hansen JA and Kyrou AJA;[1] and *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161 at 174 [53]).[2]
[30] "In the present case, neither the respondent nor its liquidators have raised any matter in opposition to the applicant's claim. In particular, neither the respondent nor its liquidators have requested the Court not to enforce the award on one or more of the grounds specified in Sect. 8(5) and (7) of the IAA.
[31] "In all the above circumstances, there is no reason not to enforce the award and I propose to do so.
[32] "However, there is one matter which requires separate consideration. At para. 5 of the Decision forming part of the award, the arbitrators made clear that 20 percent of the arbitration fee was to be paid by the applicant, come what may. Apparently, this decision was arrived at because the arbitrators were of the opinion that part of the arbitration was occupied in considering claims made by the applicant which were ultimately rejected by the arbitrators. In this Court, the applicant has claimed the whole amount of RMB 171,305, being the total amount paid by it to the arbitrators as their fee. Given that the respondent was only ever responsible for 80 percent of that fee, I am not prepared to enter judgment for the full amount of RMB 171,305 on account of arbitrators' fees. Rather, I think that the appropriate figure is the amount of the legal fees (RMB 140,000) and that proportion of the arbitration fees which the respondent was ordered to pay

1. Reported in Yearbook XXXVI (2011) pp. 242-251 (Australia no. 35).
2. Reported in Yearbook XXXVII (2012) pp. 163-165 (Australia no. 37).

by the arbitrators (RMB 137,044). Therefore, the amount to be incorporated in the judgment for the legal fees and arbitrators' fees is RMB 277,044 and not RMB 311,305, as claimed.

[33] "There will be orders accordingly."

AUSTRIA

Accession: 2 May 1996
No Reservations

24. Oberster Gerichtshof [Supreme Court], 24 August 2011, No. 3Ob65/11x

Parties:	Petitioner: C Ltd (Nigeria) Respondent: M GmbH (Austria)
Published in:	Available online at <www.ris.bka.gv.at>
Articles:	IV(1)(*a*); V(1)(*a*); V(1)(*e*); V(2)(*b*); VI
Subject matters:	– certified copy of arbitral award – certified signature of arbitrator – award "not (yet) binding" – review of merits of award (no) – narrow concept of public policy – adjournment of enforcement decision
Topics:	[1]-[28] = ¶ 402 + ¶ 404; [30] = ¶ 507 (illegible signature); [31]-[35] = ¶ 514; [35] = ¶ 402; [36]-[37] = ¶ 524 (violation of treaties); [39]-[42] = ¶ 518; [40]-[41] + [45]-[53] = ¶ 502; [43]-[44] = ¶ 524 (no discussion of issue settled in partial award); [55]-[56] = ¶ 601

Summary

The Supreme Court reversed the appellate decision denying recognition of an ICC award. It first abandoned in part its earlier jurisprudence on the issue of the certification of the copy of the award supplied with the request for enforcement under the 1958 New York Convention, stating that its current position is that: (1) the copy may be certified by a person "in a neutral position close to the arbitral tribunal" (such as an officer of the arbitral institution), if authorized under the relevant rules; (2) the signature of the attesting officer

need not be certified, unless the rules so provide; (3) the authenticity of the arbitrators' signatures on the original award must be certified at least indirectly, and this requirement is met if the arbitration rules provide that the institution notifies the award to the parties and keeps an original; (4) the applicable arbitration rules must be supplied together with the application. These conditions were met here. It was irrelevant that the signature of the certifying officer was illegible as readability is not required under the ICC Rules and the officer was sufficiently identified in the stamp above his signature. The Court further denied all objections to recognition. The argument that the award was not binding failed, because ICC awards are directly binding and the award had not been set aside. The fact that it could be open or subject to challenge in the country of origin was irrelevant. The public policy objections raised by respondent failed on the facts. The Court stressed that a public policy review must be exercised cautiously, concerns only the fundamental principles of Austrian law and may not lead to a factual or legal review of the award. The Court then remanded the case to the appellate court for a decision on respondent's request for a suspension, with the indication that the party resisting recognition has the burden to explain why its appeal against the award in the country of origin has a prospect of success; that this prospect of success is the guideline for the court's discretionary decision; and that commencement of annulment proceedings alone does not suffice.

On 16 February 2005, C Ltd and M GmbH entered into an Exclusive Projects Promotion Agreement (EPPA) and a Joint Venture Agreement (JVA) in respect of a joint venture. Both agreements contained an ICC arbitration clause.

A dispute arose between the parties. An ICC sole arbitrator was appointed and issued three awards: a partial award confirming jurisdiction; on 8 May 2008, a final award; on 29 June 2008, an addendum rectifying the final award's decision on costs. M GmbH sought annulment of the final award in France; on 10 September 2009, the Paris Court of Appeal denied the application. Appeal to the *Cour de Cassation* was pending at the time of the present decision.

In turn, C Ltd sought recognition of the ICC award in Austria. On 26 April 2010, the Hernals District Court granted the application. On 31 January 2011, the Vienna Court of Appeal reversed this decision.

The Supreme Court reversed the appellate decision, finding that there were no grounds for denying recognition of the ICC award under the 1958 New York Convention. The Court remanded the case to the court below for a decision on M GmbH's request for a suspension of the recognition proceedings, with which the court of appeal failed to deal in light of its refusal to declare the award enforceable.

The Court first examined the certification requirements for the final award and addendum supplied by C Ltd with its application. The sole arbitrator had certified on both documents, by a handwritten addition, that he had rendered and signed them; the additions were signed and accompanied by an apostilled

endorsement of a London notary public attesting that the certification was authentic and signed in the notary's presence. A stamp under the additions indicated that these were true copies certified by the ICC's General Counsel.

The 1958 New York Convention, which applied here, provides at Art. IV(1)(*a*) that the party seeking recognition and enforcement must supply the duly certified original arbitral award or a copy thereof. The Supreme Court noted that it is not specified whether the certification requirements are those of the state of origin or (also) the state of enforcement.

In a 2008 decision, the Court deemed that certification under the law of the country of origin suffices, and that the certification may be issued by an authorized officer of the arbitral institution, or the tribunal's president: that is, a person "in a neutral position close to the arbitral tribunal".

The 2008 decision further held that the certification that a copy is a true copy does not indirectly certify the authenticity of the signatures of the arbitrators on the original award. This finding was convincingly criticized by some authors. The Court explicitly deviated from its earlier jurisprudence on this point by finding that when the arbitral institution certifies a copy of the original award, notifies it to the parties and keeps one original in its possession, its certification does indirectly attest the authenticity of the signatures of the arbitrators on the original award. This conclusion is justified by the fact that the arbitral institution is in the position to assess whether the award was really signed by the appointed arbitrators. This is true, added the Court, even if the relevant arbitration rules do not provide that the arbitral institution may certify the authenticity of the arbitrators' signatures.

The Supreme Court also disagreed with the finding of the appellate court – based on Supreme Court jurisprudence – that the signature of the person who certifies the copy must in turn be certified, and held that this certification of the certification (*Überbeglaubigung*) is no longer to be deemed necessary, unless the applicable arbitration rules so provide.

The Court summarized its current position on the issue of certification as follows: (1) the requirement in Art. IV(1)(*a*) of the New York Convention is satisfied if the copy of the award is certified by a person "in a neutral position close to the arbitral tribunal", provided this person is authorized under the relevant arbitration rules; (2) certification by the arbitral institution only requires a stamp and a signature of the attesting officer, unless the applicable arbitration rules provide for a certification of the certification; (3) the requirement that the authenticity of the arbitrators' signatures on the original award be certified at least indirectly is complied with if the arbitration rules explicitly provide for such certification, but also when these rules provide that the arbitral institution

notifies the award to the parties and keeps one original; (4) the applicable arbitration rules must be supplied together with the application, as they are relevant to a decision on the issue of certification.

These conditions were met in the present case. It was irrelevant that the ICC Rules were not supplied to the first instance court, because this defect was cured in the proceedings before the appellate court.

The Supreme Court then examined and dismissed the objections raised by M GmbH. The argument that the signature of the ICC's General Counsel under the stamp was illegible failed. The ICC Rules do not require that the signature of the certifying officer be readable, and at any event illegibility was cured here by the indication of the name and function of the attesting officer in the stamp.

M GmbH also argued that the award was not yet binding. However, reasoned the Court, the ICC Rules provide that awards are immediately binding; respondent does not claim that the award has been set aside; and the fact that the award may be open or subject to challenge in the country of origin is irrelevant.

Equally unsuccessful were M GmbH's public policy objections under the New York Convention. The Supreme Court noted that such objections are to be examined notwithstanding the prohibition in the applicable ICC Rules to waive any form of recourse, because Art. V(2)(*b*) of the Convention serves the purpose of taking into account public interest and therefore may not be disposed of by the parties. However, a public policy review must be exercised cautiously and may never lead to a factual or legal review of the award. The relevant standard for this limited review is whether enforcement of the award would be at odds with the basic values of the Austrian legal system: the fundamental principles of the Federal Constitution and of criminal, private and procedural law.

In the case at hand, M GmbH claimed a violation of public policy, inter alia, because the sole arbitrator decided not to allow further discussion on the invalidity of (the arbitration agreement in) the EPPA and JVA after the rendition of the partial award, which in the arbitrator's opinion finally settled this matter. The Court noted that the arbitrator, though finding that M GmbH was not entitled to raise this argument again, did in fact examine it "for the sake of completeness" and rejected it in a reasoned manner.

Nor was there a violation of public policy because the arbitrator directed M GmbH to reimburse C Ltd for certain expenditures in respect of the joint venture company even if finding in the award that C Ltd violated its good faith obligation under the EPPA and JVA. This, argued M GmbH, was at odds with the principle that no one may profit from his own illegal acts. However, reasoned the Supreme Court, the award of compensation was based not on C Ltd's allegedly illegal acts, but rather on a specific contractual provision in the JVA,

under which M GmbH was financially responsible for the joint venture company and its operation.

The allegation that the arbitral tribunal abused its powers, in violation of public policy, by awarding C Ltd full reimbursement of its arbitration costs although C Ltd only partially prevailed in the arbitration was similarly rejected. The Court noted that M GmbH acknowledged in the arbitration that the winning party would be entitled to reimbursement of costs and did not dispute the sum indicated by C Ltd.

The Supreme Court remanded the case to the appellate court for a decision on M GmbH's request for suspension of the recognition proceeding, with the following indications: (1) the request for suspension shall be decided not under Austrian law but pursuant to Art. VI of the Convention; (2) the court shall assess, for its discretionary decision, whether the means of recourse in the country of origin has a prospect of success; the party resisting recognition and enforcement shall explain why its appeal should succeed – the commencement of annulment proceedings alone does not suffice; (3) the action filed against both C Ltd and M GmbH by a third company in Nigeria shall be deemed irrelevant to this purpose.[1]

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345022-n>.

1. On 15 May 2012, the Supreme Court denied respondent's request for an oral revision of this decision.

Excerpt

I. CERTIFICATION

[1] "The application [for a declaration of enforceability] was accompanied inter alia by the Arbitral Award of 8 May 2008 (Attachment A) and the Addendum to the Arbitral Award of 29 June 2008, which contains a rectification of the decision on costs in the arbitral award (Attachment B), each with a certified translation.
[2] "Attachment A is a copy of the arbitral award, dated 8 May 2008 and signed by S.I. (the Award), in English. Under the signature there is a handwritten addition reading (in translation): 'I, S.I. QC, hereby attest that I, as the validly appointed sole arbitrator, have rendered the present Final Award, dated 8 May 2008, and that this signature is my true and authentic signature.' This addition is again signed S.I. and dated 11 December 2009. The copy of the arbitral award is accompanied by an apostilled endorsement of a London notary public of 11 December 2009, in which the notary attests that the [above] certification attached to the award, by which the authenticity thereof is attested, was signed in his presence on 11 December 2009 'by. S.L.I., QC, British Passport no. …'. Under the handwritten addition and its signature (and also at the bottom of the first page of the copy of the arbitral award) there is a stamp reading, in English 'Certified true copy of the Original, Paris, E.J., General Counsel, ICC International Court of Arbitration' …, which is dated 10 December 2009, in handwriting, and accompanied by an illegible signature. The award has a title page containing the sentence: 'This document is a certified true copy of the original of the Addendum to the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.' The copy is accompanied by a German translation by a generally- and court-certified translator for, inter alia, the English language, who attests under reference to her professional oath that the translation exactly corresponds with the 'attached/present original/certified photocopy'.
[3] "Attachment B is similarly constituted. This is a copy of the addendum to the award of 8 May 2008 ('Addendum to the Award dated 8 May 2008' [English original]), in English, dated 29 June 2008 and also signed S.I. Under this signature as well there is a handwritten addition reading (in translation): 'I, S.I. QC, hereby attest that I, as the validly appointed sole arbitrator, have rendered the present Addendum to the Final Award, dated 29 June 2008, and that this signature is my true and authentic signature.' This addition is again signed S.I. and dated 11 December 2009. The copy of [the addendum to] the arbitral award is accompanied by an apostilled endorsement of a London notary public of 11

December 2009, in which the notary attests that the 'attestation on the verification of the Addendum to the Award attached to this document was signed today in my presence by S.L.I., QC, British Passport no. ….' Under the handwritten addition and its signature (and also at the bottom of the first page of the copy of the Addendum) there is a stamp reading, 'Certified true copy of the Original, Paris, E.J., General Counsel, ICC International Court of Arbitration' …, which is dated 10 December 2009, in handwriting, and accompanied by an illegible signature. The Addendum has a title page containing the sentence: 'This document is a certified true copy of the original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.' The copy is accompanied by a German translation by a generally- and court-certified translator for the English language, who attests under reference to her [professional] oath that the translation exactly corresponds with the 'attached photocopy'.

(….)

[4] "Petitioner's appeal [*Revisionsrekurs*] is admissible as it requires a clarification of the interpretation of the [1958] New York Convention and [therefore] concerns the safeguarding of the certainty of the law. It is also justified and leads to the annulment of the appellate decision.

(….)

[5] "Pursuant to Sect. 614(1) first sentence ZPO,[2] the recognition and declaration of enforceability of foreign arbitral awards takes place in accordance with the procedure for the declaration of enforceability in Sect. 79 et seq. EO unless otherwise provided in international law or in legal instruments of the European Union. Sect. 86(1) EO contains the corresponding subsidiarity clause [*Subsidiaritätsklausel*] providing that agreements between states take precedence.[3] The New York Convention, which counts also Nigeria and Austria among its

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2. Sect. 614(1) first sentence of the Austrian Code of Civil Procedure (*Zivilprozessordnung* – ZPO) reads:

   "*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.…"

3. Sect. 86(1) of the of the Austrian Enforcement Act (*Exekutionsordnung* – EO) reads:

   "(1) The provisions above do not apply insofar as otherwise provided in international law or legal instruments of the European Union."

Contracting States, along with France (see <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>), (undisputedly) applies here; it is linked to the place of arbitration, which is not in the state of recognition and enforcement (Art. I(1) first sentence Convention): here, France.

[6] "According to Art. IV(1)(*a*) Convention, recognition and enforcement requires that the party seeking recognition and enforcement supply, together with its application, the duly certified (legalized) original arbitral award or a copy thereof, whose correspondence with the original is duly certified.

[7] "The Supreme Court noted on several occasions in this respect that the Convention does not clearly say whether only the requirements for authenticity/validity provided for in the state where or according to whose law the award was rendered apply to the award and the arbitration agreement or copies thereof, or whether also the certification requirements provided for foreign acts in the state in which [the award] is relied on must be complied with (RIS-Justiz RS0075355 [T1]).[4]

[8] "Based on this jurisprudence, the Supreme Court has deemed certifications according to the law of the state in which the award was rendered to suffice, also if [issued] by an officer in a neutral position close to the arbitral tribunal, for instance the president of the arbitral tribunal or the secretary of the arbitral institution, provided that [person] has the authority to do so under the relevant arbitration rules (RIS-Justiz RS0108580 [T1]).

[9] "This [finding] is based on the one hand on the fact that the parties have subjected themselves to these arbitration rules, so that it is justifiable to be satisfied, in respect of the conditions for recognition and enforcement, with the certifications provided for under these rules; on the other hand, on the letter of Art. IV of the New York Convention. The original English text (more clearly than the German version) namely indicates in Art. IV(1)(*a*) of the Convention two clearly different forms of certification, referred to as 'duly authenticated' (for the original) and 'duly certified' (for the copy). Thus, for the original there is legalization [*Legalisation*] of the signatures of the arbitrators, while the more limited certification [*Beglaubigung*] is provided only for the copy; the strict certification of the authenticity of handwritten signatures regulated in Austria in Sect. 79 of the Notary Public Regulation [*Notariatsordnung* – NO] is not required in this respect. However, it cannot be deduced from the possibility to supply copies that the formal certification of the authenticity of the signatures of the arbitrators on the original can be completely dispensed with for the purpose of recognition and enforcement. In [the] case of certified copies, the authenticity of

4. Reported in Yearbook II (1977) p. 232 (Austria no. 3).

the signatures on the original must be certified, at least indirectly (3 Ob 35/08f = RIS-Justiz RS0124091).[5] Further, the mere attestation of the correspondence of the supplied copy of the arbitral award with the original cannot be deemed to be an indirect certification of the authenticity of the signatures of the arbitrators on the award in the sense of Art. IV(1)(*a*) of the New York Convention.

[10] "This decision has been criticized by doctrine. Otto (IPRax 2009, 362) and Öhlberger (JBl 2010, 65) argue that the form requirement in Art. IV(1)(*a*) Convention cannot be deemed a mere evidence provision and that it would be an unnecessary formalism to require the certification of the signatures of the arbitrators, even when the defendant does not dispute the validity/authenticity of the arbitral award or the copy thereof at all, but only claims non-compliance with the formal requirements of Art. IV(1)(*a*) of the New York Convention. Also Czernich (in Burgstaller/Neumayr, *IZVR*, Art. IV New York Convention no. 6) deems the strict observance of the authenticity conditions of Art. IV New York Convention necessary only when the defendant claims that the award is not authentic or the translation is incorrect; otherwise compliance with formal requirements would become an end in itself. Hence, if authenticity is not disputed the obligation to supply the officially certified signed arbitral award can be dispensed with.

[11] "This author refers on this point to the jurisprudence of the German Supreme Court, according to which when the defendant does not dispute at all that the supplied copy of the arbitral award is based on a corresponding authentic original, the supply of a certified, even if not legalized original of the copy of the arbitral award suffices (NJW 2000, 3650; NJW 2001, 1730). This legal opinion is not relevant in Austria for first instance proceedings for a declaration of enforceability, because pursuant to Sect. 83(1) EO (other than pursuant to Sect. 1063(1) second sentence of the German Code of Civil Procedure [*Zivilprozessordnung* – ZPO], a decision on the application is rendered without an oral hearing and without hearing the defendant, thus in an ex parte proceeding on documents (Hausmaninger in *Fasching/Konecny*, 2nd edn., Sect. 614 ZPO no. 43 and references therein) that does not allow for the position of the defendant being taken into account at this stage.

[12] "The Court deems convincing the approach of Öhlberger (JBl 2010, 65) that a certified copy made by the arbitral institution of the original arbitral award signed by the arbitrators, which is in its possession, can indirectly attest the authenticity of the signatures of the arbitrators on the award, even when the relevant arbitration rules (other than Art. 27(4) of the Vienna Rules of

5. Reported in Yearbook XXXIV (2009) pp. 409-417 (Austria no. 20).

Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber[6] (reproduced in *Fasching/Konecny*, 2nd edn., IV/2 annex XII]) do not provide that the arbitral institution can attest the authenticity of the signatures of the arbitrators through a stamp and/or the signature of an officer of the arbitral institution.

[13] "If the arbitration rules (such as for instance the ICC Arbitration Rules, also reproduced in *Fasching/Konecny 2nd edn.*, annex XI, which apply here) provide that the arbitral institution must take care of the notification of the arbitral award rendered by the arbitrator(s) (see Art. 28(1) ICC Rules),[7] then this obligation includes the examination of the authenticity of the signatures of the arbitrator(s); otherwise it would not be guaranteed that an enforceable decision – the essential purpose of an arbitration – is delivered to the parties. Since the arbitral institution is regularly in contact with the appointed arbitrators, it is also in the position (for instance on the basis of signatures known to it, of sender's details or through direct inquiry) to assess whether the award was really signed by the appointed arbitrator(s). If according to the arbitration rules an original of the arbitral award remains with the arbitral institution, then the confirmation of the correspondence of the copy with the original by the same arbitral institution also indirectly confirms the authenticity of the signatures of the arbitrator(s) thereon, because it is to be assumed that there is an original whose authenticity has been checked. On this point, therefore, the Court deviates from the earlier-mentioned decision 3 Ob 35/08f.

[14] "It is to be assumed that there is a copy of the arbitral award certified by the arbitral institution when [the copy] carries both a stamp and a signature of an officer of the arbitral institution authorized thereto, together with an indication of his function. In this manner, the source of the certification is sufficiently

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6. Art. 27(4) of the Vienna Rules 2006 read:

   "Awards are confirmed on all copies as awards of the Centre by the signature of the Secretary General and the stamp of the Centre. By this it is confirmed that the award is an award of the International Arbitral Centre of the Austrian Federal Economic Chamber and that it was made and signed by (an) arbitrator(s) chosen or appointed in accordance with these Rules of Arbitration."

   These Rules are no longer in force.

7. Art. 28(1) of the Rules of Arbitration of the International Chamber of Commerce 1998 read:

   "1. Once an Award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them."

   These Rules are no longer in force.

documented and compliance with the conditions under the relevant arbitration rules can be verified.

[15] "Under reference to the decision of the Supreme Court 3 Ob 320/97y, the appellate court (just like the respondent in the appeal proceedings) required as further condition for the certification of the copy by the arbitral institution the proof/confirmation of the certifying officer's function and the certification of the authenticity of his signature. Also this legal opinion, followed by [the court of appeal] and repeated in 3 Ob 196/02y, is no longer to be upheld when the arbitral rules agreed between the parties, which are the basis for the assessment of this simplified certification, do not provide for such certification of the certification [*Überbeglaubigung*]. The latter therefore cannot be required. Otherwise the simplification sought by agreeing on arbitration rules would be lost.

[16] "In sum it is to be held, according to present jurisprudence, that Art. IV(1)(*a*) of the New York Convention allows the correspondence of the original arbitral award with the copy submitted to be certified also by an officer in a neutral position close to the arbitral tribunal, provided he is authorized under the relevant arbitration rules (RIS-Justiz RS0108580 [T1]). Such certification requires a stamp and a signature of the attesting officer of the arbitral institution, unless the applicable arbitration rules provide for a certification of the certification. The requirement that also the authenticity of the signatures on the original be certified at least indirectly (RIS-Justiz RS0124091)[8] is complied with if the arbitration rules explicitly so provide (see Art. 27(4) of the Vienna Rules), but also when these [rules] provide only that the arbitral institution take care of the notification of the arbitral award rendered by the arbitrator(s) to the parties and an original of the arbitral award signed by the arbitrator(s) – of which the copy is made – remains with the institution (here, according to Art. 28(4) ICC Rules).

[17] "Since the relevant arbitration rules are the basis for a decision on the debated issues, they must be supplied in the ex parte proceedings on documents pursuant to Sect. 83(1) EO together with the certified copy of the arbitral award (together with possible essential annexes) by the claimant/petitioner at the moment of filing the application. This is not provided for explicitly either in the EO or in the New York Convention, but is a necessary consequence of the adopted form of simplified certification of copies.

[18] "To the extent that – as is the case here – there is no doubt as to the admissibility of this simplified certification and no apparent doubt as to the

8. See fn. 5.

authenticity of the original(s) of the award and/or the certification, the formal requirement of Art. IV(1)(*a*) of the New York Convention must be deemed to have been complied with.

[19] "The following are relevant for the present declaration of enforceability.

[20] "Art. 1 of the [1998 ICC Rules] provides that the ICC Court of Arbitration ensures the application of these arbitration rules and that it draws up its own Internal Rules (Appendix II).

[21] "Art. 28 ICC Rules [1998] reads inter alia:

> '*Notification, Deposit and Enforceability of the Award*
> 1. Once an Award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.
> 2. Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.
> (….)
> 4. An original of each Award made in accordance with the present Rules shall be deposited with the Secretariat.
> (….)
> 6. 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.'

[22] "Art. 5 of the Internal Rules (Appendix II) provides inter alia:

> '*Court Secretariat*
> 1. In case of absence, the Secretary General may delegate to the General Counsel and Deputy Secretary General the authority to confirm arbitrators, to certify true copies of Awards and to request the payment of a provisional advance, respectively provided for in Articles 9(2), 28(2) and 30(1) of the Rules.
> (….)'

[23] "Thus, according to the ICC Arbitration Rules, including Appendix II, the Secretariat must notify an award signed by the arbitrator to each party and must deposit a further original award with the Secretariat. Further, the issuance of copies of arbitral awards and their certification by officers of the arbitral

institution, concretely also by the General Counsel, are provided for without requiring a certification of the certification. Hence, in the present case the 10 December 2009 certification by the General Counsel on both copies complies with both the conditions for a simplified certification by an authorized officer of the arbitral institution and the requirement of the indirect certification of the authenticity of the signature of the arbitrator on the original, and thus with the formal conditions of Art. IV(1)(*a*) New York Convention. Hence, the apostilled certification of the notary public of 11 December 2009 and thus the 'self-certification' of his signatures on the copies by the arbitrator are irrelevant.

[24] "The fact that the ICC Arbitration Rules, with Appendix II, were not supplied to the first instance court by the petitioner is of no consequence, because this defect was cured – though by the respondent – by the submission of Attachment no. 6 as a new filing.... Hence, there was sufficient documentary evidence at the time of the appellate decision according to due process.

[25] "The discrepancy noted by the appellate court in a passage of the (unsigned and not stamped) title page of both copies, being that the confirmation on the cover of the arbitral award refers to the addendum and vice versa, also does not give rise to serious doubts as to the correspondence of the original arbitral award and addendum with the copies supplied (Attachments A and B). This [discrepancy] is due obviously to a mistake in affixing the covers, and can go unnoticed because of the completely credible and admissible certification both on the first and last page of Attachments A and B.

[26] "Nor do the grounds for appeal raised by respondent lead to setting stricter requirements for certification, because the authenticity/validity of the arbitral award and addendum or their copies is not substantively disputed, rather only the lack of compliance with alleged formal conditions is pleaded.

[27] "No questions are raised as to the submission of sufficient translations; hence, they do not need to be decided.

[28] "The grounds for refusal relied on by the appellate court therefore are not present."

II. OTHER ISSUES

[29] "We must now deal with respondent's further grounds for appeal, which the appellate court did not examine as a consequence of its – not to be shared – finding and which it essentially upheld in its decision. They concern both formal issues and grounds for refusal under Art. V(1)(*a*) and Art. V(2) of the New York Convention."

1. Illegible Signature

[30] "Respondent sees a 'scribble, whorl or squiggle' that cannot be deemed a signature in the actually illegible signature of General Counsel E.J. Respondent's reference to the jurisprudence of the Higher Administrative Court [*Verwaltungsgerichtshof*], which is rendered in respect of Sect. 18 of the General Law on Administrative Procedure [*Allgemeines Verwaltungsverfahrensgesetz* – AVG], is irrelevant in the present context. The requirement of a readable signature of the officer cannot be deduced from the ICC Arbitration Rules. Illegibility is further cured by the indication of the name and function of the attesting [officer] in the stamp, which guarantees the necessary verification. Moreover, respondent did not doubt the authenticity of the signature of E.J. as General Counsel."

2. Award Final and Binding

[31] "The provision of Sect. 54(2) EO[9] is not applicable in the present proceeding for a declaration of enforceability (Czernich in Burgstaller/Neumayr, *IZVR* Art. IV New York Convention no. 3). Art. IV of the New York Convention, which takes precedence (Sect. 614(1) first sentence ZPO together with Sect. 86 EO), gives the claimant/petitioner the choice between supplying the original arbitral award or a copy thereof, both certified, and does not require a confirmation of the finality [*Rechtskraft*] and enforceability of the decision (RIS-Justiz RS0002515; Czernich, op. cit.). Thus, respondent's argument that it was necessary to supply the original executory title together with a certification of its enforceability does not succeed.

[32] "Insofar as it refers to the exequatur requirements under French law, respondent overlooks that the New York Convention – as it appears from its Art. V(1)(*e*) – takes into account (only) on the finality of the arbitral award.

[33] "According to the prevailing opinion, it is irrelevant in this respect both whether the law of the state of rendition sets requirements for exequatur and whether an action for setting aside or an extraordinary recourse may still be filed under the national law or is pending. This applies also when the national law excludes the enforceability in the state of rendition as long as such recourse can

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9. Sect. 54(2) EO reads in relevant part:

> "(2) A copy of the executory title with a certification of enforceability, and in respect of a foreign executory title finally declared enforceable also the declaration of enforceability together with a certification of the finality of this decision, must be attached to the application for execution…."

be or has been filed (Czernich in Burgstaller/Neumayr, *IZVR* Art. V New York Convention no. 49; Steindl in Torggler, *Praxishandbuch Schiedsgerichtsbarkeit*, p. 265 et seq.; Solomon, *Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit*, pp. 377, 378 and 386 et seq.; Adolphsen in *MünchKomm ZPO*, 3rd edn., Art. V New York Convention no. 55 and references therein; Saenger, *ZPO*, 4th edn., Sect. 1061 no. 4; BGH NJW 1988, 3090). Only an award that has been validly set aside is no longer binding.

[34] "In respect of the award at hand, Art. 28(6) of the ICC Arbitration Rules provides that the award is directly binding. It does not appear that the award could be attacked before a higher arbitral instance or by recourse to a state court (in the sense of a full review). Nor does respondent claim that [the award] has already been set aside. Thus it must be assumed that [the award] is binding, so that also these complaints of respondent fail.

[35] "The above considerations also apply to the partial award on the jurisdiction of the arbitral tribunal. Its submission with the application could be omitted, because this partial award – submitted by petitioner together with its statement in reply (Attachment K) – will not be declared enforceable. Besides, its dictum was reproduced, inter alia, in the (final) award."

3. Public Policy

[36] "Respondent relies expressly on the grounds for refusal in Art. V(1)(*a*) and Art. (2)(*b*) of the New York Convention arguing, inter alia, that the award violates the United Nations Convention against Corruption (BGBl III 2006/47) and the Civil Law Convention on Corruption together with the Agreement for the Constitution of the Group of States against Corruption – GRECO and Resolution (99) 5 on the Constitution of the Group of States against Corruption (GRECO) and Annex (BGBl III 2006/155).

[37] "These treaties entered into force in Austria on 10 February 2006 and 1 December 2006 and cannot therefore be taken into account for a decision on the 'Exclusive Projects Promotion Agreement' (EPPA) and 'Joint Venture Agreement (JVA), each containing an arbitration clause, concluded on 16 February 2005.

(….)

[38] "All remaining arguments (also raised under Art. V(1)(*a*) of the New York Convention) allege in substance violations of public policy and must therefore be examined with reference to Art. V(2)(*b*) of the New York Convention.

[39] "The following premise must be made. It is impossible to waive reliance on the grounds in Art. V(2)(*b*) New York Convention, either in advance or at the

stage of the recognition proceedings, because this provision serves the purpose of taking into account public interest and therefore cannot be disposed of by the parties (Czernich in Burgstaller/Neumayr, *IZVR* Art. V New York Convention no. 7; Reiner/Jahel, *Institutionelle Schiedsgerichtsbarkeit*, 2nd edn., Art. 28 ICC Arbitration Rules no. 4). For this reason alone, the obligation in Art. 28(6) ICC Arbitration Rules (addressed in the appeal) to waive 'any form or recourse, insofar as such waiver can validly be made', is not relevant.

[40] "In proceedings for the declaration of enforceability, the court of the enforcement state must examine the ground of violation of public policy provided for in bilateral and multilateral treaties in an autonomous manner, that is, independent of possible annulment proceedings in the state of the arbitration or the recourse thereto by the respondent (3 Ob 221/04b = RIS-Justiz RS0119799 = SZ 2005/9).[10] In no manner must this ground for refusal lead to a factual or legal review of the foreign title (prohibition of *révision au fond*); [it may only lead to an examination of] whether the decisions of the arbitral tribunal in its award violate the public policy of the enforcement state.

[41] "Thus, a factual review of the decision is allowed and necessary but only in the context of the public policy exception, and the court of the enforcement state does not have to examine how the dispute should have been correctly decided (RIS-Justiz RS0002409; Czernich in Burgstaller/Neumayr, *IZVR* Art. V New York Convention no. 1 et seq.). The relevant standard for the autonomous public policy review of the foreign arbitral award by the courts of Austria as the enforcement state is whether the award is at odds with the basic values of the Austrian legal system because it is based on a foreign legal principle completely irreconcilable with the [Austrian] legal system. This public policy exception may only be used cautiously, in order not to disturb excessively the international harmony of decisions.

[42] "It does not suffice that the law or the legal relationship itself is contrary to public policy; enforcement as well must be unacceptable for the [Austrian] legal system (stRsp, RIS-Justiz RS0110743, RS0058323, RS0002402; RS0002409). The basic values that are part of public policy are mainly the fundamental principles of the Federal Constitution, but also of criminal law, private law and procedural law; relevant for compatibility is not the path followed by or the reasons given for, but the result of the arbitral award (3 Ob 221/04b and references therein).

[43] "Respondent claims that the opinion of the arbitrator that the partial arbitral award had already finally decided on the objection of the invalidity of the

10. Reported in Yearbook XXX (2005) pp. 421-436 (Austria no. 13).

arbitration agreement, so that further argument on this point was no longer admissible, is an unreasonable application of the law.

[44] "It must be replied to [respondent] that the arbitral tribunal – notwithstanding its extensively reasoned opinion that respondent was not entitled 'to raise again the issue of the validity and enforceability of the EPPA and the JVA'– anyway discussed the substance of this new argument 'for the sake of completeness' and rejected respondent's opinion in a substantiated manner.

[45] "Respondent also objects to the refusal in both the partial and the final arbitral award to deem null and void the agreements (EPPA and JVA) and as a consequence the arbitration agreements [therein]. [Respondent], however, cannot demonstrate that there was a procedural conclusion contrary to public policy.

[46] "The argumentation that there was (a here irrelevant) violation of the treaties mentioned above … makes several factual assertions (for instance, that the sole purpose of the agreements was the improper exploitation of contacts in the highest public offices; the agreed provisions were in fact bribes; the jointly established company was grossly privileged, etc.) that were not reflected in the factual findings – which respondent did not allege to be either arbitrary or incomplete – in the arbitral award.

[47] "However, the conclusion that the agreements and thus the arbitration clauses, on the basis of the facts assumed by the arbitral tribunal, were valid is a legal assessment by the arbitral tribunal whose correctness may not be reviewed in the present proceedings and as a consequence cannot lead to finding a violation of the basic values of the Austrian legal system.

[48] "Under the heading 'Fraud against [Respondent]', respondent claims a violation of public policy because the award directed it to reimburse expenditures even if the owner and chairman of petitioner (according to the determinations in the award) started a full-fledged campaign to divest respondent unlawfully of the shares in the joint enterprise and cause the loss of its expenditures, in violation of the good faith obligations under the agreements (EPPA and JVA). However, [respondent argues] no one may profit from an illegal act.

[49] "The arbitral tribunal based [respondent's] obligation to reimburse petitioner's expenditures for the company in the period between March 2005 and January 2006, in the amount of NGN 50,963,591, on Point 4 of the JVA, where it is agreed between the parties that respondent is financially responsible for the company to be established (and which was in fact established) and its operation. Thus, [respondent] is responsible for the financing of the enterprise. Hence, the award is based on a contractual right to reimbursement of

expenditures, which does not have a relevant connection to the activities of the organs of petitioner since April 2006, which respondent qualifies as [petitioner's] illegal acts.

[50] "The outcome of the arbitral award is not that petitioner was granted financial claims resulting from illegal acts of its organs; rather, the arbitral tribunal implemented a right of petitioner under the JVA even if, according to the reasoned findings of the arbitral tribunal, [petitioner] itself subsequently acted illegally and caused damages to respondent.

(....)

[51] "Finally, respondent claims that the arbitral tribunal abused its powers because it awarded petitioner, without any explanation, full cost reimbursement for the fraudulent main claim it lost, the claim it withdrew and a claim it largely lost; this violates public policy.

[52] "The award reads ...:

> '[Petitioner] submitted that the winning party would be entitled to reimbursement of costs. [Petitioner] claims a total sum of US$ 370,922.00 and € 10,500.00. [Respondent] agreed with this sum, under reservation of the existence of an obligation to pay, and did not deny that the winning party would be entitled to reimbursement of costs.'

Hence, the rationale of the arbitrator's decision on costs lies in this citation of the position of respondent in respect of the sum for reimbursement of costs claimed by petitioner. The arbitrator also explicitly referred thereto in his addendum to the award. The arbitrator's apparent interpretation of this position of respondent – in the sense that [respondent] accepted that it would have to reimburse petitioner for the costs it claimed if a payment obligation were decided – is not an unreasonable application of the law (particularly in respect of accessory claims).

[53] "Hence, the enforcement of a decision on costs so reasoned is not based on a legal opinion totally irreconcilable with the [Austrian] legal system. A violation of public policy must therefore be denied also on this point."

4. Conclusion

[54] "Hence, there are no grounds for refusing a declaration of enforceability under the New York Convention."

III. REFERRAL TO THE APPELLATE COURT

[55] "The Supreme Court cannot settle [this dispute] in a final manner, because two requests for suspension made by respondent to the appellate court were not decided and [the appellate court] is functionally competent thereon (Jakusch in *Angst*, 2nd edn., Sect. 84 EO no. 23).
[56] "For clarification, we give the following indications on this point:

(1) The legal basis for these requests is not Sect. 84(5) EO[11] but rather, because of the subsidiarity clause in Sect. 614(1) first sentence ZPO together with Sect. 86(1) EO, Art. VI of the New York Convention, which provides that if the award is binding but means of recourse against it (for instance an application for annulment) are commenced in its country of origin, the exequatur court may suspend the recognition proceedings 'if it considers it proper' until a decision [is rendered by] the court in the country of origin; it may also, on the application of the party claiming enforcement of the award (which is lacking here), order the other party to give suitable security.
(2) Thus, Art. VI New York Convention gives the court discretionary leeway both on the question whether the proceedings is to be adjourned but also on the issue whether [adjournment] can only take place against giving of security. A guideline for this discretionary decision is an examination whether the means of recourse in the country of origin has a prospect of success; this can be ascertained generously but at any event is to be explained by the party resisting enforcement (Adolphsen in *MünchKomm ZPO*, 3rd edn., Art. VI New York Convention no. 2; Czernich in Burgstaller/Neumayr, *IZVR* Art. V New York Convention no. 56, both with references therein). The commencement of annulment proceedings alone does not suffice. Besides, the party resisting enforcement must explain concretely that its grounds for annulment (and recourse) actually should succeed, and why (agree, Adolphsen, *op. cit.*). Respondent's submission on appeal does not comply with [this requirement], because it only attests to the court that there

11. Sect. 84(5) EO reads:

> "(5) If the foreign executory title is not yet final according to the legal provisions of the country of origin, the court seized with an appeal against the decision on the application for a declaration of enforceability may, at the request of defendant, suspend the proceeding for the declaration of enforceability until the foreign executory title becomes final; it may set a suitable time limit for the defendant to file an action in the country of origin. The court may further make performance of already admissible acts of enforcement conditional on the giving by the creditor of a security for damages threatening the debtor, to be determined by the court at its discretion."

is a recourse, but makes no assertions in respect of the content of the appeal to the *Cour de Cassation*.
(3) Since Art. VI New York Convention takes into account an application 'for setting aside or suspension of the award' that has already been filed, neither the claim filed in Nigeria by F Ltd (not even by respondent) against, inter alia, petitioner and respondent – which seeks a determination on the scope and validity of the arbitration clauses in the EPPA and the JVA – nor a claim whose filing is contemplated can be deemed a ground for adjournment under Art. VI New York Convention.
(4) If the appellate court will deny a suspension, it will have to decide on respondent's appeal in respect of the arbitral award and addendum with due regard to the stated legal positions."
(….)

25. Oberster Gerichtshof [Supreme Court], 18 April 2012, No. 3Ob38/12b

Parties:	Plaintiff: T (nationality not indicated) Respondent: D (nationality not indicated)
Published in:	Available online at <www.ris.bka.gv.at>
Articles:	V(1)(*b*)
Subject matter:	– due process and expert evidence
Topics:	¶ 511 (questions to expert report)

Summary

The Supreme Court affirmed the declaration of enforceability of two Swiss awards granted by the lower courts, dismissing a claim of violation of due process based on the fact that the written questions filed by the respondent in respect of an expert report were not dealt with because the arbitral tribunal held that they concerned legal rather than factual issues. However, due process is safeguarded where as here the party can state its position on the facts and evidence on which the award is based.

On 13 July 2011, the District Court for Vienna City Centre granted a declaration of enforceability and an order of execution for a partial award of 23 December 2010 and a final award of 14/15 June 2011 rendered by the Chamber of Commerce of the Swiss Canton Ticino. On 27 December 2011, the Vienna Court of Appeal affirmed the lower court's decision.

By the present decision, the Supreme Court rejected the appeal from the appellate decision. The Court dismissed the respondent's argument that there had been violation of due process in the arbitration because a written expert report was not discussed orally and the arbitral tribunal did not take into account certain written questions raised by the respondent in respect of the report, finding that they concerned legal rather than factual issues.

The Supreme Court noted that there is a ground for refusal under Art. V(1)(*b*) of the New York Convention only when the party against which a foreign arbitral award is rendered was not duly informed of the arbitration or could not otherwise present its case. The fact alone that the respondent formulated

questions in writing to the expert proved that the respondent could present its case. It was irrelevant that these questions were not answered. Also according to Austrian civil procedural law, due process is guaranteed when the party can state its position in respect of the facts and evidence on which the decision is based. This was the case here.

Only the relevant part of the decision is reported.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345023-n>.

Excerpt

[1] The Supreme Court noted at the outset that the appellate court affirmed the declaration of enforceability on the ground that

> "the mere incomplete determination of the facts or failure to discuss the legally relevant facts by the arbitral tribunal is not a violation of public policy, because a strict standard must be applied in an examination under Art. V(1)(*b*) [of the 1958 New York Convention]. Since the defendant could ask questions in writing in respect of the expert report, the lack of an oral discussion at most is only a procedural defect, not a violation of due process."

(….)
[2] "Respondent continues to rely on the ground for refusal in Art. V(1)(*b*) of the New York Convention, which it believes to be present because [respondent] was deprived of its right to be heard by the arbitral tribunal. [respondent argues that] as the written report of the expert was not discussed orally, the arbitrator did not at all take into account the questions formulated in writing, on the sham and further unexplained ground that they were of a legal nature; thereby the arbitral award was based on facts and evidence in respect of which the parties could not state their views, which is contrary to Art. 6 European Convention on Human Rights [on the Right to a Fair Trial].
[3] "The Supreme Court has already held, in respect of the ground for refusal of the violation of due process within the meaning of Art. V(1)(*b*) New York Convention, that this ground for refusal requires that the party against which a foreign arbitral award is rendered was not duly informed of the arbitral proceedings or could not otherwise raise its claims or defend itself.
[4] "Thus, the ground for refusal of the violation of adversarial proceedings [*Verletzung des beiderseitigen Gehörs*] is substantively consistent with Sect. 611(2) second sentence ZPO[1] (3 Ob 122/10b and references therein). The fact alone

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1. Sect. 611(2)(2) of the Austrian Code of Civil Procedure (*Zivilprozessordnung* – ZPO) reads:

> "*Application for Setting Aside an Award*
> (….)
> (2) An arbitral award shall be set aside if:
> ….
> 2. a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present his case[.]"

that respondent could formulate questions in writing to the expert – that the arbitrator deemed legally irrelevant – clearly proves that respondent could present its case.

[5] "Hence, only the argument remains that no sufficient answer was given to the questions asked. On the conceptual plane already, this cannot be deemed to be the ground for refusal [of violation of due process], which exists only when the party could not raise its claims and means of defense (see 3 Ob 1091/91). Also according to Austrian civil procedural law, due process is guaranteed when the party is given the opportunity to state its position and can state its views in respect of all facts and evidence on which the decision shall be based (RIS-Justiz RS0005915 [T17]; RS0074920 [T18]). Also according to respondent's statement, this was the case here. This [situation] does not change if the party could not ask the expert all the questions it wished (see RIS-Justiz RS0074920 [T19]; 3 Ob 230/11m).

[6] "Thus, the rejection of the invoked ground for refusal by the appellate court is not an untenably incorrect decision."

(….)

BELIZE

Accession: 24 February 1981
(extension by the United Kingdom)
1st Reservation

2. Court of Appeal of Belize, 8 August 2012, Civil Appeal No. 4 of 2011
Caribbean Court of Justice, 26 July 2013, CCJ Appeal No. CV 7 of 2012

Parties:	Appellant/Respondent: The Attorney General of Belize Respondents/Appellants: (1) BCB Holdings Limited (Belize); (2) The Belize Bank Limited
Published in:	*Court of Appeal of Belize*: available online at <www.belizejudiciary.org>; *Caribbean Court of Justice*: available online at <www.caribbeancourtofjustice.org/wp-content/uploads/2013/07/2013-CCJ-5-AJ.pdf>
Articles:	In general; III; V(1)(*b*)
Subject matters:	– implementing legislation – narrow concept of public policy – public policy and state representative unauthorized to make contractual promises – estoppel from raising objection by failure to participate in the arbitration (no) – discretion to enforce award where there is ground for refusal
Topics:	¶ 113; [51] + [59]-[75] + [78] = ¶ 001; [101]-[109] = ¶ 518; [106] + [110]-[113] = ¶ 502; [114]-[140] = ¶ 524 (state representative unauthorized to make contractual promises); [136]-[138] = ¶ 303; [141]-[142] = ¶ 500A

Summary

Enforcement of an LCIA award was denied in both instances. First decision: the court of appeal held that Part IV of the Belize Arbitration Act, which gives effect to the 1958 New York Convention, was inapplicable and therefore the enforcement application filed thereunder failed. The court held that Belize's colonial legislature enacted the 1980 Ordinance containing Part IV when the Convention had not yet been extended to Belize by the United Kingdom and therefore infringed the exclusive power of the executive (the Crown) in the field of foreign policy. Second decision: the Caribbean Court found instead that Part IV was valid: by enacting the 1980 Ordinance the colonial legislature did not exceed its powers because the Ordinance dealt solely with the internal affairs of Belize – the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize. However, enforcement should be denied on grounds of public policy (in the narrow meaning of this defense in the context of the enforcement of foreign awards), because the Belizean Minister of Finance did not have the power to make the promises he made in the agreement whose breach led to the award against Belize. Under that agreement, the Minister promised the first claimant – without parliamentary approval – an irrevocable favorable tax regime which it was not in his power to promise. Even Parliament could not have made such irrevocable promises, added the Court. In the circumstances of the case, the Court should not exercise its discretion to enforce the award even in the presence of grounds for refusal.

On 22 March 2005, the Government of Belize, through its Minister of Finance and its Attorney General, entered into a Settlement Deed with BCB Holdings Limited (BCB) to settle a pre-existing dispute that had arisen between the Government and BCB – then known as Carlisle Holdings Limited – in respect of the sale of shares in a Belizean telecommunications company.[1] The Deed took effect immediately; no mention was made of seeking the approval of the Belizean Parliament, nor was approval sought later. Under the Settlement Deed, BCB agreed to terminate the arbitration proceedings pending against Belize at the London Court of International Arbitration (LCIA), and was granted in return, as of 1 April 2005 and for an undetermined period of time, a favourable tax regime at variance with Belizean tax law. The Belize Bank Limited had the power to enforce the Deed. The Deed further provided that it was governed by English law; it also contained a clause providing for arbitration of disputes in London by a panel of three arbitrators under the LCIA rules.

The Belizean Commissioner of Income Tax was initially unaware of the existence of the Settlement Deed, which was "confidential". On 10 July 2006, he wrote to BCB and The Belize Bank Limited (collectively, the Companies)

1. A decision of the Belize Supreme Court of 18 February 2005 in respect of this dispute is reported in Yearbook XXXIII (2008) at pp. 360-370 (Belize no. 1).

seeking their compliance with Belizean tax law; he later withdrew his request after being referred by the Companies to the Belizean Minister of Finance. After a new administration took office in Belize following a general election in February 2008, however, the Commissioner rejected the tax returns filed by the Companies for the two previous years and required them to comply with tax law in respect of that period. On 16 October 2008, the Companies filed a new request for LCIA arbitration, claiming that the Government of Belize breached the Settlement Deed. The Government did not participate in the arbitration proceedings in London.

By a final award of 20 August 2009, an LCIA arbitral tribunal found that the dispute was arbitrable, that the Settlement Deed was valid and that Belize was in breach thereof. The tribunal awarded the Companies damages in addition to arbitration costs, legal fees and interest.

On the following day, 21 August 2009, the Companies sought enforcement of the LCIA award in the Belizean courts. The Government objected that the award was in respect of a non-arbitrable matter and that its enforcement would be contrary to public policy. A trial judge, Muria J, rejected both objections and granted enforcement. The judge also dismissed the Government's contention that the Companies' application should fail because it was filed under Part IV of the Belize Arbitration Act, which provides for the enforcement of 1958 New York Convention awards; in the Government's opinion, Part IV was inapplicable because the Arbitration Ordinance which enacted it in 1980 was unconstitutional as it was adopted before the New York Convention became applicable in Belize by extension by the United Kingdom. The trial judge disagreed. He noted that the Arbitration Ordinance was issued on 10 October 1980; the New York Convention was extended to Belize by the United Kingdom on 24 February 1981; and Belize became independent on 21 September 1981 (Belize as an independent state has not ratified the Convention). Hence, the Convention was an "existing law" of Belize at the time of independence and was saved by the Independence Constitution of 1981, which made provision for the saving of "existing laws" – that is, any act, ordinance, rule, regulation, order or other instrument "having effect as part of the law of Belize immediately before Independence Day".

By the first reported decision, dated 8 August 2012, the Court of Appeal of Belize, before Manuel Sosa, President, and Douglas Mendes and Duke Pollard, Justices of Appeal, in an opinion by Pollard (Sosa concurring), reversed the lower court's decision and denied enforcement, finding that the part of the 1980 Arbitration Ordinance giving effect to the 1958 New York Convention, and the Convention itself, were not applicable.

The court of appeal first noted that the Belizean legal system subscribes to the constitutional law principle of dualism, under which the Executive has exclusive prerogative powers in the area of foreign policy and may enter into obligations on behalf of the state by concluding treaties without the intervention of Parliament, while the Legislature is required to enact such obligations into domestic law. Thus, in Belize international treaties must be both approved by the Executive and incorporated into the Belizean legal system by the Legislature.

The court concluded that by issuing the Arbitration Ordinance 1980 – which enacted Part IV of the Belize Arbitration Act purporting to give effect to the New York Convention and its accompanying Fourth Schedule (which reproduces the text of the Convention) – the colonial Legislature encroached on the exclusive prerogative of the Executive, the Crown, in respect of a matter relating to foreign affairs. Hence, the enactment was void ab initio and could not have been cured by the subsequent extension by the Crown of the New York Convention to Belize. Consequently, Part IV and the Fourth Schedule of the Arbitration Ordinance 1980 did not constitute "existing law" within the meaning of the Belize Constitution of 1981 and could not be saved thereunder.

The court of appeal also found that Belize was not estopped from denying the applicability of the New York Convention by the unilateral declaration of its Prime Minister to the United Nations Secretary General, on 29 September 1982, indicating Belize's provisional application of treaties, on a basis of reciprocity, concluded by the previous sovereign, the United Kingdom. The court held that this declaration did not suffice, according to the applicable rules of international law, to make Belize a Contracting State of the New York Convention.

Justice Mendes filed a dissenting opinion. This is the first decision reported.

By the second reported decision, dated 26 July 2013, the Caribbean Court of Justice, before Byron, President, and Saunders, Bernard, Wit and Anderson, JJ, in an opinion by Justice Adrian Saunders and Justice Winston Anderson, disagreed with the appellate court on the validity of Part IV of the Belize Arbitration Act but reached the conclusion that enforcement should be denied on grounds of public policy.

Justice Anderson dealt with the first issue before the Court – whether Part IV of the Act was valid – in the second part of the decision. He concluded that Part IV was valid because the Belizean colonial Legislature did not exceed its powers by enacting the 1980 Ordinance when the New York Convention had not yet been extended to Belize. The Court agreed with the dissenting judge of the court of appeal, reasoning that the 1980 Ordinance dealt with the internal affairs of Belize – the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize – and did not purport to regulate or govern external affairs; thus, it did not interfere with the exercise

of the authority of the Executive in foreign affairs. The annexure of the Convention to the 1980 Ordinance as the Fourth Schedule was only for purposes of identifying the categories of foreign awards that would be recognized and enforced; it did not undertake international law obligations on behalf of Belize.

The Caribbean Court also reasoned that while in dualist jurisdictions the act of acceptance of a treaty by the Executive usually precedes the treaty's legislative incorporation in the country's legal system by the Legislature, this is not a strict requirement, as there are many examples of cases where legislative incorporation has preceded executive acceptance.

The Court concluded that Part IV of the 1980 Ordinance was constitutional, was saved as "existing law" under the 1981 Independence Constitution and was therefore applicable in Belize.

Justice Saunders dealt with the second issue before the Caribbean Court – whether enforcement should be denied on grounds of public policy and lack of arbitrability – in the first part of the decision. The Court first stressed that the concept of public policy to be taken into account in the context of the enforcement of a foreign award is the public policy reflecting "the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize". Also, the public policy exception must be applied in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario; as there is a pro-enforcement bias, enforcement should be denied only in exceptional circumstances.

The Court then noted that although the public policy exception should not be an excuse to reopen the merits of a case already determined by the arbitrators, in the circumstances of the case it could re-examine the legality of the Settlement Deed even if the LCIA arbitrators had specifically addressed that issue and found the Deed to be valid. The Court reasoned that all the relevant facts here were accepted by both sides and it was only necessary to decide whether, on the basis of these undisputed facts, enforcement of the award would violate public policy.

The Court agreed with the LCIA arbitrators that the Minister of Finance has wide prerogative powers to enter into agreements on behalf of Belize. However, the arbitral tribunal should have considered whether the Minister had the power to make the irrevocable promises he made in the Settlement Deed – to except a taxpayer from obligations contained in current and future revenue statutes – without Parliamentary approval. The Court concluded that he did not, either under the Belize Income and Business Tax Act or because of his executive prerogative powers. In respect of the latter powers, the Court reasoned that the power to impose, alter, regulate or remit taxes and duties is constitutionally vested in the Legislature, and only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the

country's revenue laws. In light of the fundamental principle of the separation of powers, whose "keen observance" is vital in young states especially, the Minister had no right to make the promises he made under the Settlement Deed.

The Court then considered that the pro-enforcement bias and the restrictive manner in which the public policy exception should be applied in the case of foreign awards mean that enforcement may still be granted even if features of the award are inconsistent with public policy. Here, however, the grounds for not enforcing the LCIA award were compelling and the Court should not exercise this discretion to enforce, because the Minister had no power to guarantee fulfillment of the promises he gave. The Court added that not even Parliament could have bound itself to such irrevocable promises.

The Caribbean Court finally held that Belize's non-participation in the LCIA arbitration was irrelevant, as the failure to participate in the arbitration does not per se preclude a party from raising the public policy exception at the enforcement stage. Rather, the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns must be weighed against the court's desire to promote finality and certainty with respect to arbitral awards. Here, the former prevailed over the latter. Also, the Court noted that nothing in the Arbitration Act suggests that participation in the arbitration is a pre-condition for invoking the public policy exception.

Finding that its conclusions on the public policy point was dispositive of the appeal, the Court did not consider the non-arbitrability point. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345024-n>.

Excerpt

Court of Appeal of Belize, 8 August 2012

Sosa, P, Concurring Opinion

[1] "I concur in the reasons for judgment given by Pollard JA in his judgment, which I have read in draft. The order of the judge below is accordingly set aside. Subject to what is set out [at [81]], the appellant shall have his costs, here and below, to be agreed or taxed. I am authorized by Pollard JA to say that he concurs in these orders."

Mendes, JA, Dissenting Opinion

[2] "I have the great misfortune to dissent from the judgment of my brother Pollard JA, with which the President, Sosa P, has concurred.

[3] "This is an appeal from the judgment of Muria J whereby he ordered that, pursuant to Sect. 28 of the Arbitration Act Cap. 125,[2] the respondents be at liberty to enforce a final award obtained by them against the Government of Belize from the London Court of International Arbitration (LCIA). They are at liberty to enforce the award in the same manner as a judgment or order to the same effect and to make any further application to the Court to effect its enforcement.

[4] "The final award was obtained in arbitration proceedings which the respondents commenced by a request for arbitration dated 16 October 2008. The request was made pursuant to an arbitration clause contained in an agreement referred to as 'the Settlement Deed'. The arbitration clause permitted the parties to refer any dispute arising out of or in connection with the Settlement Deed, which could not be resolved amicably, to be finally resolved

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2. Sect. 28 of the Belize Arbitration Act 2000, Chapter 125, reads:

> "(1) A Convention award shall be enforceable either by action or in the same manner as an award by an arbitrator is enforceable by virtue of section 13.
> (2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it is made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Belize and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award."

by arbitration under the LCIA Rules. It was further agreed that the seat or legal place of the arbitral proceedings would be London, England. A panel of three arbitrators was constituted as the Deed envisaged and the arbitration proceeded in the absence of the Government of Belize which chose not to participate even though fully aware of the various steps being taken. On 20 August 2009, after a hearing which lasted no more than two days, the LCIA found that the Settlement Deed had been terminated as a result of the Government of Belize's repudiatory breach and the respondents' acceptance thereof. The Court awarded damages in the amount of BZ$ 40,843,272.34, reimbursement of the respondents' costs of the arbitration in the amount of [UK]£ 206,248.40 and legal, professional and other arbitration costs in the amount of BZ$ 2,960,735.69. Interest at an annual rate of 3.38 percent compounded annually on all sums found to be due was also awarded.

[5] "On the very next day, the respondents commenced these proceedings pursuant to Sect. 28 of the Arbitration Act which provides that 'a Convention award shall be enforceable either by action or in the same manner as an award by an arbitrator is enforceable by virtue of section 13'. A 'Convention award' is defined by Sect. 25(1) as 'an award made in pursuance of an arbitration agreement in the territory of a country, other than Belize, which is a party to "the New York Convention"'. It is not disputed that the award was made in the United Kingdom and that at all material times the United Kingdom was a party to the New York Convention. Invoking Sect. 30(3) of the Act,[3] the Government of Belize opposed the application for enforcement on the grounds that the award was in respect of a matter which is not capable of a settlement by arbitration and that it would be contrary to public policy to enforce it. Muria J rejected both planks of the Government's defence. The appellant appeals against these findings.

[6] "In the court below, Mr. Young SC, who appeared for the appellant, argued in addition that Part IV of the Act, in which Sect. 28 is contained, is inapplicable because the New York Convention was only extended to Belize by an act of the United Kingdom when Belize was still a colony, but as a sovereign nation after independence Belize is yet to ratify the Convention. As such, the New York Convention no longer applies to Belize and since Part IV of the Act

3. Sect. 30(3) of the Belize Arbitration Act 2000 reads:

> "(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of a settlement by arbitration, or if it would be contrary to public policy to enforce the award."

provides for the enforcement of Convention awards, it is accordingly inapplicable. Rejecting this submission, Muria J found as follows:

> 'True, as a sovereign nation, Belize might not have ratified the Convention yet, but there can be no doubt that it applies to Belize. At independence on 21 September 1981, the New York Convention as extended to Belize by Notice dated 26 November 1980, became "existing law" of Belize and preserved (sic) by Sect. 134 of the Constitution of Belize.
>
> There is even a further and more fundamental reason to hold that the New York Convention applies to Belize. The Arbitration Act (Cap. 125) under its 1980 Amendment incorporates the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as the Arbitration (New York Convention on Recognition and Enforcement of Foreign Awards 1973). Thus I find that Part IV of the Act is applicable in this case.'"

I. APPLICABILITY OF PART IV OF THE BELIZE ARBITRATION ACT

[7] "Before us, Mr. Young pointed out, and it is not disputed, that the New York Convention was ratified by the United Kingdom on 24 September 1975. The Arbitration (Amendment) Ordinance No 12 of 1980 (the 1980 Ordinance), which introduced Part IV and annexed the text of the New York Convention as a schedule, was assented to on 10 October 1980 and gazetted on 18 October 1980. The application of the New York Convention was subsequently extended to Belize by notification received by the relevant authorities on 26 November 1980, but to take effect on 24 February 1981. Belize became independent on 21 September 1981 and since then has taken no step to ratify the Convention and has not deposited any instrument of succession or accession to the treaty. On the other hand, we were referred to a letter dated 29 September 1982 from the Prime Minister of Belize to the Secretary General of the United Nations informing him that

> 'the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize.

> Such provisional application would subsist until Belize otherwise notifies Your Excellency, the depository (in the case of a multilateral treaty), or the state party (in the case of a bilateral treaty).'

Mr. Young submitted that, nevertheless, this did not constitute Belize a party to the treaty and he referred to an email dated 18 December 2008 from the Deputy Chief, Treaty Section, Office of Legal Affairs, United Nations, which stated, inter alia, that 'since independence, Belize has not deposited with the Secretary General an instrument of succession or accession to the Convention. As such, Belize is not considered to be a party to the Convention at international law.' Mr. Young accordingly argued that 'since Part IV of the Arbitration Act was introduced and was extant on the basis that it was applying the New York Convention to Belize, the non-extension and non-application of the New York Convention must necessarily result in the non-application of Part IV of the Arbitration Act'.

[8] "I understand my brothers in the majority to have found that, but for the brief period between 24 February 1981, when the United Kingdom extended the treaty to colonial Belize, and 21 September 1981, when Belize became independent, the New York Convention did not and does not apply to Belize and Belize never became a party to it. However, this finding does not avail the appellant because as a matter of pure construction, the status of Belize as a party to the New York Convention is wholly irrelevant to the applicability of Part IV of the Arbitration Act.

[9] "The only criterion established for the applicability of Part IV is that the award which a party seeks to enforce is a 'Convention award'. Sect. 27(1) provides that:

> 'Sections 28 to 31 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this Section, be also a foreign award within the meaning of Part III of this Act, that Part shall not apply to it.'

As noted Sect. 28(1) makes 'Convention awards' enforceable either by action or in the manner provided for by Sect. 13. To constitute a 'Convention award', an award must satisfy three criteria in accordance with Sect. 25(1): (i) it must be an award made in pursuance of an arbitration agreement; (ii) it must be made in the territory of a country, other than Belize; and (iii) the country in whose territory the award is made must be a party to the New York Convention. There is no requirement that Belize be a party to the New York Convention in order that what would otherwise satisfy the criteria of a 'Convention award' be enforceable

under Part IV. I would accordingly reject Mr. Young's submission as misconceived, but in doing so I must not be taken to have accepted the findings of the trial judge quoted above."

II. CONSTITUTIONALITY OF PART IV OF THE BELIZE ARBITRATION ACT

[10] "In the course of examining Mr. Young's submissions on the applicability of the New York Convention to Belize, the Court thought it appropriate to seek the parties' assistance on the following questions:

– Did the enactment of Schedule IV of the Arbitration Ordinance (now the Arbitration Act) by the colonial legislature of Belize at the time when the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was not yet applied to the colony of Belize amount to an impermissible interference with the prerogative of the Crown in the area of international relations/foreign affairs such as to render the enactment ultra vires?
– If so, was the Arbitration Act capable of being saved at the time of Belize's attainment of independence?

[11] "This produced thorough and interesting submissions by both parties, with the Attorney General taking the not so usual role of arguing for the invalidity of the 1980 Ordinance and the respondents seeking to uphold it.
[12] "In his very helpful submissions Mr. Young reminded us and emphasized that the British Honduras Legislature passed the 1980 Ordinance to give effect to the New York Convention at time when British Honduras was not and could not then have been a party to the Convention because of its colonial status, and at a time when the Convention had not yet been extended to and was otherwise not applicable to British Honduras. He pointed out that by Sect. 16 of the Letters Patent 1964 which, along with the British Honduras Constitution Ordinance 1963, vested self government status in British Honduras, the Governor, acting in his discretion, was to be responsible for, inter alia, external affairs, a responsibility which, acting in his discretion, he could delegate, with prior approval of the Secretary of State, to a Minister designated by him, upon such conditions as he might impose. Sect. 2(4) of the 1963 Constitution Ordinance itself, he pointed out, recognized 'external affairs' as falling within what is referred to in the constitution as the Governor's 'special responsibilities'. When the British Honduras colonial legislature purported to give effect to the New York Convention, he submitted, it was doing an act that it had no constitutional authority to do since 'it is entirely and exclusively for the executive to accede to

or ratify an international treaty'. Mr. Young accordingly would equate 'giving effect' to a treaty with 'acceding to or ratifying a treaty'.

[13] "In reply, Mr. Pleming QC, who appeared for the respondents, submitted first of all that the Court of Appeal lacked jurisdiction to declare the 1980 Ordinance ultra vires the 1963 Constitution since the 1963 Constitution has been revoked and replaced by the 1981 Independence Constitution. The Court of Appeal's power, he said, is limited to declaring legislation to be invalid by reason of inconsistency with the 1981 Constitution. In any event, he submitted, the 1980 Ordinance did not purport to cause British Honduras to accede to or ratify or otherwise become a party to the New York Convention. What it did was simply to give domestic effect to a treaty within the territory of British Honduras. That, he said, is not an incursion into the domain of external affairs and accordingly does not trespass on the Governor's special responsibilities in relation thereto."

1. Jurisdiction of the Court of Appeal

[14] "I do not accept Mr. Pleming's contention that the Court of Appeal is not empowered to review a law passed under the 1963 Constitution on the ground that it is inconsistent therewith. The Court of Appeal is charged with the responsibility of upholding the rule of law. The British Honduras legislature was a creature of the 1963 Constitution and could only exercise such powers as were vested in it by that Constitution. As Lord Pearce said in *Bribery Commissioner v. Ranasinghe* [1965] AC 172, at p. 197, 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law'. It is a fundamental principle of our legal system that when confronted with two laws, one inconsistent with the other, a court of law is duty bound to say which prevails. This is precisely what the appellants have asked us to do. They say that the 1980 Ordinance violates the provisions of the 1963 Constitution vesting special responsibilities in the Governor. We have no choice but to determine whether that is in fact so and, if it is so, then to declare what the law is. The fact that the 1963 Constitution has been replaced by the 1981 Constitution does not relieve us of that responsibility. If the 1980 Ordinance was passed unconstitutionally, we must say so. The repeal of the 1963 and 1969 Orders and Constitutions of the Bahamas and their replacement by the 1973 Independence Constitution did not preclude the Privy Council from determining in *Bowe v. R* [2006] 1 WLR 1623 whether the mandatory death penalty was inconsistent with the repealed constitutions. In addition, Sect. 28(1)(b) of the Interpretation Act provides that the repeal of an enactment 'does not affect the previous operation of any enactment so repealed'. Whether an

Ordinance passed in violation of the 1963 Constitution but not invalidated before the commencement of the 1981 Constitution is saved by Sect. 134 thereof is an entirely different question, but it is one I need not grapple with since I am satisfied that the 1980 Ordinance did not infringe the 1963 Constitution."

2. Interference with the Prerogative of the Crown in International Relations

[15] "The constituent elements of Mr. Young's argument, which has found favour with the majority, are firstly that it has traditionally been the prerogative of the Crown to enter into treaties on behalf of a state. This power was expressly reposed in the Governor by the 1964 Letters Patent and the 1963 Constitution by the vesting of responsibility for external affairs in him. The second proposition is that a law passed by the British Honduras Legislature which makes the Sate of British Honduras a party to a treaty violates the treaty making prerogative and is accordingly invalid. The third proposition is that a law which gives effect to an international treaty violates the treaty making prerogative either because it thereby constitutes the state a party to the treaty or it otherwise encroaches upon the executive's exclusive external affairs preserve.

[16] "I have no hesitation accepting the first proposition. The power to make treaties is a quintessential executive function and has been well recognized as such by the highest authority. In *Attorney General of Barbados v. Joseph and Boyce* (2006) 69 WIR 104, para. 55, de la Bastide P and Saunders J said that 'treaty-making … is a power that lies in the hands of the executive'. Or as Lord Hope said more expansively in *Roberts v. Minister of Foreign Affairs* [2007] UKPC 56, para. 12:

> 'The right to enter into treaties is one of the prerogative powers of the Crown. No-one other than the Queen can conclude a treaty. In practice, in the case of The Bahamas, this prerogative power is exercisable on behalf of Her Majesty by the Governor-General or by a Minister acting under the Governor-General's authority. The Governor-General does not require the advice or consent of the legislature to authorise the signature to or ratification of a treaty. Nor does a Minister to whom authority has been delegated by the Governor-General. The signature and ratification by the Minister was all that was needed to give effect to the Treaty in international law.'

I accept as well that the power to make treaties would have fallen within the Governor's responsibilities for external affairs under the 1963 Constitution.

[17] "I accept for the sake of argument, but do not decide, that it is an impermissible use of the legislative power of a colonial legislative to usurp to prerogative treaty making power. I note the statement in Sir Kenneth Roberts-Wray's text on *Commonwealth and Colonial Law* (Stevens & Sons, 1966) (at p. 380) that:

> 'subject to any special arrangements, external relations are excluded from the executive and legislative authority of every dependent territory. It follows that local laws purporting to limit these prerogatives of the Crown would be outside the limits of the legislative power granted.'

I hesitate from making any definitive finding because of the elaborate provisions in the 1963 Constitution which permit the Governor to intervene in the legislative process to stay any further proceedings on a Bill which he considers affects his special responsibilities (Sect. 27(1)), to require introduction and proposal of a Bill in pursuance of his special responsibilities (Sect. 27(2)), and to deem the Bill to have been passed if the legislature fails to do so within a reasonable time (Sect. 27(3)). The Constitution also requires all Bills passed by the legislature to be presented to the Governor for his assent (Sect. 28(2)) and empowers him, in his discretion, to refuse to assent to a Bill which appears to him to affect his special responsibilities (Sect. 28(4)) or to reserve for the signification of Her Majesty's pleasure any Bill which appears to him, acting in his discretion, 'to be likely to prejudice the Royal Prerogative'. No bill may become law unless it receives the assent of the Governor or of Her Majesty (Sect. 28(1)) and all laws must bear words of enactment which record that they are 'enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the House of Representatives' (Sect. 29). The issue which would arise in each case therefore is whether a law which impinges upon the Governor's special responsibilities or Her Majesty's Royal Prerogative but nevertheless is assented to can be held to be inconsistent with those responsibilities or prerogatives. This issue is not an easy one to resolve and has not been explored by the parties in sufficient detail in their submissions.

[18] "What I do not accept, for reasons which in no small measure have been influenced by Mr. Pleming's submissions, is that the 1980 Ordinance usurps the executive's treaty making power.

[19] "In the first place, there is nothing in the 1980 Ordinance which purports to make British Honduras a party to or bound by the New York Convention. No promise is made to any other state party and no obligation enforceable in international law is created. Moreover, as Mr. Pleming rightly points out, the process for accession to the Convention is spelt out in Art. VIII of the

Convention itself and it does not include accession by way of a domestic legislative act. The obvious purpose of the Ordinance was to provide for the enforcement of what are called 'Convention awards'. Sects. 27 and 28 make this clear. As already noted, Sect. 25(1) defines the term 'Convention award' as an award made in a country which is a party to the New York Convention. Sect. 25(1) proceeds to define the term 'New York Convention' as meaning 'the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958, and set out in the Fourth Schedule hereto'. The fourth schedule appears to contain the full terms of the treaty including the means by which a state may ratify or accede thereto or denounce it altogether. The Convention was annexed, it appears, by way of identification only. There is no provision incorporating the Convention wholesale as part of the domestic law of British Honduras. Far less is there any indication that the annexure of the treaty was intended to signify the assumption or imposition of any obligations on the part of British Honduras towards any state which might have been a party to the Convention.

[20] "To be sure, the 1980 Ordinance did declare in its long title that its purpose was to give effect to the New York Convention. And true to that promise, the enacting provisions do mirror the terms of the Convention in many respects. Thus, to the extent that the Ordinance permits the enforcement of Convention awards it mirrors Arts. I, II and III of the Convention. Sect. 29, which requires a party seeking to enforce a Convention award to produce the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or a duly certified copy of it and a translation of an award in a foreign language, mirrors Art. IV. Similarly, the circumstances under which an award will not be enforced under the Ordinance have their counterparts in Art. V. Sect. 30 thus provides that a court may refuse to enforce a Convention award on the grounds:

– of the incapacity of a party to the arbitration agreement;
– of the invalidity of the arbitration agreement under the law to which the parties subjected it;
– that a party had no notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present his case;
– that the award deals with a matter not contemplated by or falling within the terms of reference;
– that the award contains decisions on matters beyond the scope of the submission to the arbitrator;

– that the composition of the arbitration authority or procedures was not in accordance with the agreement of the parties;
– that the award has not yet become binding, or has been set aside or suspended;
– that the award is in respect of a matter which is not capable of settlement by arbitration; and
– that it would be contrary to public policy to enforce the award.

All of these grounds of non-enforcement appear in the Convention as well. It is therefore accurate to say that the 1980 Ordinance gave effect to the New York Convention at a time when British Honduras was not a party thereto and at a time when the Convention had not yet been extended to it by the United Kingdom. The question is whether giving effect to the Convention in this way and at that time usurped the treaty making prerogative of the Crown.
[21] "The first thing to note is that by Sect. 16 of the 1963 Constitution Order the British Honduras Legislature was empowered to 'make laws for the peace, order and good government of the Territory'. This power has been interpreted expansively. In *Riel v. The Queen* (1885) 10 App Cas 675, 678 Lord Halsbury LC said that the conferral of such power was 'apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to'. In *Ibralebbe v. The Queen* [1964] AC 900, 923, Viscount Radcliffe said that the words 'peace, order and good government' 'connote, in British institutional language, the widest law-making powers appropriate to a Sovereign'.
[22] "Secondly, as Mr. Pleming points out, the authorities do make the distinction between the ratification of treaties on the international plane, which is an executive act, and the domestication of treaties, which is a legislative act. In *Attorney General for Canada v. Attorney General for Ontario* [1937] AC 326, 347, Lord Atkins said:

> 'Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alternation of existing domestic law, requires legislative action.'

In his text on *Commonwealth and Colonial Law*, Sir Kenneth Roberts-Wray, after referring to the limitations on the power of a colonial legislature to restrict the prerogatives of the Crown observed (at p. 381) that

> 'This does not mean that such laws cannot make provision relating to external affairs. They frequently do, particularly for the purpose of giving effect to international conventions.'

[23] "As much as it must be accepted that the wide plenary powers of the British Honduras Legislature included the power to give effect to international treaties, the authorities cited do not address the position, as here, where at the time the treaty is given effect to domestically, the state party has not yet become a party to the treaty which the legislature purports to incorporate into domestic law. Mr. Young makes the point, and Pollard JA places great emphasis on the usual legislative practice of awaiting the ratification of a treaty before steps are taken to incorporate the treaty provisions into domestic law. Against that is the example of the UK Arbitration Act 1975 which was enacted to 'give effect to the New York Convention' at a point in time (25 February 1975) when the United Kingdom had not yet acceded to the Convention, although the Act itself was only brought into force on 23 December 1975 after ratification of the treaty on 2 September 1975. It may be said accurately nonetheless that the Act was enacted in anticipation of accession. McNair on the *Law of Treaties* (Oxford, 1961) also refers (at p. 86, footnote 3) to a number of instances where legislation incorporating treaties predated ratification by the United Kingdom of those treaties. Mr. Pleming has also referred us to the views of Sir Arthur Desmond Watts, who he describes as an international law specialist, and who is on record as recommending to the Belize Government that the right time to give effect to the obligations imposed by a treaty is before the ratification of the treaty, otherwise upon ratification the state party would be in breach of the treaty.

[24] "I must say that I have gained very little assistance from this excursion into the practice of states as to the timing of the incorporation of treaties. It is either that the British Honduras Legislature was competent under the 1963 Constitution to give effect to the New York Convention when it was not bound thereby, or it was not. That issue is to be determined by an examination and construction of the 1963 Constitution. The practice of states is irrelevant in this regard.

[25] "The establishment of obligations on the international plane is the domain of the executive. The enactment of laws for the peace, order and good government of the people of British Honduras was the responsibility of the British Honduras Legislature. It seems clear to me that these plenary powers include the power to provide for the enforcement of arbitration awards, no matter where made and no matter who the parties to the award might be. It was also within the competence of the legislature to place such limitations on the enforcement of such awards as it might deem fit. In this particular instance, it chose to identify the awards which are enforceable by reference in part to whether the country in which the award was made was a party to the New York Convention. That too was clearly within its plenary powers. It does not seem to me to make one jot of difference that the terms in which the legislative will of the

British Honduras Legislature was expressed was inspired by or was intended to replicate or indeed was intended to give effect to an existing treaty by which British Honduras was not yet bound. Such a legislative act does not intrude into the domain of external affairs. It concerns entirely the development of the domestic law of British Honduras.

[26] "Indeed, I am unable to discern in the 1963 Constitution any limitation on the power of the colonial legislature to enact a law which reflects the provisions of a treaty to which it is not yet a party, whether in anticipation of accession to the treaty at some point in time in the future, or not. Take for example a colonial legislature which is satisfied that the prohibition contained in the Inter-American Convention on Human Rights against the imposition of the death penalty on minors is a policy which should be pursued. It enacts a law which prohibits such executions. Would the fact that the executive might have been simultaneously considering or was on the verge of accession to the Convention strip the law of its pure legislative character? Or suppose that quite independently and in ignorance of the terms of a treaty on the subject a colonial legislature enacts a law which promotes the equality of women. Surely such a law is not a usurpation of the treaty making prerogative because the law in substance, albeit not intentionally, incorporates the terms of a treaty. If that is right, such a law cannot be said either to impinge on the external affairs domain of the executive simply because the executive may have been contemplating accession to the treaty at the relevant time. In short, the broad plenary powers of the British Honduras Legislature cannot be held to be restricted by the existence of treaties to which it is not yet bound, dealing with subject matters on which it wishes to pursue a legislative agenda. But, with respect, this is the effect of Mr. Young's submissions.

[27] "The powers dispersed by the 1963 Constitution are not to be viewed as contained in tight, hermetically sealed compartments. The separation of powers doctrine accommodates the sharing of power between the three arms of the state. The executive is empowered to bind the legislature in international law to pursue certain legislative policies. The legislature is empowered and indeed duty bound to implement legislative measures for the peace, order and good government of the territory. There is no requirement that the legislature must await action by the executive in the international arena before taking action domestically on matters already covered by a treaty. As much as there may be some semblance between the two, the executive act of binding the legislature by treaty to enact laws is not a legislative function. A treaty is not self executing. It does not create rights and obligations cognizable in domestic law. Likewise, a law which gives effect to the terms of a treaty even before the treaty is binding on the state in international law is not an exercise of the executive power of treaty

making. It has no effect in the international arena, even though it might make the act of accession to the treaty a mere formality given that compliance domestically has already been achieved. Its sole impact is in the domestic plane. As much as there may be some overlap between the exercise of the two powers and the one may have a practical impact on the other, therefore, it is wrong to conflate them, as Mr. Young has done. The British Honduras Legislature exercised its broad plenary powers to make 'Convention awards' enforceable in British Honduras. It did not purport to impose obligations enforceable in international law. It altered the domestic law of British Honduras to provide for the enforcement of certain arbitration awards. This is not an incursion into the executive treaty making domain. No question of usurpation of the prerogative power to make treaties arises at all.

[28] "I would end by pointing out that, as required by Sect. 29 of the 1963 Constitution, the 1980 Ordinance is declared to have been enacted by 'the Queen's Mark Excellent Majesty, by and with the advice and consent of the House of Representatives and the Senate of Belize'. Such words of enactment came at the tail end of a procedure which, as noted above, requires that all Bills be submitted to the Governor who may refuse his assent thereto if he considers, in his discretion, that the Bill is 'likely to prejudice the royal prerogative' or 'to affect his special responsibilities'. While obviously not conclusive, the Governor's assent to the Ordinance is some indication that it was not thought that providing for the enforcement of 'Convention awards' as defined usurped the treaty making prerogative of her Majesty, or any special responsibility in that regard which the Governor may have had. It is not that the question would not have been drawn to the Governor's attention. The long title of the Act specifically said that its purpose was to give effect to the New York Convention.

[29] "For these reasons, in disagreement with the majority, I find that the 1980 Ordinance was validly made and the respondents were entitled to apply to enforce their award under Part IV of the Act."

III. MERITS

[30] "Ordinarily, I would have proceeded at this stage to consider the merits of the appellant's appeal, that is to say, whether the award was in respect of matters which were not capable of settlement by arbitration or would result in a breach of public policy if enforced. As it stands, however, if there is no further appeal, or if there is an appeal to the Caribbean Court of Justice and the decision of the majority is upheld, any view which I might express on the merits would be academic. On the other hand, if there is an appeal and the decision of the

majority is overturned, their Honours of the Caribbean Court of Justice are very likely to require the views of this court particularly on the question whether the enforcement of the award would be contrary to public policy. In such matters, the views of a local court of appeal are usually of not inconsiderable weight. For my part, I would very much prefer to know the views of my brothers before finalizing my own. As it is, the President and Pollard, JA, have determined the appeal entirely on the basis of their conclusion that the 1980 Ordinance is invalid. Accordingly, with reluctance, I will not now give my views on the merits of the appeal."

Pollard, JA, Majority Opinion

[31] "This is an appeal from the judgment of Mr. Justice Muria enforcing an award made by the London Court of International Arbitration (LCIA) in respect of a Settlement Deed concluded between BCB Holdings (then known as 'Carlisle Holdings Limited'), the Government of Belize, the Minister of Finance of Belize (who signed for himself as well as on behalf of the Government of Belize) and the Attorney General of Belize (acting on behalf of the state of Belize) on 22 March 2005, that had as its purpose to settle a dispute among them, which had been submitted to the LCIA arbitration, concerning a share purchase deed and an option deed. Clause 8 of the Settlement Deed gave to Belize Bank Limited, the second respondent, the power to enforce the Settlement Deed. Clause 11 of the Settlement Deed internationalized the agreement set out therein by providing for the settlement by arbitration of any dispute arising from the Settlement Deed as follows:

> '11.2 Any dispute arising out of or in connection with this deed including any question regarding its existence, validity or termination, which cannot be resolved amicably between the Parties shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this clause. The number of arbitrators shall be 3 (one appointed by each Party and the third appointed jointly by the two Parties' arbitrators).'[4]

4. "See *Texaco Overseas Petroleum Co. Ltd. and California Asiatic Oil Co. v. Libya* (1977) 53 1LR for the internationalization of agreements."

[32] "The gravamen of the appellant's appeal is that the learned trial judge erred in finding that: (a) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applied to Belize; (b) the issues raised in the Settlement Deed were arbitrable, and (c) the final award of the arbitrators was not contrary to public policy and was enforceable by the Courts of Belize. The various grounds of appeal adduced by the appellant were adumbrated in the aforementioned grounds either expressly or by ineluctable inference and would not be addressed in this Judgment separately. In any event, if the appellant were to succeed on any of the grounds articulated above, the appeal would have to be allowed. In this context, any one of the foregoing grounds of appeal must be seen to be conclusively determinative of the issue, if allowed."

I. IMPLICATIONS OF THE STATUS OF BELIZE AS A DUALIST JURISDICTION

[33] "In addressing the first ground of appeal, it is important to bear in mind the status of Belize as a dualist jurisdiction in constitutional international law and the implications of such a status for the resolution of the present dispute. Although dualism, when dispassionately analysed in historical perspective, betrays attributes of a prophylactic constitutional principle designed, inter alia, to protect the ordinary citizen in municipal systems from the arbitrary excesses of executive lawlessness, it has also important juridical implications for state responsibility in international law.[5] In respect of some constitutional implications of dualism in international law, mention may be made of

> '(t)he British practice as to treaties, as distinct from customary international law, (which) is conditioned primarily by the constitutional principles governing the relations between the executive (that is to say, the Crown,) and Parliament. The negotiation, signature and ratification of treaties are matters belonging to the prerogative powers of the Crown. If, however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliamentary approval.'[6]

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5. "See generally Duke E.E. Pollard, "Unincorporated Treaties and Small States", Commonwealth Law Bulletin, Vol. 33 No. 3, Sept. 2001, pp. 389-421."
6. "See I.A. Shearer, *Starke's International Law*, 11th ed. 1994 at p. 71."

[34] "Similar juridical implications of dualism were eloquently adumbrated by Lord Hoffman in *John Junior Higgs v. Minister of National Security and others* [2000] 2 AC 228. In his judgment Lord Hoffman reminded us:

> 'In the law of England and The Bahamas (whose constitution is representative of those in the Caribbean Community), the right to enter into treaties is one of the surviving prerogative powers of the Crown … the Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. But the corollary of the unrestricted treaty-making power is that treaties form no part of the domestic law unless they are enacted by the legislature. This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: *J.H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* (1990) 2 AC 44.... The second consequence is that unincorporated treaties cannot change the law of the land.
>
> "They have no effect on the rights and duties of citizens in the common law; see the classic judgment of Sir Robert Phillimore in *The Parlement Belize* (1879) 4 PD 129. They may, however, have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the Government in its acts affecting them will observe the terms of a treaty: see *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.... The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle settled by the Civil war and the glorious revolution in the 17th Century.'"

[35] "What Lord Hoffman was ardently articulating here was the classical dualist principle whereby international law and municipal law are regarded in common law jurisdictions as discrete normative regimes, unlike monism which regarded those regimes as one normative continuum, and accorded to international law deemed to occupying the apogee of this normative order direct effect at the domestic level. However, for legally binding international obligations to have legal incidence or direct effect at the domestic level in dualist jurisdictions, the relevant treaty has to be incorporated or enacted by the legislature. In this way

the democratic principle, which was established at the cost of much British blood and treasure, is sustained and safeguarded. In the characterization of Lord Hope:

> 'An international treaty does not, of course, by itself form part of domestic law. This is a necessary consequence of the unqualified treaty making power which resides entirely with the executive. Treaties do not form part of the law of the Bahamas unless and until they have been enacted by the legislature. The assent of Parliament must be obtained before a domestic court can give effect to them.'[7]

[36] "Where a domestic tribunal is required to make a determination based on an alleged rule of international law, such a tribunal has to be satisfied that the alleged rule is, in fact, a generally agreed rule of international law accepted as such by the principal actors of the international community. It is not for the Courts to create the required rule of international law. In the characterization of Lord Oliver,

> 'A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilized nations and it is for those who assent the rule to demonstrate it if necessary before the International Court of Justice. It is certainly not for a domestic tribunal to legislate a rule into existence for the purpose of domestic law and on the basis of material that is wholly indeterminate.'[8]

[37] "In similar vein, an authoritative publicist enunciated,

> 'it has always been held that general customary international law is part of the law of England and, therefore, will be applied "as such". Thus, international law is a matter of judicial notice, and there is no question of having to prove it by evidence. It is argued and applied in the same way as any other part of the common law. On the other hand, for constitutional reasons, a treaty which requires for its carrying into effect an alteration of English Law, or a charge on public funds, requires an act or other

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7. "*Roberts v. Minister of Foreign Affairs* [2007] UKPC 56."
8. "See R.Y. Jennings, "An International Lawyer Takes Stock", 1CLQ Vol. 39, July 1990 at p. 524."

> instrument making the needful changes in English Law if the Courts are to give effect to it.''[9]

[38] "The dualist paradigm has been adopted throughout the Commonwealth as exemplified in the weight of judicial authority as follows: *Rustomjee v. The Queen* 2 QB 69 which was affirmed by the English Court of Appeal in *JH Rayner (Min[c]ing Lane) v. The Board of Trade*; and *Blackburn v. Attorney General* (1971) WLR 1037; endorsed by The Supreme Court of Australia in *Simsek v. Macphee* (1982) 56 ALJR 277; and *Minister of Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273; as well as The Supreme Court of Canada in *Ahani v. Attorney General of Canada* 58 O.R (3d) 107; approved by the Judicial Committee of the Privy Council in *Fisher v. Minister of Public Safety and Immigration*; and nearer home, endorsed by The Supreme Court of Trinidad and Tobago in *Ismay Holder et al v. Council of Legal Education* HCA No. 732 of 1997, and The Judicial Committee of the Privy Council in *Roberts v. Minister of Foreign Affairs* [2007] UKPC 56.

[39] "Despite the foregoing, however, dualism as a constitutional international law principle was inadvertently, but not irretrievably, compromised by the decision of the Judicial Committee of the Privy Council in *Thomas v. Baptist* (1999) 2 LKC where it was boldly asseverated by Lord Millet:

> '(t)he appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.'

In effect, contrary to historical learning on the constitutional principle of dualism, Lord Millet was asserting that a prerogative act by the executive at the international plane could amend the supreme law of the dualist state of Trinidad and Tobago, temporarily, thereby compromising, by ineluctable inference, the hallowed constitutional principle of separation of powers enunciated by Lord Diplock in *Hinds v. The Queen* (1977) AC 195, and which constitutes the *Grundnorm* of the Commonwealth Caribbean constitutional order.

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9. "*Idem*, at p. 523."

[40] "Fortunately, the Caribbean Court of Justice in the celebrated case of *Boyce & Joseph v. The Attorney General of Barbados* (2006) CV3 (AJ) – see in particular the judgment of Justice Pollard which enunciated the principle of treaty-compliant executive conduct at the municipal plane – distinguished *Thomas v. Baptiste* and restored a measure of constitutional legitimacy to this hallowed principle. As the situation now stands, there can be no doubt that ratification of a treaty by the executive in the exercise of its prerogative powers cannot, *ipso facto*, alter the ordinary municipal law of a dualist state much less its supreme law – the Constitution. And this principle is of seminal relevance in the present case where the colony of Belize, allegedly, enacted the New York Convention into municipal law at a time when that Convention was not duly applied to Belize by the Crown in the exclusive exercise of the royal prerogative.

[41] "What may be deduced from the foregoing dicta and other relevant statements is the following: dualism as a constitutional law principle deems international law and municipal law to be two discrete normative regimes; in the international law arena, the executive in the exercise of its exclusive prerogative powers in the area of foreign policy is entitled to establish legally binding commitments for the state by concluding treaties without the intervention of Parliament; the legislature was normally required to enact such obligations into domestic law, especially where performance of those obligations required expenditure of public funds, new legislation, or amendments to existing legislation or the disposition of land or other national assets; or where the discharge of such obligations may not be achieved by executive action; as a matter of state practice, the assumption by the executive of obligations at the international plane normally preceded enactment of the instrument. And Belize as a Commonwealth Caribbean State subscribing to the dualist doctrine is constrained in its conduct by these realities."

II. CONSTITUTIONAL VALIDITY OF PART IV AND SCHEDULE FOUR OF THE BELIZE ARBITRATION ACT

[42] "There is no room for doubt that Part IV of the Belize Arbitration Act and the Fourth Schedule accompanying it were duly passed as laws of Belize prior to the independence of the colony in 1981. Notwithstanding the foregoing, however, in my respectful opinion, the legality of this 'enactment' cannot be the subject of an axiomatic, uncritical determination by a Court of competent jurisdiction, as a matter of Cartesian logic. Indeed, the Courts of common law jurisdictions have, from time to time, struck down many aspiring constitutional

enactments which were duly approved by the legislature on the ground of unconstitutionality or some other legitimate ground.

[43] "An excellent case in point in this context is *Attorney General for Canada v. Attorney General for Ontario* [1937] AC 326 where the Dominion Parliament of Canada legislated to implement certain international labour conventions. On appeal from the Supreme Court of Canada, the Judicial Committee advised the Crown that the legislation was ultra vires the Dominion Parliament; that legislative competence on the subject concerned vested in the legislatures of the provinces. In the characterization of Lord Atkin,

> 'it will be essential to keep in mind the distinction between (1) the formation; and (2) the performance of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail the alteration of the existing domestic law requires legislative action.... Parliament no doubt, as the Chief Justice points out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.'

By parity of reasoning Part IV of the Belize Arbitration Act and Schedule IV thereto, given their legislative history, does necessarily imply repugnancy to the generally accepted principles of constitutional legitimacy.

[44] "In this context, counsel for the appellant reminded this Court in his supplementary written submissions (for which I am grateful), that the Letters Patent 1964 and the Constitutional Ordinance 1963 established the allocation of the powers of governance and the basis of constitutional legitimacy in Belize as a dualist state in which matters relating to international treaties were always exclusively within the domain of the royal prerogative. For example, Sect. II(I) of the Letters Patent 1964 empowered the Governor of Belize to exercise the executive authority of the Crown on its behalf. And Sect. 16(I) reposed external affairs in the Governor to be discharged at his discretion. Further, Sect. 2(4) of the Constitutional Ordinance 1963 provided for matters exclusively in the prerogative of the Crown, including foreign affairs, to be exercised by the Governor of Belize on the Crown's behalf.

[45] "Sect. 16 of the Constitutional Ordinance 1963 empowered the colonial legislature of Belize to make laws for the peace, order and good government of Belize. However, when the colonial legislature purported to pass an ordinance 'to give effect to the New York Convention on the Recognition and Enforcement

of Foreign Arbitral Awards', the colonial legislature was clearly encroaching on the royal prerogative in respect of a matter relating to foreign affairs. The 'enactment' of the Convention by the colonial legislature necessarily involved interference in foreign affairs which was exclusively in the domain of the Crown.

[46] "In the premises the purported enactment was ultra vires and void ab initio.[10] The constitutional repugnancy of this 'enactment' could not have been cured by the subsequent extension by the Crown of the New York Convention to Belize. In my respectful opinion, consequently, the Arbitration Ordinance as amended did not constitute 'existing law' within the meaning of Sect. 134(1) of the Belize Constitution and amenable to being saved at the time of independence of Belize. Consider in this context the relevant determinations of Belize cases which were brought to the Court's attention by learned counsel for the appellant, to wit *Jeffrey Prosser et al v. Attorney General and Minister of Public Utilities* [2005] and *Dean Boyce et al v. Attorney General* [2010] involving enactments of the Belize legislature declared to be unconstitutional for repugnancy to the Constitution.

[47] "On the evidence before this Court, the colonial legislative assembly of Belize presumed to apply in its domestic law, and I would venture to say without proper executive authority, express or implied, an international treaty, the New York Convention, which had not yet been extended by the Crown in the exercise of its exclusive prerogative powers to Belize by way of declaration pursuant to Art. X thereof. In so doing, the colonial legislature, in my respectful opinion, disingenuously purported to exercise without authority a power of the royal prerogative in the area of foreign policy exclusively reserved for the Crown. As Lord Hoffman reminded us above, domestic courts have no jurisdiction to construe or apply a treaty – see [at [34]] above. And the same restriction, by compelling inference from the exclusivity of prerogative powers, applies to a colonial legislature in the absence of appropriate executive authority. And this is precisely what the colonial legislature of Belize purported to do thereby tainting the ordinance with constitutional repugnancy. In my respectful opinion, such an exercise of the prerogative power was far beyond the legislative competence of the lowly colonial legislature of Belize.

[48] "When, for example, the dependent colonial territory of Montserrat desired to join the Caribbean Community and Common Market by enacting into law the Treaty Establishing the Caribbean Community and Common Market (Chaguaramas, 4 July 1973), Her Majesty's Government was required, constitutionally, to issue an appropriate Instrument of Entrustment authorizing

10. "See *Murphy v. R* [1982] lr 241."

it to do so. In effect, the Crown by issuing the Instrument of Entrustment delegated to Montserrat the required treaty making powers of the prerogative for the purpose thereby permitting the legislature of Montserrat to enact an appropriate ordinance.

[49] "And although the Belize enactment was not declared to be unconstitutional by an appropriate challenge in a court of competent jurisdiction at the material time, this omission does not in my respectful opinion preclude this Court from pronouncing on its constitutionality or illegality, as the case may require, even though somewhat belatedly. And, in my respectful judgment, Part IV and Schedule IV of the Arbitration Act are hereby declared to be and to have been at the material time ultra vires the constitution of the colony of Belize, null and void. Granting the constitutional propriety and legitimacy of the foregoing determination, it does appear to be the subject of a compelling inference that Part IV of the Arbitration Act and its handmaiden, Schedule IV, were not 'existing laws' within the meaning of Art. 134 of the Belize Constitution at the material time and, as such, were not amenable to being saved by the said Article on the attainment of independence by Belize.

[50] "Consequently, it is my respectful opinion, that the Courts of Belize have no jurisdiction to recognize and enforce Part IV of the Arbitration Act and Schedule IV thereof. And even assuming, but not conceding, that Part IV and Schedule IV of the Act were not repugnant to the constitutional and legal order of Belize, there is yet another legitimate constitutional imperative constraining the Courts of Belize from recognizing and enforcing it. Dualist jurisdictions like Belize normally do not recognize and apply the legal principle of direct effect which is common currency in monist jurisdictions. Two known exceptions in the common law constitutional legal order are, on the one hand, the United States of America where treaties duly approved by the Senate and signed by the President have immediate legal incidence in the domestic jurisdiction – see Art. VI of the US Constitution. The other partial exception is the United Kingdom which was required to modify the British constitutional legal order in appropriate measure to accommodate various determinations of competent institutions of the European Union, absent the intervention of Parliament. And this explains the language of commitment employed in Sect. 2(1) of the European Communities Act 1972 which provides as follows:

> 'All such rights, powers, liabilities and restrictions from time to time created or arising by or under the Treaties and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and

available in law and be enforced, allowed and followed accordingly and the expression "enforceable Community right" and similar expressions shall be read in treaties as referring to one to which this subsection applies.'

[51] "However, in all other common law Commonwealth jurisdictions, legally binding obligations assumed at the international plane must be enacted into domestic law by the legislature in order to have legal incidence for private entities at the domestic plane, subject to the evolving qualifying principle of legitimate expectations – see *Boyce & Joseph v. Attorney General of Barbados* (2006) CV3 (AJ). As a matter of practice by dualist jurisdictions, however, obligations assumed by the state at the international plane are given effect at domestic level only when it has been established that they are legally binding internationally. It follows *aequo vigore,* not to mention axiomatically, that incorporated treaties are instruments which normally are legally binding at international level by virtue of an appropriate international act, be it signature, ratification, accession, approval or acceptance as the case may require according to the Vienna Convention on the Law of Treaties 1969.[11] For ease of appreciation in this context, it is recalled that signature, ratification, accession, approval or acceptance, as the case may require, is the international act, so named, by which a state establishes at the international plane its consent to be bound by a treaty.

[52] "It also follows a fortiori that, more often than not, the legislature of a dualist jurisdiction is normally required to enact an international instrument which has already created legally binding obligations for the state at the international plane. It is, to say the least, contrary to the normal practice for a state's legislature to enact into domestic law the provisions of an international convention which is not legally binding on the state. And if my memory serves me correctly, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 provides a rare example of the United Kingdom's Parliament enacting a treaty before it was duly ratified by the executive.

[53] "Bearing the foregoing in mind, it does appear to have been an exercise in futility for the colonial legislature of Belize to have purported to enact into law for Belizean citizens the New York Convention which had not been extended to Belize by the United Kingdom through the exercise of the royal prerogative in accordance with Art. X of that Instrument. And, in the unlikely event that that was indeed the intention of the legislature, such an intention would have been effectively frustrated by the operation of law since, given the circumstances

11. "See Art. 2(1)(a) of the Vienna Convention on the Law of Treaties (1969).

under which Part IV of the Act and Schedule IV were enacted, the legislature was attempting to tread on constitutionally prohibited ground as intimated above. In effect, the action of the Belize legislature was egregiously misconceived and constitutionally misinformed.

[54] "It is currently standard international practice for states to establish their consent to be bound by treaties one or two years before the instrument is actually enacted into law. This is so because parties to a treaty, concerned about discharging, in good faith, the obligations assumed thereunder in accordance with the principle *pacta sunt servanda*, normally need some time to determine whether implementation of the instrument required new laws, or the amendment of existing laws, or expenditure of public funds, or whether mere administrative measures would suffice. Where the disposition of national territory was involved or expenditure from the national consolidated fund was required, legislation must be enacted to achieve treaty compliance.

[55] "However, it is normal to have a juridical nexus established between the state party and other members of a treaty regime before enactment of legislation may be contemplated to secure treaty compliance. Rarely, as intimated above does an enactment precede or anticipate the establishment of an intention at the international plane to comply with the treaty. In point of fact, the depressing treaty practice of the states of the Commonwealth Caribbean is to ratify treaties and leave them unimplemented rather than to enact them into law in anticipation of becoming parties thereto. Indeed, the treaty registers of CARICOM States are replete with unincorporated treaties.[12] And there was no evidence adduced before the Court below to establish that the replication by the Belize legislature of the provisions of the New York Convention set out in Schedule IV of the Belize Arbitration Ordinance must be construed as an intention to enact this instrument in anticipation of its legally binding effects for the colony of Belize at the international plane as part of the territory of the United Kingdom."

III. IS BELIZE ESTOPPED FROM DENYING THE APPLICABILITY OF THE NEW YORK CONVENTION?

[56] "Relevant rules of statutory interpretation facilitate the reception of norms of international law in the municipal systems of Commonwealth Caribbean States. In this connexion, it would be apposite to address the relevant provisions

12. "D.E.E. Pollard, 'Juridical and Constitutional Implications of CARICOM Treaty Practice', Commonwealth Law Bulletin, Vol. 35 No. 1, March 2005, pp. 7-29."

of the Interpretation Act of Belize and their juridical implications for this state. Sub-sect. 64(1)(b) of this enactment provides as follows:

> '64(1). In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say –
>
> (a) ....
> (b) Any relevant treaty or other international agreement which is referred to in the Act.'

Sub-sects. 65(a) and (b) provide as follows:

> 'The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provisions in question is reasonably possible, namely –
>
> (a) That a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not; and
> (b) That a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not.'

[57] "And, it is of considerable significance for resolving the intractable legal issues involved in this case that the respondents in their Speaking Note made the following admissions and submissions:

> '16. Belize is not and has never been a Contracting State to the Convention. Nevertheless, Part IV of the Act has been given effect to the Convention in Belize. Although it is not a Contracting State, Belize has signaled in unequivocal terms that the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize. Until withdrawn, this declaration is effective to have the Convention apply provisionally between Belize and any Contracting State that accepts this declaration by Belize. Insofar as Belize is concerned, it has represented to all members of

> the United Nations and its agencies that the Convention applies provisionally.'

[58] "Given the importance of this statement for a resolution of the issues before this Court, it is important to analyze it and to address its juridical implications. As concerns the extracts [at [14]], it is my respectful opinion that the relevant provisions of the Interpretation Act of Belize cited in the respondents' Speaking Note have no relevance in terms of advancing their claim against the appellant. In the context of the Belize Interpretation Act, Sect. 64(1)(b), the Convention cannot be regarded as a 'relevant Treaty or other or other international agreement which is referred to in the Act' (to wit, the Belize Arbitration Act) because the Convention in relation to Belize, was, at all material time, a *res inter alios acta* which was not within the contemplation of the draftsperson. Similarly, the provisions of Sect. 65(a) and (b) of the Interpretation Act are irrelevant for present purposes because there were no 'international obligations of the Government of Belize' to speak of since by respondents' own admission, Belize was not a Contracting State to the Convention at all material times.

[59] "More importantly, the unilateral declaration of the Prime Minister of Belize to the Secretary General of the United Nations, following the independence of Belize cannot be construed as operating to establish legally binding relations with any Contracting State of the Convention as submitted by the respondents. This declaration set out in a *Note Verbale* dated 29 September 1982, stated the intention of Belize 'to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize'. Art. 25 of the Vienna Convention on the Law of Treaties which addresses provisional application of treaties makes it pellucidly clear that this rule of international law is applicable only to a negotiating state. And this Court was not presented with any evidence to establish that Belize, as a dependent territory of the United Kingdom, at the material time, was part of its negotiating team when the New York Convention was being negotiated and elaborated.

[60] "The respondents have not adduced any evidence in support of their position before this Court. In the premises, the Prime Minister of Belize in making the unilateral declaration to the United Nations mentioned above appeared to have lacked the required *locus standi* for his declaration to have the desired effect. The relevant provisions of the Vienna Convention on the Law of Treaties 1969 read as follows:

> '1. A treaty or a part of a treaty is applied provisionally if:
> (a) the treaty itself so provides; or
> (b) the negotiating states have in some other manner so agreed.'

In the submission of one preeminent authority on international law, 'it takes two or more parties to make a treaty, and that there must be a novation before the successor state is bound?'[13] In the present case the New York Convention did not provide for provisional application and the dependent territory of Belize was not a negotiating state.

[61] "Indeed, Art. 9(1) of the Vienna Convention on the Succession of States in Respect of Treaties 1978 reads:

> '1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.'

Further, it is of no juridical significance whatever that the said declaration in the submission of the respondents had not been withdrawn at the material time since, as submitted below, it was incapable, juridically, of having the intended effect.

[62] "Similarly, it does not avail the respondents any advantage in this litigation that Art. X of the Convention might be construed, in their submission, as applying to states which are not Contracting States and that 'the United Kingdom has not notified the Secretary General of the United Nations that the Convention has ceased to extend to Belize'. This omission which is not peculiar to the treaty practice of the United Kingdom and rather appears to be in the nature of an undecipherable but accepted convenience of imperial amnesia of metropolitan states, may not be construed as irretrievably compromising the application of the non-transmissibility principle associated with the succession of states addressed by Ian Brownlie.[14] And the fact that the Vienna Convention on Succession of States in Respect of Treaties 1978 'was not a part of international law when the Convention was concluded (1958) nor when Belize succeeded to independence' as submitted by learned Counsel for the respondents, is of no juridical

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13. "Ian Brownlie, *Principles of Public International Law*, 7th ed. OUP 2008."
14. "Ian Brownlie, [*ibid.*], at p. 661."

significance for present purposes, since the non-transmissibility principle is more likely than not a rule of customary international law whose validity is not necessarily a function of the codification in the Vienna Convention on Succession of States in Respect of Treaties, 1978.[15] The compelling inference and legal effect of the foregoing is that the New York Convention created no legally binding obligations for Belize, a non-Contracting State. In the premises, the Courts of the State of Belize are not required but, indeed, are constrained not, to recognize and enforce Convention arbitral awards.

[63] "Dualism has peculiar relevance in the present context as the focus of attention is not only on what commitments are assumed at the international plane but also on their enactment into law at the municipal plane. Postulated in other terms, incorporated treaties are, in the international practice of states, instruments having legally binding effect at the international plane and which have been enacted into law at the municipal plane to ensure the discharge of treaty obligations assumed therein. For, it is trite law that having committed to a treaty at the international plane a state is precluded from invoking its municipal law or the absence thereof as a ground for not discharging its international obligations.[16] Indeed, it is not without considerable significance that the Draft Articles of the International Law Commission on the Rights and Duties of States go so far as to preclude a state from invoking its Constitution as a ground for not discharging an international obligation."[17]

IV. APPLICABILITY OF THE NEW YORK CONVENTION TO THE STATE OF BELIZE

[64] "The appellants contend that the New York Convention is not applicable to Belize. The respondents, however, have submitted that the Fourth Schedule of the Arbitration Act of Belize set out the New York Convention as the law of Belize and which was allegedly saved by Art. 134 of the Belize Constitution at the date of independence. It appears to be common ground from both the oral and written submissions of Counsel that the provisions of the New York Convention were replicated in the Fourth Schedule of the Belize Arbitration Act. However, this is, in my respectful opinion, fundamentally different from establishing to the satisfaction of a court of competent jurisdiction that the provisions of the New York Convention replicated in the Fourth Schedule to the Belizean Arbitration

15. "Ian Brownlie, [*ibid.*]."
16. "Art. 27 of the Vienna Convention on the Law of Treaties (1969)."
17. "Art. 13 of the ILC's Draft Declaration on the Rights and Duties of States 1949."

Act did incorporate the provisions of an international instrument applicable to Belize and legally binding on Belize. Incorporation in the traditional practice of common law dualist states involves enactment of an instrument creating legally binding obligations at the international plane in order to give them effect at the municipal plane.

[65] "At the time of the enactment of the Fourth Schedule, to wit, 10 October 1980, it was some time before notification by Britain of the application of the New York Convention to Belize in compliance with Art. X(2) thereof. In effect, when the New York Convention was purported to have been enacted in Belize as Schedule IV of the Arbitration Act there was no existing convention in terms of an instrument creating legally binding obligations, to apply at the material time. Moreover, no evidence was adduced before the Court below that the Fourth Schedule was enacted in anticipation of the application by the Crown to Belize of the New York Convention. The Fourth Schedule of the Belize Arbitration Act, as mentioned above, did not *stricto juris* apply the New York Convention. In this connexion attention is drawn to the memorandum of A. D. Watts, Legal Counsellor dated 31 December 1980 recalling the practice of Belize regarding the incorporation of treaties and which is to be found at TAB 26 of the skeleton arguments of the applicants dated 8 March 2012. In this memorandum the Solicitor General of Belize was represented as affirming that the Assembly of Belize enacts ordinances to give effect to treaties only after their ratification or exchange with the other party as the case may require. It merely replicated the provisions of the Convention and purported to give them the force of law in Belize. But the New York Convention as an instrument creating legally binding obligations for Belize at the international plane required, as a condition precedent, the exercise of prerogative powers extending it to Belize. Consequently, the premature legislative act of the Belize legislature constituted no less than an unwarranted and impermissible, not to mention unprecedented, unequivocal interference in the exercise of the royal prerogative, and was, *ex facie*, ultra vires, unconstitutional, null and void and of no legal effect.

[66] "In my respectful opinion it does not appear that the New York Convention applies to Belize at present nor at any material time. The language of commitment employed in the New York Convention clearly establishes that the Convention applies to contracting states. Thus, Art. III provides 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 awards are relied upon. But the obligation to recognize awards only devolves on contracting states, a status to which Belize never attained judging from the evidence adduced in this Court. And the respondents have admitted this, without equivocation, in their Speaking Note. Belize enacted Parts I, II and III of the Arbitration Act by

Ordinances in 1926 and 1932 while still a dependency of Britain. Part IV was also enacted by Ordinance No. 21 of 1980 and purported to take effect on 10 October 1980 before notification of the application of the New York Convention on 24 February 1981 pursuant to Art. X(2) of the instrument.

[67] "In effect, when the New York Convention was extended to Belize, the country was still a colony of Britain. And it is trite law that restrictions on the sovereignty of states are not to be presumed: the *Lotus Case*, PCIJ, Ser. A, No. 10. In the premises, the action of Britain was enough to entitle Belize to enjoy all rights under the Convention even though Belize was not a contracting state. Belize attained independence on 21 September 1981. By *Note Verbale* dated 29 September 1982, the Prime Minister of Belize informed the Secretary General of the United Nations and, through him, the members of the international community that

> 'the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity all treaties to which the Government of the United Kingdom was a party, the application of which was extended either expressly or by necessary implication to their dependent territory of Belize.'

[68] "It now falls to be determined what was the status of Belize in relation to the New York Convention at the material time, that is, on 21 June 2006 when the Settlement Deed as amended was signed by the Minister of Finance and the Attorney General on behalf of the Government of Belize and BB Holdings. In my respectful opinion, Belize was not a contracting state within the meaning of the New York Convention at the material time. In the authoritative submission of Ian Brownlie

> 'when a new state emerges, it is not bound by the treaties of the predecessor sovereign by virtue of a principle of state succession. In many instances the termination of a treaty affecting a state involved in territorial changes will be achieved by the normal operation of provisions for denunciation or the doctrine of fundamental change in circumstances. However, as a matter of general principle a new state, ex hypothesi, a non-party, cannot be bound by a treaty, and in addition other parties to a treaty are not bound to accept a new party, as it were, by operation of law.'[18]

18. "[Ian Brownlie], *op. cit.*, fn. 13, at p. 661."

[69] "It does appear to follow from the foregoing that Belize did not automatically succeed to the New York Convention on independence by operation of law and the mere fact of a unilateral declaration of the nature described above was incapable of having this effect. In order for Belize to have become a contracting state to the New York Convention, for example, by way of accession, it would have had to submit to the depository an appropriate instrument of accession. But the Government of Belize chose not to exercise this option. The foregoing not withstanding the fact that Belize never was at all material times a contracting state does not operate to terminate discussion of the issue. There are avenues open to states to assume legally binding obligations in international law other than by being parties to a treaty.[19] Instead, the Prime Minister of Belize, as mentioned below made a unilateral declaration to the United Nations Secretary General, and, through him, to the international community at large indicating Belize's provisional application of treaties, on a basis of reciprocity, concluded by the previous sovereign, The United Kingdom.
[70] "However, in my respectful opinion, the declaration did not suffice, according to the applicable rules of international law, to make Belize a contracting state of the New York Convention, a circumstance which was confirmed by the Deputy Chief, Treaty Section Office of Legal Affairs of The Secretariat of the United Nations. In his authoritative submission, 'Since independence, Belize has not deposited with Secretary General an instrument of succession or accession to the Convention. As such, Belize is not considered to be a party to the Convention at international law.' This statement was dated 18 December 2008, some considerable time after the conclusion of the Settlement Deed and the arbitration agreement incorporated therein in 2006. Even though the New York Convention did not expressly provide for a depository, Art. XV confers on the Secretary General of the United Nations regular depository functions. In the premises the statement issuing from the United Nations is extremely authoritative and it is doubtful whether a court of competent jurisdiction will be disposed to go behind it.
[71] "Indeed, the statement from the Treaty Department of the Office of Legal Affairs appears to confirm the submissions of Ian Brownlie regarding the effect of unilateral declarations made by competent officials of emerging sovereignties at the time of independence. In his submission,

> 'such declarations combine a vague or general recognition that certain unspecified treaties do survive as a result of the application of rules of

19. "See the *Eastern Greenland Case* (1933) PCIJ Ser A/B No. 53."

> customary law with an offer of a grace period in which treaties remain in force on an interim basis without prejudice to the declarant's legal position and is a requirement of reciprocity.... The practice based on such declarations supports the view that what eventually occurs is either termination or novation as the case may be in respect of the particular treaty.'[20]

[72] "Having established that Belize was not a contracting state of the New York Convention and that Schedule Four of the Belize Arbitration Act did not, as a matter of law, incorporate the New York Convention, what are the juridical implications of such a finding? In support of this determination it is submitted that if Schedule Four, as the respondents contend did apply to the New York Convention, it must be the subject of a compelling inference that the colonial legislative of dependent Belize had, *ipso facto,* purported to extend the Convention to its territory constituting thereby an unacceptable and impermissible interference with the exercise of the royal prerogative in the area of foreign affairs exclusively reserved for the Crown as intimated by Lord Hoffman above [at [34]]. In effect, Part IV and Schedule IV of the Belize Ordinance constituted no less than a brazen attempt at the usurpation of executive prerogative powers and were, ultra vires, the colonial constitution. And, in my respectful opinion, it would be inconceivable to conclude from any provision in The Colonial Laws Validity Act enacted by the British Parliament in 1865 authorization for such an intervention, express or implied. Consider in this context the proviso in Sect. 5 of this enactment. Furthermore, Belize as a non-contracting state would not be obliged to recognize and enforce an award in accordance with Art. III of the New York Convention. Moreover, the New York Convention is an international instrument governed by international law and creating obligations at the international plane; and since Belize was not a contracting state, its domestic legislation is not required to be in compliance with the relevant provisions of the New York Convention.

[73] "The foregoing notwithstanding, it is still extremely important to determine the juridical significance of the *Note Verbale* despatched by the Prime Minister of Belize gratuitously and unilaterally declaring the intention of the Government of Belize to apply provisionally, and on a basis of reciprocity, all treaties of the United Kingdom which were extended to Belize. But even, assuming, and not admitting, the juridical significance of the Prime Minister's conduct, there are some juridical solecisms which need to be addressed in the present context. Provisional application of the provisions of a treaty is governed

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20. "Ian Brownlie, *op. cit.*, 13, at p. 665."

by the Vienna Convention on the Law of Treaties 1969 which, the International Court of Justice has determined largely codifies customary international law. Art. 25 of this Convention provides that the negotiating states of a treaty may provisionally apply the articles thereof pending its entry into force (see at para. 29).

[74] "However, it does not appear that Belize was at the time of the unilateral declaration by the Prime Minister a negotiating state within the meaning of Art. 2(1)(e) of the Vienna Convention, 1969 and which had engaged in the elaboration of the New York Convention. Consequently, it is a moot point whether the government of Belize was in a position to provisionally apply the New York Convention. More importantly, the declaration was expressed to be subject to reciprocity and in the absence of an indication by any other interested state to reciprocate, provisional application of an indeterminate treaty unilaterally extended by any state would appear to be juridically infeasible in terms of achieving the desired objective.

[75] "For present purposes, it would also be extremely important to determine whether by virtue of the unilateral declaration of the Prime Minister of Belize mentioned above, Belize would be precluded or estopped from declaring it was not a contracting state of the New York Convention and that that instrument constituted a *res inter alios acta*: the *Eastern Greenland Case* (1933), PCIJ, Ser. A/B No. 53; the *Temple of Preah Vihear Case*, ICJ Reports (1961) 17. In this connection it is my respectful opinion that the requirements for preclusion or estoppel in international law do not appear to have been satisfied by the Prime Minister's unilateral declaration. In the submission of Brownlie, as a principle of international law the doctrine of estoppel has no particular coherence and its incidence and effects are not uniform. In the characterization of D.W. Bowett, estoppel as a principle of international law requires three elements –

> '(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party relying on the statement or to the advantage of the party making the statement'.[21]

Given that the declaration of the Prime Minister was expressly made conditional on reciprocity, it cannot operate to create preclusion or estoppel in international law."

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21. "Ian Brownlie, *op. cit.*, fn. 13, at pp. 843- 844."

V. CONCLUSION

[76] "In view of the fact that the New York Convention does not apply to Belize, by virtue of this state not being a Contracting State, that its unilateral provisional application on the part of the Prime Minster of Belize was juridically misconceived in terms of the objective sought to be secured, and that the principle of estoppel or preclusion is inapplicable in the present context, what is the status of the award handed down by the International Court of International Arbitration. It is clear that since the New York Convention does not apply to Belize at the level of international law either by express consent or the operation of law, there is no legal obligation on the part of Belize to recognize and enforce domestically arbitral awards within the contemplation of the New York Convention in accordance with Art. III of that instrument. Refusal of the Courts of Belize to recognize and enforce domestically convention awards cannot operate to engage the international responsibility of Belize.

[77] "The foregoing notwithstanding, however, Belize still has to justify, juridically, Schedule Four of the Arbitration Act on its Statute Books. In my respectful opinion, however, that Schedule is a dead letter since, purporting as it did to intervene without the required authority in the exercise of the royal prerogative in the area of foreign affairs exclusively reserved for the Crown, it would be declared by a court of competent jurisdiction to be ultra vires, null and void and without effect ab initio. As such, it could not have been regarded as an existing law within the meaning of Art. 134 of the Belize Constitution and I have so determined.... And if Schedule IV of the Belize Arbitration Act could not have been regarded as existing law at the material time, Art. 134 of the Constitution was incapable of saving it before the independence of Belize and at the elaboration of its Constitution.

[78] "The Respondents contend that neither the United Kingdom nor Belize is a party to the Vienna Convention of 1969 and that this Instrument has not been extended to, applied to, nor domesticated in Belize. The foregoing notwithstanding, the International Court of Justice has determined that the Vienna Convention on the Law of Treaties 1969 largely codified customary international law which does not require domestication nor incorporation to produce legal incidence at the municipal plane in dualist jurisdictions.[22] And the fact that the Vienna Convention has no provision which may be construed as dis-

22. *"Gabcikovo v. Nagymaros*, ICJ Reports 1997; *Fisheries Jurisdiction Case* (*UK v. Iceland*), ICJ Reports 1973."

applying or repealing Part IV and the Fourth Schedule to the (Belize) Act is immaterial.

[79] "Applicable rules of international law have been adduced to establish that Part IV and the Fourth Schedule of the Belize Arbitration Act replicated but did not incorporate or enact provisions of a legally binding international treaty known as the New York Convention. More importantly, it is my respectful opinion that Part IV and the Fourth Schedule of the Belize Arbitration Act were incapable of being saved by Art. 134 of the Constitution since insofar as it represents colonial legislation without appropriate authority on matters peculiarly and exclusively within the royal prerogative of the Crown, it was invalid and not a law in existence at the material time capable of being saved by Art. 134 of the Belize Constitution.

[80] "For the foregoing reasons, the appeal is allowed."

Sosa, P, Costs

[81] "The order as to costs dealt with [at [1]] above is made on the basis that such costs are certified fit for two counsel, viz Senior Counsel and a junior, and is provisional in nature. Application may be made for a contrary order within 7 days of the date of the delivery of this judgment (in which event the Court shall make a new order as to costs on written submissions to be filed in 15 days from that date). I am authorized by Pollard JA to say that he concurs in all I have said in this paragraph."

Caribbean Court of Justice, 26 July 2013

Judgment of the Honourable Mr. Justice Saunders

[82] "The London Court of International Arbitration (the Tribunal) determined that the State of Belize should pay damages for dishonouring certain promises it had made to two commercial companies, namely, BCB Holdings Limited and The Belize Bank Limited (the Companies). The promises were contained in a Settlement Deed as Amended (the Deed) executed in March 2005. The Deed provided that the Companies should enjoy, from 1 April 2005, a tax regime specially crafted for them and at variance with the tax laws of Belize.

[83] "This unique regime was never legislated but it was honoured by the State for two years until it was repudiated in 2008 after a change of administration in Belize following a General Election. The Companies then commenced

arbitration. The Tribunal found the State of Belize in breach and awarded damages against Belize in addition to arbitration costs and legal, professional and other fees (the Award). The Award totalled approximately [BZ]$ 44 million and it carried interest at the rate of 3.38 percent compounded annually. The damages were calculated on the hypothesis that the Companies would have continued to benefit from the special tax regime at least until 2020; the year when, in keeping with the laws of Belize, BCB Holdings Limited's status as a public investment company was due to expire.

[84] "The Companies are applying now to enforce the award. The State resists enforcement. The critical question is whether it is or is not contrary to public policy for the Court to enforce the same. For the reasons that follow it is our judgment that it would be contrary to public policy to recognize the Award and accordingly we decline to enforce it."

I. BACKGROUND

[85] "The Deed arose, at least in part, out of the stated intention of the Minister of Finance and the Companies to settle a pre-existing dispute between them. The prior dispute had to do with a share purchase deed and an option deed the parties had previously negotiated. That initial dispute had itself been submitted to the Tribunal for resolution by arbitration because of certain claims made by the Companies against the State. The Deed recorded the Companies' agreement not to pursue further these existing claims. In return, the Minister agreed to grant the Companies the special tax regime to which reference was earlier made. The Deed expressed that its provisions were to be governed by English law and it contained an arbitration clause stipulating that either party could refer to the Tribunal for resolution of disputes that were not amicably settled.

[86] "The Deed was executed by the Prime Minister (the then Minister of Finance) and also by the Attorney General of Belize. The document was expressed to be 'confidential'. The parties agreed not to make any announcement concerning its contents or any ancillary matter. That did not, however, prevent any announcement being made or any confidential information being disclosed by a party: '(a) with the written approval of the other parties, which in the case of any announcement shall not be unreasonably withheld or delayed; or (b) to the extent required by law or any competent body or stock exchange'.

[87] "For well over a year after its execution, the Commissioner of Income Tax was unaware of the Deed's existence or its implications. On 10 July 2006 the Commissioner wrote to the Companies seeking their compliance with the published tax laws of the land. The Companies responded by instructing the

Commissioner to liaise directly with the Minister of Finance. Three months later the Commissioner wrote back to the Companies accepting the Companies' position and retracting what initially was his. For a period of two years, the Companies enjoyed the tax regime set out in the Deed.

[88] "In February 2008, following a general election, a new administration was sworn into office in Belize. A few months later the Commissioner of Income Tax assessed the Companies for tax on the basis of Belize law in respect of the period the Companies had enjoyed the benefits under the Deed. The Commissioner rejected the tax returns filed by the Companies for the two previous years and required the Companies to comply with the law. The Commissioner informed the Companies that the Deed did not supersede the country's revenue laws. This turn-around by the Government constituted a repudiation of the promises made in the Deed and motivated the Companies once again to resort to arbitration."

1. The Arbitral Award

[89] "The Tribunal was duly constituted but the State did not participate in the arbitration. It did not appear. It did not make any submissions to the Tribunal. It did not enter a defence to, nor did it comment upon, the Companies' submissions. The Tribunal nonetheless rightly felt that it still had an obligation to take into account such matters as it considered might represent Belize's position on the issues in dispute. There was some material that enabled it so to do. Satellite proceedings had been tried in the Belize courts in which the State had participated and been legally represented. The Tribunal concluded that the submissions made in those proceedings and the judgments of the courts provided an indication of what arguments the State of Belize would have likely pursued before the Tribunal in relation to the matters in dispute.

[90] "The Tribunal considered that it had jurisdiction to entertain the dispute. It dismissed any notion that the dispute was not arbitrable whether because tax-related matters were involved or because of the alleged incompatibility of the promises made to the Companies with Belize law. In making these findings the Tribunal emphasized that it was pronouncing not upon the taxation regime of Belize but instead upon the contractual warranties the Government, in the exercise of its sovereign power, had made to the Companies. The Tribunal noted that the Crown at common law had a wide prerogative power to enter into contracts and this power was unfettered by restrictions as to subject matter or persons. The Tribunal asserted that the only constraint on this wide prerogative power is that any such contract: (i) should be entered into in the ordinary or necessary course of Government administration; (ii) must be authorized by the

responsible Minister, and that (iii) any payments by the Government to honour any such contract must be covered by, or referable to, an appropriate Parliamentary grant.

[91] "The Tribunal decided that the first of these three conditions was demonstrably established as the Deed gave the Government considerable financial benefits, including the Companies' agreement not to re-open the previous disputes between the parties. The Tribunal reasoned that it was not unusual for governments to enter into settlement arrangements which involved concessions or reductions. As to the second condition, according to the Tribunal, the Prime Minister clearly had actual and ostensible authority both to make the contractual warranties that were made and to assure the Companies that they would indeed enjoy the promised benefits. The Tribunal stated that the third condition did not apply in this case. No specific reason was given for this finding but one can infer that it was because the Deed did not require the Government to make unappropriated payments to anyone.

[92] "The Tribunal did not justify their decision only on the wide prerogative power of the Government. The Tribunal also held that Sect. 95 of the Income and Business Tax Act[23] expressly authorized the Government, through the Minister of Finance, to make and guarantee the promises contained in the Deed. As Sect. 95 is a short section we take the liberty of setting it out in full:

> '(i) The Minister may remit the whole or any part of the income tax payable by any person if he is satisfied that it would be just and equitable to do so.
> (ii) Notices of such remission shall be published in the Gazette.'

In support of its findings that the Agreement was not illegal and the dispute was arbitrable the Tribunal cited several authorities."[24]

2. The Decisions of the Courts Below

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23. "Income and Business Tax Act, Cap 55 [Belize]."

24. "These included but were not limited to *The Attorney General of New South Wales v. Bardolph* [1934] 52 CLR. 455; *The Attorney General of Saint Lucia v. Martinus Francois*, Civil Appeal No 37 of 2003; *In re D.H. Curtis (Builders) Ltd* [1978] 2 WLR 28; *Marubeni Hong Kong and South China Ltd v. Government of Mongolia* [2004] 2 Lloyd's Rep. 198; *Attorney-General v. Silver* [1953] AC 461; Arbitral awards made in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*; *Engineering Company (Italy) v. Engineering Company (Greece) and Producer (Greece)*; *TCSB Inc. v. Iran* and *Paushok and Others v. The Government of Mongolia* and an article by Emmanuel Gaillard on Tax Disputes Between States and Foreign Investors, "Tax Disputes Between States and Foreign Investors" [1997] NYLJ 217."

[93] "The Tribunal's award cannot be enforced in Belize without an application first being made to the court to enforce it. The legislative basis for enforcement is the Arbitration (Amendment) Ordinance No. 21 of 1980[25] (the Act). The application to enforce was made to a trial judge in Belize. On this occasion the State appeared and made several submissions strenuously resisting the application.

[94] "In essence, the State submitted to the judge that (a) the relevant provisions of the Act were in fact not part of the law of Belize; (b) the subject matter of the arbitration was non-arbitrable and (c) it would be contrary to public policy to enforce the Award. The judge rejected each of these arguments. The judge noted that Sect. 28 of the Act enshrines the principle that an arbitral award, made pursuant to the [1958 New York Convention][26] is, for all purposes, binding on those who are parties to the Convention. The judge held that this Award is a Convention Award. The judge therefore weighed this principle against the provisions of Sect. 30 of the Act which enjoins the court not to refuse enforcement of a Convention award except upon very limited grounds which are specifically prescribed. Citing the case of *P T Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*,[27] the judge explained that the courts in Belize ought to lean toward enforcement of Convention awards unless to allow enforcement would 'shock the conscience' or 'is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public'. The judge concluded that the Deed was a lawful and legally binding commercial agreement and that to refuse enforcement would transgress established applicable legal principles and practices. He therefore ordered that the Companies be at liberty to enforce the Award in the same manner and to the same effect as a local judgment. The State appealed the judge's decision to the Court of Appeal.

[95] "It is a matter of great regret that the Court of Appeal determined the appeal on a consideration only of the State's submission (discussed more fully in the judgment delivered by Justice Anderson), that the Act was invalid and that for this reason enforcement of the Award should be refused. Two of the three judges upheld that submission. The third, Mendes, JA, dissented. In his opinion the Act was valid and therefore the other submissions regarding enforceability were not at all moot.

[96] "No other issues were discussed in the judgment of the Court of Appeal. Mendes JA expressed his willingness to pronounce on the other issues in the case

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25. "Arbitration Act, Cap 125 [Belize]."
26. "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force on 7 June 1959) 330 UNTS 3 (New York Convention)."
27. "[2007] 1 SLR (Reissue) 597."

which, given his opinion that the Act was valid, would have arisen. Since his views on those other issues would have been otiose, given that the opinions of his colleagues had already determined the appeal, he considered ultimately that it was superfluous to express them in his judgment."

II. THE ISSUES

[97] "Three central issues arise from the appeal of the Companies to this Court:

(1) Is the Act valid? Was its passage an improper encroachment by the Belize colonial legislature upon the preserve of the Crown? Should the claim for enforcement be dismissed on this ground?
(2) If the first point is decided in favour of the Companies and the Act is valid and applicable, should this Court remit the case to the Court of Appeal so that it can first pronounce on the questions whether the Award should not be enforced because it is non-Arbitrable and/or because it is contrary to public policy?
(3) If the Act is not invalid and the case is not remitted, should the application to enforce the Award be refused either because it would be contrary to public policy to do so (the public policy point) or because it is in respect of a matter which was not capable of settlement by arbitration (the non-Arbitrability point)?

[98] "For the reasons set out by Justice Anderson, we are of the view that the Act is not invalid and the case should not be remitted. As our opinion on the public policy point is dispositive of the appeal we consider it unnecessary to consider the non-arbitrability point."

III. PUBLIC POLICY

1. The Submissions of the Parties

[99] "On this point, the State submits that it was never bound by the agreement that gave rise to the Deed because implementation of the same without parliamentary approval violates the country's fundamental law. While the Minister, in making agreements, could ordinarily be taken to have implicitly promised that he would secure any necessary legislative approval, the Award on its face discloses that no such approval was ever sought or obtained and there never was any intention to seek or obtain such approval. In these circumstances,

counsel submits, the Court should not enforce the Award as it is repugnant to the Belize legal order.

[100] "The Companies, on the other hand, argue that the State benefited from the Agreement because the Deed amicably settled prior and pending claims of the Companies against the Government. The Tribunal has definitively ruled that the Agreement was not illegal and the Court should not now re-open the merits of what has already been determined. The State could and should have raised, before the Tribunal or before the English supervisory courts, any arguments it now wishes to raise on the legality of the Deed. The Award is final and, in keeping with the pro-enforcement bias courts should have towards Convention Awards, this Court should enforce it. The Companies support their submissions with reference to several authorities."[28]

2. The Broad Approach to the Public Policy Exception

[101] "Competing policies are invariably at play when a court is called upon to decide whether to enforce an arbitral award. The court must balance divergent policies and interests and apply to them principles of proportionality.

[102] "Almost two hundred years ago, Burrough J. in *Richardson v. Mellish*[29] famously noted that 'public policy' is a very unruly horse. Once you get astride it, he warned, you never know where it will carry you. This admonition is especially prescient because the concept of public policy is fluid, open-textured, encompassing potentially a wide variety of acts. It is conditioned by time and place. Religion and morality, as well as the fundamental economic, social, political, legal or foreign affairs of the State in which enforcement is sought, may legitimately ground public policy concerns. Whether those concerns are of a substantive or procedural nature, if they are fundamental to the polity of the enforcing State, they may successfully be invoked.

[103] "Since the Award here in question is a foreign Award governed by English law, the question that naturally arises is, whose public policy is being interrogated? Is there some international public policy which must be used as a

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28. "These included: *Soinco SACI and Another v. Novokuznetsk Aluminium Plant and Others* [1998] 2 Lloyd's Rep. 337 [reported in Yearbook XXIII (1998) pp. 795-801 (UK no. 49)]; *Westacre Investments Inc v. Jugoimport-SPDR Holding Co. Ltd* [2000] 1 QB 288; and *Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment* and *Isny Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment and Isny*, 24 November 1993, reported in Yearbook Commercial Arbitration, A.J. van den Berg ed., Vol. XXI, 1996, p. 624."

29. "(1824) 2 Bing 229, 252."

yardstick against which to measure those matters which it is said are contrary to public policy?

[104] "Public policy in this case must in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize. It is in Belize that the Companies seek to enforce the Award and it is the courts of Belize that must make the assessment as to what, if anything, is offensive to public policy. It is also in Belize that the underlying obligations and promises were to be performed. Art. V(2)(*b*) of the Convention provides that enforcement of an award may be refused, if enforcement would be contrary to 'the public policy of that country'; that is, in this case, the State of Belize. But this does not mean that, although there is no universal standard of 'public policy',[30] it would be appropriate for courts to adopt a parochial approach. As Cardozo J. reminds us in *Loucks v. Standard Oil Co. of New York*,[31] the courts are not free to refuse to enforce a foreign judgment at the pleasure of the judges or to suit the individual notion of expediency or fairness.

[105] "Where enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalized and mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards.

[106] "The Court must be alive to the fact that public policy is often invoked by a losing party in order to re-open the merits of a case already determined by the arbitrators.[32] Courts must accordingly be vigilant not to be seen as frustrating enforcement of the Award or affording the losing party a second bite of the cherry. To encourage such conduct would cut straight across the benefits to be derived from the arbitral process and undermine the efficacy of the parties' agreement to pursue arbitration.[33]

[107] "An expansive construction of the public policy defence would vitiate the Convention's attempt to remove pre-existing obstacles to enforcement and to

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30. "See International Law Association's Final Report on Public Policy 2002 at [21]."
31. "224 N.Y. 99."
32. "See *A v. R* (Arbitration: Enforcement) [2009] 3 HKLRD 389 at page 395 [24]."
33. "*Ibid.*, at p. 395 [25]."

accommodate considerations of reciprocity.[34] For all these and other reasons the Convention has a definite pro-enforcement bias and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias. There is universal consensus that courts will decline to enforce foreign arbitral awards only in exceptional circumstances. In particular, this restrictive approach is adopted in relation to Convention Awards; therefore, only where enforcement would violate the forum state's most basic notions of morality and justice[35] would a court be justified in declining to enforce a foreign Award based on public policy grounds. Enforcement would be refused, for example, if the Award is 'at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle'.[36] In such a case the infringement must constitute 'a manifest breach of a rule of law regarded as essential in the legal order'.[37] In this vein, the Indian Supreme Court has stated that it will decline to enforce an Award only if enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.[38]

[108] "The International Law Association (the 'ILA') has recommended the use of the phrase 'international public policy' as an appropriate description of the restrictive scope of public policy that should be applied to Convention Awards.[39] The phrase is used in contra-distinction to 'domestic public policy'. Its content includes such matters as (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; and (ii) rules designed to serve the essential political, social or economic interests of the State.

[109] "We agree that to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must represent an unacceptable violation of those principles. The threshold that must be attained by the State to establish the public policy exception is therefore a very high one."

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34. *"Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America*, 508 F.2d 969 (2d Cir. 1974) [reported in Yearbook I (1976) p. 205 (US no. 7)]."
35. "*Ibid*."
36. *"Krombach v. Bamberski* [2001] 3 WLR 488 at [37]."
37. "*Ibid*."
38. "See *Renusagar Power Company Ltd v. General Electric Company* (1994) AIR 860 at [66] [reported in Yearbook XX (1995) pp. 681-738 (India no. 22)]."
39. "See ILA Final Report on Public Policy 2002, <www.newyorkconvention.org/publications/full-text-publications/general/ila-report-on-public-policy-2002>."

3. Public Policy and the Underlying Agreement

[110] "The rival submissions of the parties raise two important preliminary questions. Is it permissible for the Court now to examine the underlying Agreement reflected in the Deed? Should the Court re-examine the legality of the Deed even after the Tribunal has specifically addressed that issue and found the Deed to be valid?

[111] "In our view, the circumstances of this case lend themselves to a positive answer to both questions. There is no controversy as to the conduct of the parties in the making of the Agreement. No one has any quarrel with the manner in which the Award sets out the basic terms of the Minister's Agreement with the Companies. The warranties and promises made to the Companies, the consideration given in exchange, these are all agreed. There is no dispute that in 2008, when a new Minister of Finance assumed office, further implementation of the Agreement was halted. The reasons put forward to justify premature termination of the Agreement are also undisputed. In short, this is a case where all the relevant facts are uncontested matters of public record accepted by both sides. It is necessary only to decide whether, on the basis of these uncontroverted matters, enforcement of the Award will violate 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal'.[40]

[112] "It may be possible here to make that decision by confining oneself to the dispositive aspect of the Award, but given the circumstance that the factual background is agreed and since the court is performing, essentially, a balancing exercise between the competing public policies of finality and illegality, the nature and seriousness of the alleged illegality and the extent to which it can be seen that the same was addressed by the arbitral tribunal are factors we must take into account.[41] If there is illegality we must also consider the extent to which it impacts on the society at large and is offensive to primary principles of justice.

[113] "We respectfully disagree with the opinion of the trial judge that, because the Tribunal had considered and rejected the idea that the Deed was illegal, we are necessarily precluded from considering afresh that issue. We agree with Colman J who held in *Westacre* that any such estoppel must yield to the public policy against giving effect to transactions obviously offensive to the court.[42] In the context of the credible allegations of illegality put forward by the

40. "See Cardozo J in *Loucks v. Standard Oil Co. of New York* 224 N.Y. 99 at 111."

41. "*Westacre Investments Inc v. Jugoimport-SPDR Holding Co. Ltd* [1999] 3 All ER 864 at 885 H [rported in Yearbook XXIV (1999) pp. 753-776 (UK no. 54)]."

42. "See *Westacre Investments Inc v. Jugoimport-SPDR Holding Co. Ltd* [1998] 2 Lloyd's Rep. 111, 118."

Government, in order to assess whether this transaction is truly offensive the court must examine the Agreement and the promises the Minister made to the Companies against the backdrop of fundamental principles and rules."

a. The promises made by the Minister

[114] "The promises made by the Minister were designed to affect, indeed to alter, the Companies' tax obligations under existing law. The Deed looked to past as well as future obligations. As to those of the past, whatever may have been the factual position in relation to the Companies' liabilities as at the date of its execution, the Deed determined that, for 'all periods up to and including 31 March 2005', the Companies had 'satisfied in full all and any such liabilities, assessments or claims'. The Deed further assured the Companies that all their filings, in relation to any form of taxation required to be made on their behalf, were complete and up to date.

[115] "As to the future, the Deed recites at Clause 4.1(c) that 'to the extent that [the Companies] are liable to pay any Business Tax and/or Income Tax in respect of any period beginning on or after 1 April 2005, the calculation of the raising of any assessments or claims in respect of such Business Tax and/or Income Tax shall be calculated solely and exclusively on the basis that …'. The Deed at this point goes on at some length to construct in careful detail a special tax regime reserved for the Companies; a regime that all parties readily acknowledge is at variance with the extant revenue laws of Belize and one which conferred significant benefits on the Companies. To cite just one example of this variation, Sect. 21(3) of the Income and Business Tax Act states:

> 'The excess of any business tax paid by any person other than an employed person during the basis year over the income tax due on the chargeable income of such person shall be carried forward as an expense to the next basis year.'

On the other hand Clause 4.1(c)(iii) of the Deed states

> 'Business tax is a withholding tax and an advance payment of final Income Tax and any amount paid in Business Tax which is in excess of the amount due in Income Tax will constitute an overpayment of Income Tax and shall be offset on a quarterly basis against Business Tax and payable in subsequent financial years.'

[116] "The Award discloses that the Deed was buttressed by other assurances made to the Companies. The Deed was accompanied by a letter dated 21 June

2006 addressed to the Chairman of the Companies in which the Minister of Finance '*irrevocably confirmed*' that all business and income tax obligations of the Companies would be governed by the terms of the Deed. The Minister also confirmed that the Deed had '*irrevocably fixed*' the rate of income tax payable by the Companies for as long as BCB Holdings remained a Public Investment Company *notwithstanding anything contained in the Income and Business Tax Act to the contrary*' (the italics are all those of the Tribunal in its published Award).

[117] "In sum, in exchange for settling the prior arbitral proceedings, the Deed purported to create and guarantee to the Companies a unique tax regime that was unalterable by Parliament. So, for the sake of argument, if BCB remained a Public Investment Company for the next 15 years, the State of Belize would be in breach of contract if its National Assembly, at any time during that period, without the Companies' concurrence, enacted any revenue measure applicable to the Companies that diverged from the Deed. The promises made by the Minister were thus intended to supplant and supersede all current and any future statutes enacted by the National Assembly.

[118] "The Tribunal addressed the issue of the legality of the Deed by asking itself whether the Minister had actual and/or ostensible authority to make these promises to the Companies. The Tribunal held that the Minister did have such authority. The Tribunal rested this conclusion on two premises, firstly, the extensive prerogative powers of the Executive to make agreements and secondly, Sect. 95 of the Income and Business Tax Act.[43] The Tribunal noted that it is commonplace in international investment contracts for a host country to promise a foreign investor or contractor tax incentives as an inducement to make the investment or carry out an activity which is the subject of such agreements. The judge at first instance affirmed these conclusions of the Tribunal.

[119] "We agree that the Minister does indeed possess wide prerogative powers to enter into agreements. The Executive may do so even when those agreements require legislative approval before they can become binding on the State. This was also the opinion of the Eastern Caribbean Court of Appeal in the Saint Lucian case of *The Attorney-General v. Francois*,[44] an authority cited by the Tribunal. The judge's focus, however, ought logically to have extended beyond the issue of whether it was lawful to make the promises. The making of a Government contract may be a matter quite distinct from its enforceability against the State as the *Francois* case also demonstrates.

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43. "See [at [92]] above where the Section is set out."

44. "Civil Appeal No. 23 of 2003, Judgment of the Court of Appeal delivered 29 March 2004."

[120] "It was necessary for the judge to consider whether the Award was contrary to public policy given the implementation of the underlying agreement without parliamentary approval and without any intention on the part of the contracting parties to seek such approval. This was an issue that was not at all considered by the Tribunal and the judge failed to advert to it. *Francois* concerned a guarantee entered into by the Saint Lucia Minister of Finance. No parliamentary approval had been given for the grant of the guarantee. The State was subsequently obliged to make good on the instrument. A citizen challenged its legality. The court held that nothing prevented the Minister from giving the guarantee, but the State only became bound by the same after Parliament had approved the funds necessary to discharge it. As Parliament had done so before the guarantee was honoured there was no basis for the citizen's complaint."

b. Executive prerogative and the separation of powers

[121] "If it turns out that the Minister had no power to make or implement the promises he made, his lack of authority would be a potent factor in any assessment of the legality of the Agreement and the question whether enforcement of the Award is contrary to public policy. The Companies accept that the Minister's authority to make the Agreement could only have been premised either on prerogative power or on Sect. 95 of the Income and Business Tax Act.[45] As to the former, the Companies submit that the Deed was 'a detailed commercial agreement' between two parties dealing with matters of 'a significant financial value'; that both sides must have sought legal advice with its drafting; and that it was entered into in order to settle prior arbitral proceedings in which claims amounting to 'considerable sums of money' were being made against the State. None of these points is disputed although it must be emphasized that this Court has no material before it to indicate the reasonableness or strength of the claims the Companies allegedly had against the Government. The Court also has no evidence before it of an approximate figure that might reasonably represent the 'considerable sums' mentioned by the Companies for which the State may have been liable if the prior dispute had been settled or arbitrated upon terms favourable to the Companies. These are, however, not matters of great significance. The crucial question is whether any of the points made above to justify the exercise of prerogative power, or all of them taken together, serves to render enforceable an agreement made by the Executive branch of government, without parliamentary approval, to except a taxpayer from obligations contained in current and future revenue statutes.

45. "See [at [92]] above where the Section is set out in full."

[122] "To negotiate an agreement with a company that can properly be described as a 'detailed commercial' or 'business' agreement or 'settlement deed' does nothing to enhance the capacity of the Executive unilaterally to provide exceptions from the country's revenue laws on the strength of Executive prerogative. The Government either has or lacks such capacity. It is trite that whatever legal advice the Minister procured does not bind a court and, interestingly, the State today actually has radically different advice from that which apparently informed the making of the Deed. The idea that the Minister who signed the Deed (or his Government) was attempting, in good faith, to settle a prior dispute is also quite beside the point. Neither a noble motive, as may have been the case, nor an executed Deed excuses or repairs an obvious excess of jurisdiction or serious breach of the fundamental principle of Separation of Powers.

[123] "The latter principle goes back to the writings of Montesquieu. So far as it relates to a strict division between the Executive and the Legislature, with the growing complexity of the machinery of government, the principle may have lost some of its lustre. In particular, in relatively small Parliaments like Belize's, and where the Executive is largely drawn from the legislature, the separation between these two bodies often appears blurred. But it is erroneous to assume that there is not an important division between the functions performed by each branch. The struggle to maintain this important distinction is as old as the epic battles waged between Chief Justice Coke and King James I who sought to use Royal proclamations to make law without Parliament's approval.[46] The structure and content of the Belize Constitution reflects and reinforces the distinction. The Constitution carefully distributes among the branches the unique functions that each is authorized to exercise.[47] The rights and freedoms of the citizenry and democracy itself would be imperilled if courts permitted the Executive to assume unto itself essential law-making functions in the absence of constitutional or legislative authority so to do. It would be utterly disastrous if the Executive could do so, selectively, via confidential documents. In young States especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance. Caribbean courts, as part of their general function of judicial review, have a constitutional obligation to strike down administrative or

46. "See Case of Proclamations (1611) 12 Co. Rep. 74 which established the principle that the Executive has no general inherent power to alter the law of the land."

47. "See in relation to the Constitution of Jamaica the judgment of Harrison JA in *Independent Jamaica Council for Human Rights and others v. The Attorney General*, Civil Appeals Nos. 36-39 of 2004, at pp. 11-13, judgment of the Court of Appeal delivered 12 July 2004."

executive action that exceeds jurisdiction or undermines the authority of the legislature.[48]

[124] "Sect. 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country's revenue laws. Counsel for the Companies submitted that the Deed merely resolved 'uncertainties and ambiguities' in the law, but the Executive Branch, whether for the purpose of 'settling' claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the parliament and the courts. Governments in the region are authorized to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the State, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorized by the Constitution or the legislature, before they can be implemented.

[125] "There is and must continue to be a healthy relationship among the arms of government. The State certainly cannot function effectively with its three mighty branches strictly compartmentalized and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each Branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one Branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the Executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the Minister to implement the promises recorded in the Deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.

[126] "There is a more fundamental reason why the Minister's authority to make and implement the promises given in the Deed cannot be justified on the basis of prerogative power. This is because, as was noted by Lord Bridge in *Williams Construction v. Blackman*,[49] it is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under

48. "See for example: *J Astaphan & Co. (1970) Ltd v. Comptroller of Customs of Dominica* (1996) 54 WIR 153 K."

49. "(1994) 45 WIR 94 at 99."

which the same function might previously have been exercised is superseded. While the statute remains in force, the function can only be exercised in accordance with its provisions. Since it is being put forward also that the Minister's authority sprang from his powers under Sect. 95 of the Income and Business Tax Act,[50] prerogative power is ousted and it is to the statute that one must turn to discover whether (a) Sect. 95 authorized the Minister to do what he did and (b), assuming such authorization, the Minister acted within the scope of the authority given."

c. Whether the Minister could remit taxes under Sect. 95 of the Income and Business Tax Act

[127] "The constitutionality of Sect. 95 was challenged by counsel for the State. It is unnecessary now to rule on that challenge. Suffice it to say that, assuming its constitutional validity, the section must be interpreted in light of the Constitution. The Belize Constitution, like other Anglophone CARICOM Constitutions, places a specific and extremely high value on legislation dealing with taxation. Any Bill dealing with the imposition, repeal, remission, alteration or regulation of taxation is in the Constitution referred to as a 'Money Bill'.[51] Money Bills are not enacted in the ordinary way. Sects. 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly exercised, the accompanying safeguards must be scrupulously observed.

[128] "Sect. 95 cannot properly be interpreted as being capable of granting the Minister the power to do what the Deed here purported to do. In particular, we fail to see how, in one fell swoop, the Minister could possibly 'remit' tax payable in respect of business activity to be conducted over an indefinite time in the future. The Tribunal expressed a different view on this issue. The Tribunal also likened remission of tax to the cancellation or extinguishment of all or part of a financial obligation whether past or future. In our opinion there is a substantial difference between the remitting tax payable and extinguishing an obligation to

50. "See [at [92]] above where the Section is set out in full."

51. "See Sect. 80(1) of the Belize Constitution."

pay tax. If the Minister was authorized by Sect. 95 to do the former he certainly had no power whatsoever to promise the latter.

[129] "Since the Minister is not the only official upon whom is conferred a power of remission, it is instructive to reason by analogy. Sect. 52(1)(d) of the Constitution confers on the Governor-General the power to 'remit the whole or any part of any punishment imposed on any person for any offence …'. If the Tribunal's views on remission are correct, then the Governor-General would be acting within the scope of the power if he/she remitted all the future sentences likely to be imposed upon a known recidivist. This would be an absurd interpretation of the Governor-General's power.

[130] "In the exercise of the statutory power to remit, Sect. 95 imposes upon the Minister the obligation to comply with two rather weak safeguards. Failure so to conform would impugn and automatically render void the exercise of the power. Here, the Minister flouted both measures. Firstly, the Minister's power under the section is constrained to the extent that the Minister needs to satisfy himself, on objective criteria, that it is just and equitable to remit tax payable. Fore-knowledge of the actual tax payable (which may be remitted in whole or part) constitutes a crucial, if not indispensable, factor informing the Minister's exercise of discretion. Just as it would be perverse for the Governor-General (whose discretion is not ostensibly limited by what is 'just and equitable') to remit punishment when no crime has as yet been committed, far less a sentence imposed, so too the Minister cannot properly satisfy himself of the justice or equity in remitting tax payable by a company where the business activity upon which the tax may or may not accrue has not yet commenced and there is no knowing whether the company would even be in business for the period the tax is supposedly 'remitted'. Apart from its absurdity, to construe the power to remit tax as capable of being exercised in respect of tax that may or may not become payable throughout the lifetime or existence of the taxpayer, evades Sect. 95's first safeguard and easily opens the door to the arbitrary and unlawful exercise of the power delegated.

[131] "Sect. 95 also required Notices of any remission to be published in the Gazette. Given the cloak of confidentiality that surrounded the making and implementation of the Deed, it is reasonable to conclude that there was never an intention on the part of the Minister to publish the required Notice. At any rate, the Minister had two years to fulfil this statutory obligation and no attempt was made to comply with it during that time. The trial judge accepted the Tribunal's view that the requirement of publication is merely 'an administrative formality' and that publication may lawfully be done at any time. In light of the importance the Constitution attaches to the remission of tax, we disagree. Parliament in its wisdom has decreed publication in the Gazette so that the Minister's decisions

on remission are open to public scrutiny. This might be a mild, after-the-fact legislative safeguard. But to strip it of all its content, to render it devoid of any force only emphasizes the grave danger to public policy that flows from interpreting the first limb of Sect. 95 in the manner in which the Companies suggest.

[132] "Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of taxation.[52] Even if one assumes that the Minister was entitled, by Sect. 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of 'remitting tax payable' includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament's revenue laws. In essence, the framers of the Deed conceptualized and designed a whole new tax policy for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly.

[133] "It is not the Court's function in this case to assess the wisdom of this special tax policy. The Government does of course have the power to settle, and to settle in confidence if it so desires, and on terms it considers prudent, claims made against it. But transforming the policy conceived here, effectively into the status of a Money Bill, necessitated the intervention of the National Assembly so that legislation consistent with the imperatives of the Constitution could be enacted to give force to it.

[134] "Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy. No court can afford to encourage the spread of such cancer.[53] In our judgment, implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize. In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement."

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52. "*Ibid*."

53. "See in this regard *Antigua Power Company Ltd v. The Attorney General of Antigua and Barbuda & Ors (Antigua and Barbuda) (Rev 1)* [2013] UKPC 24 at [51]-[60]."

IV. REFUSAL TO ENFORCE THE AWARD AT ISSUE ON PUBLIC POLICY GROUNDS

[135] "As stated before, competing policies contend with each other when one must decide whether the public policy exception may successfully be invoked to render a foreign award not enforceable. Even if a judge determines that there are features of an award that may seem inconsistent with public policy, it does not at all follow that the court must decline to enforce the Award. Reference has already been made to the pro-enforcement bias that informs the court's approach and to the restrictive manner in which the public policy exception should be applied in the case of foreign awards.

[136] "There is also the fact here that the State treated with indifference the arbitral process to which it had agreed. This was far from exemplary conduct and it is a factor to which one should have regard. For this purpose no useful distinction can be made between the Administration in Belize which occupied the seat of government prior to 2008 and the one which held the reins immediately after the General Elections of that year. The latter was contractually bound by the warranties of the former, provided that the implementation of those warranties was not by law, impliedly or expressly, subject to parliamentary or judicial approval. The agreement to arbitrate was a free standing agreement separable from the remainder of the Deed and it is unfortunate that the Government approached its obligations under that agreement in the way it did.

[137] "We do not consider, however, that in each and every case, a failure to participate in the arbitral process should preclude a party from successfully arguing the public policy exception at the enforcement stage. The case law on this issue is far from coherent and it would not be right to lay down hard and fast rules. It seems to us that here also, a tension exists between various public interests. In resolving that tension the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns must be weighed and placed alongside the court's desire to promote finality and certainty with respect to arbitral awards.

[138] "There is actually nothing in the Act that suggests that a pre-condition for invoking the public policy exception is prior participation in the arbitral process. The Convention envisages that a court may on its own motion decline to enforce an Award on public policy grounds. This is hardly surprising. While it is public policy that arbitral awards, and in particular foreign awards, should be enforced, it is also public policy that awards which collide with foundational principles of justice ought not to be enforced. These two facets of public policy may sometimes appear to be, but are really not, mutually inconsistent. When a municipal court considers whether to decline to enforce an Award on public policy grounds, the court is not concerned with favouring or prejudicing a party

to the arbitral proceedings. The Court is concerned with protecting the integrity of its executive function. In the process, the Court seeks simultaneously to guarantee public confidence in arbitral processes generally and to respect the institutional fabric of the country where the Award is to be enforced.

[139] "This is a case where, as we have noted, it is clear that the Minister had no power to guarantee fulfilment of the promises he gave. It is equally clear that the signatories to the Deed, including the Companies' representatives, had no intention to seek the requisite parliamentary approval. There was nothing in the Deed to suggest any such intention. Implementation of the promises made, far from being suspended pending possible legislative approval, took effect immediately upon execution of the Deed. But even if Parliament had ratified the promises made, not even Parliament could have bound itself to legislation that was 'irrevocable'.

[140] "The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value.[54] So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted.[55] To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception.[56] The Committee on International Commercial Arbitration has endorsed 'tax laws' as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award.[57] In our judgment, especially as the underlying agreement was to be performed in Belize, the balance here undoubtedly lies in favour of not enforcing this Award. This is a case where the Court actually has a duty to invoke the public policy exception.

[141] "We have considered whether, notwithstanding all of the above, we should still enforce the Award because if we did not, the State of Belize may be unjustly enriched. There are powerful factors that weigh against this view. As mentioned above [at [121]], we have no evidence of the strength of the Companies' claims relating to the prior dispute between the parties. There is therefore only a tenuous basis for presuming any unjust enrichment. Even assuming there could conceivably be some unjust enrichment, there is no way of assessing its likely

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54. "See *Methodist Church v. Symonette* [2000] 5 LRC 196 at 208; (2000) 59 WIR 1 at 13."
55. "See *Moses Hinds v. The A.G. of Jamaica* [1976] 1 All ER 353 at 359."
56. "See Report, Committee on International Commercial Arbitration, International Law Association – London Conference (2000) pp. 4-5."
57. "See ILA Final Report on Public Policy 2002 at [30]."

quantum. It is also significant that the Companies are not foreign entities. They are Belizean companies cognizant of and constrained by the public policy of special tax rates, exemptions and concessions being granted by Parliament. The Companies themselves are currently the beneficiaries of tax concessions which were obtained, not from the Minister but through the National Assembly.
[142] "The public policy contravened in this case falls well within the definition of 'international public policy' recommended by the ILA that might justify the non-enforcement of a Convention Award. If this Court ordered the enforcement of this Award we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this. Responsible bodies, including the Attorney General, have a right and duty to draw attention to and appropriately challenge attempts to undermine the Constitution."

Judgment of the Honourable Mr. Justice Anderson

[143] "An interesting question of general public importance raised by this case is the following: Did the enactment by the Parliament of Belize of the 1980 Arbitration Ordinance to give effect to the New York Convention before that treaty had been accepted by the Executive constitute a breach of the separation of powers doctrine thereby making the legislation unconstitutional?"

I. CONSTITUTIONALITY OF THE 1980 ARBITRATION ORDINANCE

[144] "In order to properly examine the constitutionality of the 1980 Arbitration Ordinance it is necessary to engage in a brief review of the historical background to the constitutional and legislative order in Belize. British Honduras was acquired by Great Britain by settlement becoming part of Her Majesty's dominions by 1817, at the latest. The British Honduras Constitution of 1870 vested power to make laws 'for the peace, order and good governance of the … Colony' in the Governor 'with the advice and consent of the … Legislative Council …'. On 1 January 1964, the Colony achieved self-government through the British Honduras Letters Patent (Letters Patent) and the enactment of the British Honduras Constitution Ordinance (Constitution Ordinance). These instruments, together with the common law relating to the Crown prerogative and executive power, delineated and delimited the boundaries of the three arms of governmental power in British Honduras: executive power was vested in the

Monarch headed by Queen Elizabeth II; legislative authority vested in the colonial legislature; and judicial authority vested in the colonial judiciary.

[145] "British Honduras became Belize on 1 June 1973. For ease of reference the Court will henceforth refer to 'Belize' regardless of the date of the relevant event. Belize became independent on 21 September 1981. By letter dated 29 September 1982, the Prime Minister informed the Secretary General of the United Nations that Belize would continue to apply provisionally and on the basis of reciprocity, the treaties extended to it by the United Kingdom.

[146] "On 10 October 1980, during the era of self-government, the Belize Legislature enacted the Arbitration (Amendment) Ordinance[58] (the 1980 Ordinance) which came into effect on the same day. By the 1980 Ordinance the Legislature added Part III, Sects. 25-30 and a Fourth Schedule titled 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' to the Arbitration Ordinance of 1932. The 1980 Ordinance was expressed to be: 'An Ordinance to amend the Arbitration Ordinance Chapter 13 of the Laws to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards'. It provided for the staying of court proceedings in the absence of proof that the arbitration agreement was null and void and the enforcement in Belize of an arbitration award made in the territory of a country (other than Belize) which is a party to the New York Convention ('Convention Award'). The New York Convention had been ratified by the United Kingdom on 24 September 1975 and made applicable to Belize by Notice of Territorial Application (in the form of a Declaration by the United Kingdom) which was received by the Secretary General of the United Nations on 26 November 1980, some six weeks after the enactment of the 1980 Ordinance.

[147] "The Appellants contend that the LCIA Final Award of 29 August 2009 was made in the United Kingdom, a party to the New York Convention and is therefore a Convention Award that ought to be enforced in Belize in accordance with the provisions of the 1980 Arbitration Ordinance inserted into the Arbitration Act. This is opposed by the Respondent who argues that the Ordinance was ultra vires the powers of the Legislature and therefore unconstitutional at the time of its enactment. In response the Appellants say that even if the 1980 Arbitration Ordinance was defective at its passage, which they strenuously deny, it could nevertheless be characterized as 'having effect' immediately before Independence Day and was therefore 'saved' as existing law by Sect. 134(1) of the Constitution. Finally, the Appellants argue that Belize is estopped from contending that the New York Convention is not applicable given

58. "No. 21 of 1980."

the 29 September 1982 letter of the Prime Minister to the Secretary General of the United Nations."

1. Is Ultra Vires Legislation Saved as Existing Law?

[148] "If the Appellants are correct that any defect in the passage of the 1980 Arbitration was cured by its being 'saved' under the Independence Constitution then the issue would be resolved in their favour and this resolution would foreclose on the need to discuss whether the Ordinance was ultra vires the powers of the colonial legislature. For this reason it is convenient to consider this point first.

[149] "Sect. 134 of the Independence Constitution of 1981 made provision for the saving of 'existing laws' and where necessary, for the Governor-General and the courts to bring those laws into conformity with the 1981 Constitution. 'Existing laws' meant any Act, Ordinance, rule, regulation, order or other instrument 'having effect as part of the law of Belize immediately before Independence Day'. The Appellants argue that even if the 1980 Ordinance was ultra vires, it was still capable of being saved on the basis that Sect. 136(6) does not require that an Ordinance be 'valid' to qualify as an existing law but only that it be an Ordinance 'having effect' immediately before Independence Day. Having been saved by Sect. 134 the only basis on which the Ordinance could be declared unconstitutional was for want of compatibility with the 1981 Constitution, since the section gave the same effect to saved laws 'as if they had been made in pursuance of this Constitution'.

[150] "There is no merit in this argument. In order for a law to be saved as 'existing' law that law must first exist. The purported enactment of a law by a legislature that has no power to enact that law does not result in the creation of law. Such a 'law' does not exist and never did; it is void ab initio: see *Murphy v. R.*[59] There is therefore nothing to be saved. If the 1980 Ordinance was outside the legislative competence of the colonial Legislature then the Court agrees entirely with Pollard JA that the Ordinance could 'not constitute "existing law" within the meaning of Sect. 134(1) of the Belize Constitution and amenable to being saved at the time of independence of Belize'.[60] The real question, therefore, is whether the enactment of the 1980 Ordinance was in fact outside of the legislative powers of the Legislature."

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59. "1982 Ir. 241."
60. "At [[46]] of the Judgment in the court below."

2. Was the 1980 Ordinance Ultra Vires the Powers of the Legislature?

[151] "The Respondent argues that by enacting the 1980 Ordinance the colonial legislature acted outside its legislative competence and encroached on the authority of the Executive thereby breaching the Separation of Powers doctrine and thus rendering the legislation unconstitutional. The competence of the colonial legislature derived from the Letters Patent and from the Constitutional Ordinance, Sect. 16 of which provided:

> 'Subject to the provisions of this Ordinance, the Legislature may make laws for the peace, order and good government of the Territory.'

Under the Royal Prerogative executive power was vested in the Crown and exercised by the Governor of Belize. For centuries it has been accepted that executive powers in the Royal Prerogative included the power to make international treaties, although the legislative implementation of the treaty was a matter for the legislature: *Roberts v. Minister of Foreign Affairs*,[61] and *Attorney General v. Joseph and Boyce*.[62] Sect. 16 of the Letters Patent and Sect. 2(4) of the Constitutional Ordinance confirmed that the Governor acting in his discretion was responsible for 'external affairs'.

[152] "The difficulty in this case arises from the fact that the 1980 Ordinance was expressly enacted 'to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' at a time when the Executive had not yet accepted the Convention. Pollard JA, who delivered the majority judgment in the court below, held as follows:

> 'Sect. 16 of the Constitutional Ordinance 1963 empowered the colonial legislature of Belize to make laws for the peace, order and good government of Belize. However, when the colonial legislature purported to pass an ordinance "to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" the colonial legislature was clearly encroaching on the royal prerogative in respect of the matter relating to foreign affairs. The "enactment" of the Convention by the colonial legislature necessarily involved interference in foreign affairs which was exclusively the domain of the Crown.... On the evidence before this Court, the colonial legislative assembly of Belize presumed to

61. "[2007] UKPC 56."
62. "[2006] CCJ 3 (AJ)."

> apply in its domestic law, and I would venture to say without proper executive authority, express or implied, an international treaty, the New York Convention, which had not yet been extended by the Crown in the exercise of its exclusive prerogative powers to Belize….'

[153] "The Appellants argue that the 1980 Ordinance dealt with the internal affairs of Belize, that is, the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize. It does not purport to regulate or govern external affairs or the external relationships between the State and other States. This line of reasoning found favour with Mendes JA who put the matter this way:

> 'The establishment of obligations on the international plane is the domain of the executive. The enactment of laws for the peace and good government of the people of [Belize] was the responsibility of the [Belize] Legislature. It seems clear to me that these plenary powers include the power to provide for the enforcement of arbitration awards, no matter where made and no matter who the parties to the award might be. It was also within the competence of the legislature to place such limitations on the enforcement of such awards as it deem fit. In this particular instance, it chose to identify the awards which are enforceable by reference in part to whether the country in which the award was made was a party to the New York Convention. That too was clearly within its plenary powers. It does not seem to me to make one jot of difference that the terms in which the legislative will of the [Belize] Legislature was expressed was inspired or was intended to replicate or indeed was intended to give effect to an existing treaty by which [Belize] was not yet bound. Such a legislative act does not intrude into the domain of external affairs. It concerns entirely the development of the domestic law of [Belize].'

[154] "This Court finds the views expressed by Mendes JA utterly convincing and prefers them to those articulated by Pollard JA. The 1980 Ordinance in no way interfered with the exercise of the executive authority in foreign affairs. In legislating the 1980 Ordinance, the legislature was not engaged in the negotiation, signature or ratification of the New York Convention; matters which belonged to the prerogative powers of the Crown. Nothing in the 1980 Ordinance purported to make Belize a party to the New York Convention. The annexure of the Convention to the Ordinance appeared to have been for purposes of identifying the categories of foreign awards that would be recognized and enforced in Belize, not to undertake international law obligations on behalf

of the State. By giving force to the obligations in a treaty at the domestic level the legislature does not usurp the executive's functions. Belize could not, by virtue of the 1980 Ordinance, assert an international law right to compel other parties to the Convention to enforce awards made in favour of Belizean nationals; equally, an amendment to or repeal of the 1980 Arbitration Ordinance could not engage the international responsibility of Belize. There is a normative separation between international rights and obligations under the New York Convention and domestic legislative enactment of that Convention.

[155] "Further, the 1980 Ordinance was within the broad powers of the Belize legislature, 'to make laws for the peace, order and good government of the Territory'. These words are apt to connote the widest plenary law-making powers appropriate to a sovereign (*Ibralebbe v. The Queen*[63] and *Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)*.[64] It is, indeed, unanimously agreed that this law-making power includes the power to legislate for the incorporation of international treaties. What the Respondent argues, and Pollard JA accepted, was that there was state practice in so-called 'dualist' jurisdictions that established a requirement for the prior executive act of acceptance of the treaty by the Executive.

[156] "There is no such requirement. At best, state practice could amount to a customary rule of international law recognized as part of the common law but such a common law rule could scarcely override the clear vesting by the Constitution of the widest plenary law-making powers in the Legislature. Furthermore, the emergence of customary law requires uniformity of state practice and state practice is by no means uniform on whether treaty acceptance must precede legislative incorporation. There are undoubtedly many instances in which the executive act of treaty acceptance has preceded legislative enactment of the treaty, although the authorities cited for the proposition that the timing of the 1980 Ordinance made it ultra vires, i.e., being enacted six weeks before executive acceptance of the New York Convention, do not establish that principle. *Attorney-General for Canada v. Attorney General for Ontario*[65] held that the legislative enactment by the Dominion Parliament of the Versailles Treaty was ultra vires not because of a sequencing issue but, rather, because the domestic implementation of the relevant treaty obligations was within the exclusive competence of the legislatures of the provinces. The Dominion

63. "[1964] AC 900 at 923 (PC)."
64. "[2009] 1 AC 453 at 486."
65. "[1937] AC 326 (PC)."

Parliament had therefore sought to usurp the jurisdiction of the Provincial Legislatures.

[157] "It is also the case that there are many occasions where legislative incorporation of a treaty has preceded executive acceptance of that treaty.[66] The Arbitration Act 1975 of England was enacted to give effect to the New York Convention before the United Kingdom had acceded to the Convention, although in *Channel Group v. Balfour Beatty Ltd*[67] it was said that 'strictly speaking' the legislation should have followed Executive acceptance of the Convention. The UK Act to implement the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air was passed before the Convention was ratified by the Executive.[68] In some instances the New York Convention has been given effect in domestic law even though the State is not a party to the Convention, as in the British Virgin Islands,[69] an important Caribbean jurisdiction for the settlement of transnational commercial disputes. Pre-acceptance enactment has also been recommended by colonial legal advisors as well as modern academic writers.[70] The rationale appears to be that if domestic legislation is required to enable the State to give effect to its treaty obligation then the legislation should be in place before the treaty comes into force so as to avoid a breach of the international obligation at the point when the treaty enters into force. In an ideal world both the treaty and the incorporating legislation would enter into operation at the same time. But the sequencing of these events has never, prior to the decision below, been held to displace the constitutional competence in the legislature to enact incorporating legislation. We do not think that any such fettering of the legislative competence was intended by the Constitution.

[158] "We do not think that the majority in the court below gave sufficient weight to the Governor's assent to the 1980 Ordinance. The colonial

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66. "McNair, *The Law of Treaties* (Oxford University Press, 8th edition, 1961) at p. 86, footnote 3; *Salomon v. Commissioner of Customs and Excise* [1967] 2 QB 116, at p. 143-D; *The HOLLANDIA* [1982] 1 QB 872 (CA) and [1983] 1 AC 565 at p. 571 per Lord Diplock."

67. "[1993] AC 334 at 354 (HL)."

68. "Judgment in the court below, Pollard JA [at [52]]."

69. "The UK colony of the British Virgin Islands enacted its Arbitration Ordinance dated 6 September 1976 to give effect to the New York Convention in domestic law although the Convention has never been extended to the BVI by the British Government."

70. "See Diplomatic Telegram dated 31 December 1980 by the UK F&CO Advisers; UKFCO, Treaty Section, Information Management Department, *Treaties and MOUs, Guidance on Practice and Procedures* (2nd edition, May 2004), at p. 7; Joanna Harrington, "Scrutiny and Approval: the Role for Westminster-style Parliaments in Treaty-making", International and Comparative Law Quarterly (2006) Vol. 55 at p. 125)."

Constitution vested executive authority in the Crown and provided for its exercise by the Governor; the Governor acting in his discretion had responsibility for 'external affairs'. The Governor could interrupt the legislative passage (Sect. 27(1)) or refuse his assent or reserve the Bill for the signification of Her Majesty's pleasure (Sect. 28(3)) if he felt the Bill infringed upon the prerogative powers or his special responsibilities. While not conclusive, it is reasonable to assume that by assenting to the Bill providing for the giving of effect to the New York Convention, the Governor must have considered that the legislation did not usurp the treaty making prerogative of Her Majesty or his special responsibilities. More crucially, the Bill was only fully enacted upon Assent of the Crown in the exercise of the Royal Prerogative. It is therefore difficult to see how a law which can only become so on the exercise of the Royal Prerogative could be inconsistent with the Royal Prerogative. It is not without significance that the Crown exercised its executive power to extend the Convention to Belize a mere six weeks after the enactment.

[159] "For these reasons the Court concludes that the enactment of the 1980 Ordinance was intra vires the powers of the legislature and did not encroach into the domain of the Royal Prerogative in treaty-making. We therefore find the 1980 Ordinance to be constitutional and saved as 'existing law' under the 1981 Independence Constitution."

II. IS BELIZE ESTOPPED FROM ARGUING THAT THE NEW YORK CONVENTION IS NOT APPLICABLE?

[160] "The Appellants argue that the declaration made by the Prime Minister of Belize in the *Note Verbale* of 29 September 1982 was legally binding and estopped Belize from denying the applicability of the New York Convention. In the *Note Verbale*, the Prime Minister informed the Secretary General of the United Nations that the Government of Belize, '… had decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize'. The Prime Minister requested that his letter be circulated to all Member States of the United Nations. The Appellants contend that this declaration fulfilled the conditions for estoppel to arise in International Law, namely, (a) the meaning of the statement is clear and unambiguous; (b) the statement or representation is voluntary, unconditional, and authorized; and (c) there is reliance in good faith upon the representation of

one party by the other party to his detriment (or to the advantage of the party making the representation).[71]

[161] "This issue of the binding nature of the declaration made by the Government of Belize raises very complex issues and not only those relating to estoppel in International Law. Diverse theories underpinning the law of treaties, state responsibility, state succession, and of unilateral declarations also come into play. Since this Court has already held that the 1980 Ordinance giving effect to the New York Convention was constitutional and saved as existing law at the time of independence, we consider it unnecessary and unwise in the circumstances to decide on the issue of estoppel."

III. NO REMITTAL TO THE COURT OF APPEAL

[162] "There was no common ground between the parties as to the consequential disposal of the appeal in the event that this Court found the Arbitration Act to be constitutional, as we have. The Appellants submit that we should decide the issue of enforcement of the award without further ado while the Respondent seeks a remittal to the Court of Appeal. The remittal would enable the court below to decide the two other objections raised by the Respondent to enforcement, that is, that the subject matter of the dispute was not capable of settlement by arbitration, and enforcement would be contrary to public policy.

[163] "The issues of constitutionality, arbitrability, and public policy were the subject of comprehensive written submissions and were fully argued over a three-day period in October 2011, before the Court of Appeal. At the request of the Court of Appeal made on 26 January 2012, the parties made further written submissions on the question of the constitutionality of the 1980 Ordinance. The judgment of the Court of Appeal was handed down on 8 August 2012, and dealt exclusively with the question of constitutionality. The judgment did not at all address the issues of arbitrability or public policy. This approach was lamented by Mendes JA who observed that '… if there is an appeal and the decision of the majority is overturned, their Honours of the Caribbean Court of Justice are very likely to require the views of this court particularly on the question whether the enforcement of the award would be contrary to public policy'.[72]

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71. "These conditions are discussed by Professor Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence", British Yearbook of International Law (1957) Vol. 33 at pp. 188-194."

72. "At [[30]] of the Judgment in the court below."

[164] "We deeply regret that the Court of Appeal declined to make their views on these matters available to us. This Court places considerable weight on the opinions expressed in the Court of Appeal; opinions which are pre-eminent in providing vital juridical material to inform and shape the views of this final Court especially on such innate questions as arbitrability and public policy: *Boyce v. Attorney General and Minister of Public Utilities*.[73] The scheme of adjudication in the Constitution contemplates review by this Court of decisions of the Court of Appeal. But this Court does have explicitly in relation to any appeal, all the jurisdiction and powers possessed in relation to that case by the Court of Appeal.[74] The Court's overriding objective is 'to deal with cases fairly and expeditiously so as to ensure a just result'.[75] In every case the most important objective is for the Court to ensure a fair and just result. Subject to that requirement, the question which arises is whether the natural reluctance to decide the issues without the benefit of the views of the Court of Appeal should prevail over the judicial impulse to settle litigation with expedition and finality.
[165] "This question cannot be answered in the abstract but only by reference to the particular circumstances of the case at hand. In this case the arbitral award was made on 20 August 2009 and finalized on 29 August 2009, almost four years ago. Each subsequent cycle of litigation before the courts of Belize occasions additional substantial costs and expense. Under the terms of the award interest continues to accrue. The arguments on arbitrability and public policy were fully ventilated before the Supreme Court and in the judgment of the trial judge. That the Court of Appeal was aware of its responsibility to address the outstanding issues but chose not to do so argues against remitting the case: *Re James McDonald*.[76] Remitting the matter to the Court of Appeal could require a full rehearing before a new panel as Pollard JA is no longer a Judge of the Court of Appeal.
[166] "It is also significant that there are no relevant disputes of fact and that the issues to be decided do not derive from peculiar constitutional or legislative provisions in Belize. Whether an agreement that includes matters relating to the imposition and collection of taxes is properly submitted to international arbitration and whether enforcement of an award resulting from such arbitration would be contrary to public policy are quintessentially matters of judicial policy. Access to the views of the judges below remains important but the matters for decision are of broad significant public importance to the Caribbean polity as a

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73. "[2012] CCJ 1 (AJ) (R)."
74. "Sect. 11(6), Caribbean Court of Jurisdiction Act 2010."
75. "Rule 1.3 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules."
76. "(1975) 13 JLR 12 especially at p. 27 per Graham-Perkins, JA."

whole. In these circumstances this Court must pay some attention to its determinative role in the further development of Caribbean jurisprudence through the judicial process.[77]

[167] "For these reasons the Court decides that the balance was tilted in favour of deciding the outstanding issues in dispute rather than remitting them to the Court of Appeal."

IV. CONCLUSION

[168] "For the reasons so eloquently articulated in the judgment of our brother Saunders JCCJ the Court orders that enforcement of the arbitral award should be declined under Sect. 30(3) of the Arbitration Act."

V. COSTS

[169] "The award of costs in this case is complicated by a number of factors. The Respondent has prevailed on the central issue that enforcement of the Convention Award would be contrary to the public policy of Belize. However, the Respondent had sought to have this Court defer decision on the public policy issue and instead to remit the matter to the Court of Appeal. The Appellants succeeded on the primary ground of appeal arising from the decision of the Court of Appeal, namely, that the Arbitration Act of 1980 was constitutional and saved as existing law under the Independence Constitution. A further factor that complicates the issue was the non-participation by the Respondent in arbitration proceedings despite numerous invitations and opportunities to do so. It is not beyond the realm of possibility that had the Respondent mounted vigorous and comprehensive arguments before the arbitral tribunal as it did before us the tribunal might have been persuaded to decline to adjudicate upon the matter thereby saving considerable expense. It is also the case that this Court has and must encourage the greatest respect for international commercial under the Arbitration Ordinance and by extension as well the New York Convention. In the circumstances we consider that the most appropriate award would be for each party to bear its own costs."

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77. "Cf. *Eco Swiss China Time Ltd v. Benetton International NV* [2000] 5 CMLR 816, 832."

VI. DISPOSITION

[170] "The appeal is dismissed. There is no order as to costs."

BRAZIL

Accession: 7 June 2002
No reservations

27. Superior Tribunal de Justiça [Supreme Court of Justice], 24 November 2011, SEC No. 4.439-GB (2009/0188275-1)[1]

Parties:	Claimant: Western Bulk Carriers (nationality not indicated) Defendant: A.P. Oxidos Industria e Comercio Ltda (nationality not indicated)
Published in:	Diário da Justiça Eletrônico (DJe)19 December 2011
Articles:	IV(1); IV(1)(*a*); V; V(1)(*d*); V(1)(*e*) (all by implication)
Subject matters:	– certified copy of arbitral award – review of merits of award (no) – documents for requesting enforcement may be supplied later than "at time of application" – proof of finality of award
Topics:	[14] = ¶ 513; [15]-[16] = ¶ 502; [17]-[21] = ¶ 404; [22] = ¶ 405; [24] = ¶ 514

Summary

Enforcement of an LMMA award was granted. The award supplied with the application was deemed to be duly certified, because the signature of the arbitrator had been certified by the Brazilian consulate in London. The "authentication" required by Resolution no. 9/2005 of the Superior Court of Justice, which applies to the recognition and enforcement of foreign

1. The General Editor wishes to thank Rafael Vicente Soares, Machado, Meyer, Sendacz e Opice Advogados, São Paulo, for his invaluable assistance in translating this decision from the Portuguese original.

awards in Brazil, has the same meaning as the "legalization" of foreign acts in the Brazilian Manual of Legal and Consular Services: an act issued by the Brazilian consular authority that attests and gives full faith and credit to the formal regularity of the document made abroad. According to the Manual, legalization can be in the form of signature recognition (for signed documents) or authentication in the strict sense (for unsigned documents and documents carrying a printed signature or an embossed seal). As the LMMA award at issue was signed, the certification of the arbitrator's signature by the Brazilian Consulate in London was appropriate. Also, a copy of the award, certified by the arbitrator and notarized by a London notary public, was supplied in the course of the proceedings. The court noted that documents may be filed later than at the time of the application in recognition proceedings. The arbitrator's signed statement that the time limit to file an application for leave to appeal under English law had expired and that to his knowledge no application had been filed sufficed to prove finality of the award.

Western Bulk Carriers (WBC) and A.P. Oxidos Industria e Comercio Ltda (Oxidos) concluded a charterparty in respect of vessels for transporting iron ore from Brazil to China. The agreement was governed by English law. It contained a clause referring disputes to arbitration in London pursuant to the arbitration rules of the London Maritime Arbitrators Association (LMMA).

A dispute arose between the parties in respect of an alleged breach of the charterparty by Oxidos. WBC commenced LMMA arbitration. On 4 November 2008, a sole arbitrator rendered an award in favor of WBC, finding Oxidos liable for the indemnification of a certain sum. WBC sought enforcement of the award in Brazil.

The Superior Court of Justice, in an opinion by Justice Teori Albino Zavascki, granted enforcement of the LMMA award, finding that there were no grounds for refusal. The Court noted at the outset that Oxidos did not challenge either the validity of the arbitral proceeding, having been duly notified, or the arbitral authority which rendered the award: as contractually agreed, the arbitrator was an LMMA member.

Oxidos alleged a violation of national sovereignty and public policy because the captain of the ship, who represented the shipowner, WBC, did not abide by the rules of the Brazilian port authorities and did not follow international practices. The Court dismissed this argument, holding that there can be no review of the merits of the award in recognition proceedings; also, a decision that is contrary to the interest of a party does not constitute in itself an infringement of national sovereignty or public policy. [Now that you've pointed it out, this is one place where I think "on" might be more appropriate.]

Oxidos further argued that the copy of the foreign arbitral award supplied by WBC together with its application was inadequate, as it was incomplete and not authenticated by a Brazilian consular authority, and that this defect could not be

cured later in the recognition proceedings. The Superior Court rejected all contentions.

In respect of the incompleteness of the copy of the award, the Court noted that two copies of the LMMA award were supplied, of which one was complete.

In respect of the issue of authenticity, the Court referred to a decision it rendered in 2008, interpreting the provision in Art. 5(IV) of Resolution no. 9/2005 of the Superior Court of Justice (STJ Resolution), which applies to the recognition and enforcement of foreign awards in Brazil. According to Art. 5(IV) of the STJ Resolution, a foreign award whose recognition is sought in Brazil must be "authenticated (*autenticada*) by the Brazilian consulate and accompanied by a translation made by an official or sworn translator in Brazil". In a 2008 decision, the Superior Court held that this provision has the same meaning as the term "legalization" (*legalização*) in the Manual of Legal and Consular Services consolidating the Rules of Legal and Consular Services issued by the Ministry of Foreign Relations, which govern Brazilian consular activities. In both cases, the act meant is the act issued by the Brazilian consular authority that attests and gives full faith and credit to the formal regularity of the document made abroad.

In the Manual, there are two forms of "legalization" – signature recognition (*reconhecimento de assinatura*) and authentication (*autenticação*) in the strict sense – depending on the type of document to be legalized: (i) signed documents are legalized through recognition of the signature on the document; (ii) unsigned documents, or documents carrying a printed signature or an embossed seal are legalized by authentication stricto sensu.

Applying the reasoning in the 2008 decision to the present case, the Superior Court of Justice held that the copy of the arbitral award supplied by WBC, which was signed by the sole arbitrator, was duly certified through recognition of the arbitrator's signature by the Brazilian Consulate in London.

Moreover, WBC supplied during the recognition proceedings a new copy of the award, certified by the arbitrator and notarized by a London notary public. The Court noted expressly that the filing of documents in the course of the proceeding is admissible in recognition proceedings.

The Superior Court finally dismissed Oxidos's argument that there was no proof of finality of the award. The Court deemed sufficient the document supplied by WBC: a signed statement of the arbitrator that under English law an application for leave to appeal must be filed within twenty-eight days of the date of the award and that to his knowledge no request was made and therefore the award was final.

As none of the grounds raised by Oxidos succeeded, and recognition would not violate national sovereignty or public policy, the Superior Court granted enforcement.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345025-n>.

BRAZIL NO. 27

Excerpt

I. PROCEDURAL BACKGROUND

[1] "The case deals with the request for recognition [homologation – *homologação*] of a foreign arbitral award rendered by an arbitral tribunal in London/England, which granted the indemnification requested by Claimant [WBC] against Defendant [Oxidos] due to an alleged breach of a freight agreement for the chartering of vessels for the sea transportation of iron ore from the Port of Santos/Brazil to Nantong/China.
[2] "Defendant, which was duly served, presented a defense arguing that the award could not be recognized because:

(a) the conclusion reached by the arbitrator when finding against Defendant was reached 'on no documental, legal or technical grounds' given that it did not consider the argument that the captain of the chartered ship disobeyed 'the guidelines and rules of the Port Authority of Santos and the Brazilian Navy' as well as international rules of navigation and, therefore, violated public policy and national sovereignty;
(b) all the documents filed, rather than only the signatures of the English notary public, should have been – and were not – legalized directly by the Brazilian Consular Authority in order to be valid in Brazil;
(c) the certified signature in the award is different from the signature of Mr. Michael Baker-Harber, the arbitrator;
(d) the copy of the arbitral award in the file of the recognition action is incomplete and has neither been certified nor translated.

Furthermore, [Defendant] stresses that 'the document [in the file] concerning a declaration that the award has become final and binding … is not useful for its intended purpose, given that

(i) it is a mere copy of a fax of a statement declaring … that, as far as the arbitrator is aware, no appeal or recourse was filed against the award';
(ii) 'the arbitrator quoted several articles of the English Arbitration Act dealing with … the time period for filing a recourse and … his competence to certify that the award has become final and binding'; however, 'no copy of the foreign legislation was presented in order to allow the confirmation of the veracity of such allegations';

(iii) 'the signature on the … "declaration that the award has become final and binding" indicates that the person signing it is Mr. Michael Baker-Harber …; however, the document that certifies the signature, issued by a London notary public, states that the signature belongs to Mr. Russel St. John Gardner';
(iv) 'there is no proof in the record that Defendant was duly notified of the arbitral award'; this, in addition to the 'lack of certainty as to the signature', does not allow to be certain that the award is, indeed, final and binding.

[Defendant] alleges, finally, that the arbitral award does not contain the legal reasons on which it is based, and that certified copies of the English laws applied and their translation by a sworn professional should have been attached.
[3] "In its rejoinder, Claimant reiterates its request for full recognition of the award, clarifying that:

(a) the merits of the foreign award may not be discussed in recognition proceedings;
(b) the certification of the signature by the consular authority is sufficient to comply with the requirement of the legalization of the foreign document, pursuant to submitted case law (SEC [Contested Foreign Judgment – *Sentença Estrangeira Contestada*] 587/CH);
(c) 'the signature on the award belongs to the arbitrator Michael Baker-Harber and the signature of Mr. Russel St. John Gardner is the one placed on the certificate (stamp) of authenticity of the copies';
(d) there are two copies of the award, and the absence of one page in the first copy was cured by the complete duplicate of said award, comprising fourteen pages;
(e) the arbitral award is duly certified by the consulate by means of certification of the signature of the consular authority, and duly translated;
(f) the declaration supplied that the award has become final and binding is valid and was sent to Defendant;
(g) the proof of the foreign law by Claimant is unnecessary, because there is no such legal requirement.

[4] "[T]he Federal Attorney's Office requested that Claimant supply the following documents: (a) proof explaining the connection between Hill Dickinson LLP and M.J. Baker-Harber; (b) certified copy of the English laws applicable to the arbitral proceedings; (c) sworn translation of the contents of [a label].

[5] "In a statement … Claimant informed that 'Hill Dickinson LLP is the law firm which represented [Claimant] during the arbitration' and that, in respect of the certification made by said law firm, 'just as Brazilian Law allows the attorney to certify the authenticity of certain copies …, so does English Law, this procedure having been ratified by the consular authority of the Brazilian Consulate in England, by means of certification'. [Claimant] reiterates that there is no need to prove the foreign law and lastly supplies the following documents: (a) Internet page with the credentials of the arbitrator Michael Baker-Harber; (b) Arbitration Act 1996 … (Og Fernandes England), 1996 Chapter 23 (17th June 1996); (c) translation of the document requested by the Federal Attorney's Office.

[6] "The Defendant presented [a] statement reiterating the existence of the procedural defects indicated in its response and requesting the termination of the proceedings because the documentation presented with the initial request for recognition may not be complemented.

[7] "In its conclusive opinion, the Federal Attorney's Office opined for the granting of the request for recognition, provided that the requested documents be presented, because

> 'in order to comply with the requirements of [Superior Court of Justice Resolution no. 9/2005], it is indispensable that the arbitral authority – and not the party's attorney, as in the present case – attests that the said documents are true copies of [the documents] supplied in the case file of the arbitral procedure in which the award whose recognition is sought was rendered (with subsequent certification by the consular authority) or, alternatively, that the Brazilian consular seal must be placed on the very decision whose recognition is sought, not on the documents relating to the declarations given by the parties'.

[8] "Asked to express its opinion, Defendant once again requested the termination of the proceeding because it is not possible to complement the documents supplied.

[9] "Claimant presented new copies of the arbitral award, certified by the arbitrator, notarized by a London notary public and duly legalized by the Brazilian Embassy.

[10] "Defendant reiterated (a) that the recognition procedure does not allow for a delayed filing of documents and (b) the existence of the procedural defects pointed out in [its statement in] defense.

[11] "This is the report."

II. ANALYSIS

[12] "Recognition of a foreign arbitral award is allowed pursuant to Arts. 34 to 40 of Law 9.307/96 [Chapter VI. Recognition and Enforcement of Foreign Arbitral Awards] and Art. 4(1) of STJ Resolution no. 9/2005.[2]
[13] "In the present case, the contract concluded between the parties contains an arbitration clause (see copy and translation [in the file]: Clause 33, which provides as follows:

> 'Clause no. 33 – Arbitration:
> Any dispute or difference under this Charter Agreement shall be referred to two Arbitrators in London, one to be appointed by each party, and in case the two Arbitrators so appointed do not agree, then an arbitrator shall be appointed by them. If a party fails to nominate its own Arbitrator within seven days of the request of the other party to do so, then any dispute or difference shall be referred to the sole Arbitrator appointed by the other party. The Charter Agreement shall be subject to English Law. Any Arbitrator appointed under this contract shall be a commercial shipper.
> Arbitration in London pursuant to the latest LMMA rules. English law applies.'

[14] "Defendant did not challenge the validity of the arbitral proceeding, having been duly served to attend it and present its case, in compliance with the right to duly present one's case, as evidenced by the following documents.... Further, there was no dissent as to the chosen arbitral authority or its jurisdiction to decide the matter in dispute, since the arbitral award was duly signed by an arbitrator member of the 'London Maritime Arbitrators Association'. I quote in this respect the following [passage] from the Opinion of the Federal Attorney's Office:

> 'Art. 5(I) of Resolution no. 9/2005 deems indispensable for the recognition of a foreign award the proof that [the award] has been issued

2. Art. 4(1) of Resolution no. 9/2005 of the Superior Court of Justice, of 4 May 2005, reads:

> "The foreign judgment shall have no effect in Brazil without prior recognition [*homologação*] by the Superior Court of Justice or its President.
> 1. Non-judicial acts having the nature of a judgment for Brazilian law shall be recognized."

> by a competent authority. It appears that the award was rendered and signed by the arbitrator Michael Baker-Harber who, according to the documentation submitted … in the file, is an official arbitrator member of the "London Maritime Arbitrators Association".'

[15] "Defendant points out in its [statement in] defense that there was violation of national sovereignty and public policy because 'the captain of the ship, representing the shipowner, refused to abide by the loading plan of the port authorities which had been agreed/contracted, and also the rules of the Port Authority and the Brazilian Navy, as well as international practices'.

[16] "This is unfounded. A judgment that is simply contrary to the interests of a party does not constitute in itself an infringement of national sovereignty or public policy. Aside from that, it should be noted that the recognition of foreign awards entails only a formal analysis of procedural requirements; the review of issues regarding the merits of the award is prohibited. In this sense: SEC 3.932/EX, Special Court, Reporting Justice Felix Fischer, DJe [*Diário da Justiça Eletrônico*] of 11 April 2011; SEC 269/RU, Special Court, Reporting Justice Fernando Gonçalves, DJe of 10 June 2010; SEC 1.043/AR, Special Court, Reporting Justice Arnaldo Esteves Lima, DJe of 25 June 2009.

[17] "Defendant points to the inadequate formalization of the documents supplied, particularly the copy of the foreign arbitral award, which is allegedly incomplete and not legalized by the Brazilian consular authority.

[18] "In fact, two copies of the award were submitted, and [one] is complete.

[19] "As to the proof of authenticity, the precedent of this Court should be taken into account, to the effect that

> '"legalization" is the act representing the official authentication of documents made abroad; it is made either by an act of *recognition of the signature* or by *authentication* in the strict sense. In either case, the act itself represents the official certification by the Brazilian consular authority that gives full faith and credit to the formal authenticity of the document.' (SEC 587/CH, Special Court, Reporting Justice Teori Albino Zavascki, DJe of 3 March 2008).

[20] "Pursuant to the [above-mentioned] decision:

> '1. In the present case the fulfillment of the requirement of Art 5(IV) of STJ Resolution 9 of 4 May 2005 is disputed[;] according to [this article],

"[The following] are indispensable requirements for the homologation of a foreign decision:
(….)
IV that it is authenticated by the Brazilian consul and accompanied by a translation by an official translator or [a translator] sworn in Brazil."

The controversy must be solved in light of the Rules of Legal and Consular Services (RLCS) of the Ministry of Foreign Relations, which govern consular activities and to which the administrative authorities operating abroad are subject. These standards, contained in the Manual of Legal and Consular Services (MLCS), published on the website of the Ministry of Foreign Relations (<www.abe.mre.gov.br/informacoes-gerais/manual-do-servico-consular-e-juridico>) were approved by Service Instruction no. 2/2000, of 11 July 2000, issued by the Ministry of Foreign Relations, in exercise of the powers conferred on it by Art. 1, Paragraph II of Annex I to Decree no. 3414 of 14 April 2000, now replaced by Decree no. 5979 of 6 December 2006, in compliance with Decree no. 84788 of 16 June 1980, which delegated authority to the said Minister of State to approve and modify the regulations of the Brazilian consular activities. Chapter 1 of the MLCS consists of the following provisions:

"1.1.1 The legal and consular activities in the Secretariat of State and the Offices abroad are regulated by law and by the Rules of Legal and Consular Services.
1.1.2 The Rules of Services regulate, systematize, consolidate and standardize the activities relating to legal and consular affairs of the Ministry of Foreign Relations.
1.1.3 The Rules of Services will be binding and will be mandatorily observed by the organs of the Ministry of Foreign Relations in the carrying out of activities regulated by [the Rules].
1.1.4 The Rules of Services will be issued by the Director General of Legal, Consular and Assistance-to-Brazilians-Abroad Affairs, after approval by the Secretary-General of Foreign Relations and, at [the latter's] discretion, the Minister of State of Foreign Relations.
1.1.5 Where necessary for a better understanding, a Rule of Services may be accompanied by a sample, whose existence shall be indicated at [the Rule's] end."

Now, when dealing with Notarial and Civil Registry Acts (Chapter 4), the said Manual uses the term "legalization" to refer to the act in which the Brazilian consular authority gives full faith and credit to documents produced abroad. Such "legalization", in turn, can be accomplished through *signature recognition* (as in the present case) and *authentication*, depending on the type of document to be legalized. Here are the relevant provisions:

"4.1.12 Any document to be used in court, or for any legal purposes, must necessarily be legalized by the Consular Authority, without which it will not be of full faith and credit.
(....)
4.7.1 For a document originating from abroad to take effect in Brazil, legalization by the Brazilian Consular Authority of the original issued in its consular jurisdiction, either by signature recognition, or by authentication of the document itself, is required.
4.7.2 If the document is not written in Portuguese, a translation must be made in Brazil by a sworn public translator, after the legalization of the original document by the Brazilian Consular Authority, except in the case of a a naturalization certificate, as provided for in Chapter 5 of the MLCS.
4.7.3 The Consular Authority shall accept, for the recognition of signatures appearing thereon, only original documents issued in its jurisdiction. This recognition validates the document only as to the identity and capacity [*condição*] of the issuer.
4.7.4 The Consular Authority may authenticate documents from a different jurisdiction after prior authentication by the local embassy or by a local notary public."

In consular language, thus, "legalization" is the act representing the official authentication of documents made abroad; it is made either by an act of *recognition of the signature* or by *authentication* in the strict sense. In either case, the act itself represents the official certification by the Brazilian consular authority that gives full faith and credit to the formal authenticity of the document. No element that can support Defendant's contention that there is a certain hierarchy between the manners of legalization, in which authentication would prevail over signature recognition, can be deduced from these operative rules. On the contrary, item 4.7.1 of the transcribed rule clearly shows the equivalence of the effects of both acts. Actually, these are two forms of authentication, each suited to certain situations. The Rules of Services state:

"4.7.9 Signed documents shall be legalized in one of the following manners:
(1) If signed in the presence of the Consular Authority: 'I recognize to be true the signature, in this (or the attached) document of … pages, of … (name and function) at … (place) …. And, for the record, I had this signed and stamped with the seal of this Consulate. The legalization of the consular signature [is] unnecessary according to Art. 2 of Decree 84451 of 31 January 1980.'
(2) If signed outside the Consular Office and verified by similarity: 'I recognize to be true by similarity the signature, in this (or the attached) document of … pages, of … (name and function) at … (place) …. And, for the record, I had this signed and stamped with the seal of this Consulate. The legalization of the consular signature [is] unnecessary according to Art. 2 of Decree 84451 of 31 January 1980.'
4.7.5 The Consular Authority has the task of recognizing the signatures personally made or contained on the registries of the Consular Office:

(1) of foreign authorities that perform their functions in the consular jurisdiction;
(2) of notaries practicing in the consular jurisdiction, or any other competent authority, in accordance with local law, regardless of any quality certification by public authority;
(3) of authorities of international bodies to which Brazil is a party and which are functioning in the consular jurisdiction;
(4) of directors and secretaries of schools operating in the consular jurisdiction;
(5) of Brazilians; and
(6) of foreign holders of a valid RNE [National Registry of Foreigners] card."

Strict authentication, in turn, is a manner of "legalization" reserved to documents that are not signed or that contain a printed signature or an embossed seal:

"4.7.14 In respect of unsigned documents or [documents] containing a printed signature or embossed seals, etc., the Consular Authority may, after making sure of the veracity of the document, legalize it in the following manner: 'This document is authentic, issued by … (name of the local issuing entity) and valid in … (country). The legalization of the

consular signature [is] unnecessary according to Art. 2 of Decree 84451 of 31 January 1980.'"

In any case it is compulsory to insert the caveat that "the present legalization does not imply acceptance of the content of the document", except in the case of records of births, marriages and deaths, as follows:

"4.7.10 In the recognition of signatures and the authentication of foreign documents, except in cases of registration of birth, marriage and death, there should always be the following note: 'The present legalization does not imply acceptance of the content of the document.'"

(….)
The term "authenticated" [*autenticada*] contained in Art. 5(IV) of STJ Resolution No. 9 of 4 May 2005 should be interpreted in light of these legislative provisions. This authentication has the same meaning as "legalization" in the rule issued by the Ministry of Foreign Relations, to represent the act issued by the Brazilian consular authority that attests and gives full faith and credit to the formal regularity of the document made abroad.
2. Once the norm is so interpreted, it is impossible not to deem that the requirement of Art. 5(IV) of the Resolution is met. There is a document in the record which consists, in short, of a photocopy of the award dated May 1999, issued by the Regional Court of Unterlandquart; there is the stamp of the President of the Court and his original signature, as well as the certification of correspondence of the copy to the original through an "Official Legalization" by the "Notary Public of the Canton of Graubüden, lic.iur. Michael Fleischhauer". This document has been "legalized" (= authenticated) by the Consulate General of Brazil in Zurich by a consular act which reads as follows:

"Consulate General of Brazil in Zurich – Switzerland
Registration no. 4943/04
I hereby recognize to be true the signature of Dr. Konrad Schawaller of the State Chancellery of the Canton of Solothurn, Switzerland. And, for the record, I had this signed and stamped with the seal of this Consulate. *This legalization does not imply acceptance of the contents of the document.*
Zurich – ZH, 16 September 2004
Ricardo Alonso Bastos

Deputy Consul-General" (Emphasis in original …).

This, as we have seen, is the appropriate manner of authentication of the document, under the rules governing consular activity.'

[21] "In the present case, the copy of the arbitral award … is duly certified by the consular authority … as follows:

'Consulate General of Brazil in London – United Kingdom
I hereby recognize to be true by similarity the signature of Luis Neil Hyde-Vaamonde, notary public in London, UK. And, for the record, I had this signed and stamped with the seal of arms of this Consulate General. The legalization of the consular signature [is] unnecessary according to Art. 2 of Decree 84451 of 31 January 1980.

This legalization does not imply acceptance of the contents of the document.

([English original:] The legalization of this document does not imply acceptance or approval of its contents).
London, 12 February 2009
Carlos Alberto Lamback
Deputy Consul-General'

[22] "Further, Claimant supplied to the file a new copy of the award certified by the arbitrator and notarized by a London notary public. Thus, the document produced abroad meets the formal requirements provided by law. It must be noted that the filing of documents in the course of the proceeding is admissible in recognition proceedings (SEC 876/US, Reporting Justice Eliana Calmon, DJ 21 November 2005, p. 111).

[23] "As to the request of the Federal Attorney's Office for the presentation of 'supporting documentation explaining the connection between Hill Dickinson LLP and M.J. Baker-Harber, since all copies of the arbitral proceedings were certified by the firm Hill Dickinson' and 'the arbitral award was signed by Harber M.J.', Claimant has clarified that 'Hill Dickinson LLP is the law firm which represented [Claimant] during the arbitration' and that, with regard to the certification by this firm, 'just as Brazilian Law allows the attorney to certify the authenticity of certain copies … so does English Law, this procedure having been ratified by the consular authority of the Brazilian Consulate in England, by means of certification'.

[24] "As to finality, a document dated 17 December 2008 sent to Hill Dickinson LLP and Ince & Co was supplied, in which M.J. Baker-Harber signs the following text (sworn translation …):

> 'I refer to my award in this dispute, published on 4 November.
> Sect. 70 of the Arbitration Act 1996 provides that an application for leave to appeal in accordance with Sects. 67, 68 or 69 of the Act must be filed within 28 days of the date of the Award.
> To my knowledge, no request was made and therefore my award is final.'

As recorded in the opinion of the Federal Attorney's Office, this circumstance is duly established in the file.
[25] "Thus, it can be deemed that there is none of the situations listed in Arts. 37 and 38 of Law no. 9.307/96 that prevent recognition. Nor is it the case, likewise, that the award whose recognition is sought violates national sovereignty or public policy (Arts. 5 and 6 of STJ Resolution no. 9/2005).
[26] "Based on the foregoing, I grant the request for recognition. The losing party shall bear the legal fees which, in accordance with the parameters in Art. 20(3)-(4) of the Code of Civil Procedure, are assessed at BRL 10,000.00. No costs (STJ Resolution no. 9/2005, Art. 1). This is how I vote."

28. Superior Tribunal de Justiça [Superior Court of Justice], 21 March 2012, SEC No. 6.335 – EX (2011/0072243-3)[1]

Parties:	Claimant: Louis Dreyfus Commodities Brasil S.A. (Brazil) Defendant: Leandro Volter Laurindo De Castilhos (nationality not indicated)
Published in:	Diário da Justiça Eletrônico (DJe) 12 April 2012
Articles:	III; IV; V; V(1)(*a*); V(1)(*b*); V(2)(*a*); V(2)(*b*) (all by implication)
Subject matters:	– judicial review of arbitrators' findings as to existence/validity of arbitration clause – adhesion contract – review of merits of award (no) – due process and lack of letter rogatory – arbitrability of Brazilian Rural Product Note – recognition of award pending related court proceedings
Topics:	[2] + [4]-[5] = ¶ 301; [3] + [13]-[28] = ¶ 502; [6] = ¶ 401; [9]-[28] = ¶ 507 (adhesion contract); [29]-[35] = ¶ 509; [36]-[41] = ¶ 519; [39]-[41] = ¶ 524 (pending related court action)

Summary

The Court granted recognition of an award of the International Cotton Association. Claimant met the conditions for seeking recognition by attaching the translated arbitral award and a signed copy of the contract containing the arbitration clause to its application. Defendant's argument that the contract was an adhesion contract and as a consequence the arbitration

1. The General Editor wishes to thank Gustavo Santos Kulesza, associate at Barbosa, Müssnich & Aragão, São Paulo, Bachelor of Laws at the University of São Paulo, Master of Laws Candidate at the University of São Paulo, for his invaluable assistance in translating this decision from the Portuguese original.

clause therein was invalid under Brazilian law because it was neither contained in a separate document nor highlighted in bold face failed: the issue whether the contract was an adhesion contract concerned the merits and could not be reviewed because recognition may be refused only on the grounds listed in the Brazilian Law on Arbitration, which reflect the grounds in Art. V(1)-(2) of the 1958 New York Convention and do not include the merits of the arbitration. The existence and validity of the arbitration clause may be examined only when there is no contract, or the contract has not been signed or accepted. Here, the contract was signed by the parties and was apparently valid. Further, there was no violation of due process, because notification of the commencement of the arbitration needed to be by letter rogatory; communication by courier and email, proved in this case, sufficed The issuance of a domestic instrument of credit to claimant did not bring the dispute within the scope of the jurisdiction of the Brazilian courts, since the relationship did not fall under any of the categories in respect of which the courts have exclusive jurisdiction. It was irrelevant to recognition that an action commenced by defendant in respect of the same legal relationship was pending before a state court in Brazil.

On 7 July 2005, Louis Dreyfus Commodities Brasil S.A. (Dreyfus) and Mr. Leandro Volter Laurindo De Castilhos entered into a future sale and purchase agreement under which De Castilhos undertook to sell and Dreyfus to purchase 2,000 metric tons of raw cotton. The agreement contained a clause for arbitration of disputes at the International Cotton Association (ICA), of which both parties were members.

A dispute arose between the parties when De Castilhos allegedly did not comply with his obligation to deliver the goods under the agreement. Dreyfus commenced ICA arbitration proceedings. By an award of 10 March 2008, an ICA arbitral tribunal directed De Castilhos to pay Dreyfus US$ 993,017.56 and interest thereon. De Castilhos did not pay under the award, which caused his inclusion in the list kept by ICA of members that do not voluntarily comply with arbitral awards rendered in ICA proceedings. Dreyfus sought enforcement of the ICA award in Brazil.

The Superior Court of Justice, in an opinion by Justice Felix Fischer, granted enforcement. The Court noted at the outset that under Brazilian law foreign awards may be enforced in Brazil only after they have been recognized ("homologated") by the Superior Court of Justice. Also, the Court may refuse recognition only on the grounds listed in Arts. 38 and 39 of the Brazilian Law on Arbitration, Law no. 9.307/96, which reflect the grounds in Art. V(1)-(2) of the 1958 New York Convention. This entails that only "aspects of a formal nature" and the possible violation of public policy – not the merits of the arbitration – may be reviewed in recognition proceedings.

However, the recognition court must also ascertain compliance with the requirements for seeking recognition provided for in Resolution no. 9 of 4 May

2005 of the Superior Court of Justice (Resolution no. 9 of 2005), which also applies to the recognition of foreign awards. These requirements are that the foreign decision was rendered by a competent authority; that due process was guaranteed in the proceeding leading to the foreign decision; that the decision has become res judicata; that it is authenticated by a Brazilian consular authority and accompanied by a translation.

In the present case, Dreyfus met the conditions for seeking recognition, since it supplied the translated arbitral award and a signed copy of the contract containing the arbitration agreement together with its application.

The Superior Court then considered and dismissed all the objections raised by De Castilhos. De Castilhos first argued that the agreement between the parties was an adhesion contract: thus, pursuant to Brazilian law the arbitration clause at issue should have been contained in a separate document or highlighted in bold face. As it was neither, it was invalid.

The Court rejected this argument, reasoning that whether the agreement between the parties was an adhesion contract and thus required specific formalities was an issue for the arbitrator to decide. The court hearing a request for recognition may not review the merits of the award. Since the agreement was valid in principle and was accepted by the contracting parties, specific and intrinsic aspects related to its nature could not be discussed at the recognition stage. The Superior Court added that there are cases in which a review of the contents of the agreement underlying the award is allowed: the Court itself refused to grant recognition where there was no proof of the parties's manifest intent to waive court jurisdiction in favor of arbitration, because the contract was not signed; where there was no proof of an arbitration agreement; and where there was no acceptance of the arbitration clause by the defendant.

None of these situations, however, occurred here. The contract between the parties was signed and, as said, the nature of an adhesion contract could not be discussed in recognition proceedings.

The Superior Court also dismissed De Castilhos's objection that he was not validly informed of the commencement of the arbitration, holding that notification by letter rogatory is not necessary in respect of arbitration proceedings held abroad. As it appeared from the file of the case, De Castilho had been informed of the commencement of the arbitration by courier and email. The Court held that this notification was sufficient.

De Castilhos further argued that a Rural Product Note [*Cédula de Produto Rural* – CPR] issued in favor of Dreyfus as the buyer brought the relationship between the parties within the scope of Brazilian law, as CPRs are Brazilian instruments of credit, to be paid by delivery of goods in Brazil. The Court disagreed,

reasoning that the parties concluded an arbitration agreement in respect of this very relationship, and that this relationship did not fall under any of the categories in respect of which Brazilian courts have exclusive jurisdiction.

Equally unsuccessful was De Castilhos's contention that recognition should be refused because a lawsuit, commenced by De Castilhos, was pending before a Brazilian state court in respect of the legal relationship between the parties. The Court held that the pending action was irrelevant to the recognition in Brazil of an award having force of res judicata.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345026-n>.

Excerpt

[1] "[Dreyfus] requests the recognition [homologation – *homologação*] of a foreign arbitral award rendered by the 'Members of the International Cotton Association' (arbitration proceedings no. A01/2008/16), which directed [De Castilhos] to pay the total amount of US$ 993,017.56 and interest thereon at [a specified] rate, because of [De Castilhos's] breach of contract. Thus, the recognition of this arbitral decision of the International Cotton Association Limited is the subject matter of the present proceedings.

[2] "I stress initially that the Brazilian Law on Arbitration (Law no. 9.307/96) provides at Art. 35 that:

> 'In order to be recognized or enforced in Brazil, a foreign arbitral award is subject only to homologation by the Federal Supreme Court.'[2]

[3] "Arts. 38 and 39, in turn, determine the cases in which a foreign arbitral award shall not be recognized. This is the wording of these provisions:

> '*Art. 38*. The homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that:
> I - the parties to the agreement lacked capacity;
> II - the arbitration agreement was 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;
> III - it was not given proper notice of the appointment of the arbitrator or of the arbitral procedure, or there has been a violation of the principle of adversary proceedings rendering its full defense impossible;
> IV - the arbitral award has exceeded the terms of the arbitration agreement, and it is not possible to separate the portion exceeding the terms from what has been submitted to arbitration;
> V - the commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause;
> VI - the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made.

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2. *Note General Editor.* Since Constitutional Amendment No. 45 of 8 December 2004 and Superior Court of Justice Resolution No. 9 of 4 May 2005 the Superior Court of Justice is the correct court for homologation applications.

> *Art. 39*. The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court[3] ascertains that:
> I - in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration;
> II - the decision is offensive to national public policy.'

Hence, the judicial review of a foreign arbitral award *is limited to aspects of a formal nature, and the merits of the arbitration cannot be reviewed*; for this reason, an objection to a request for recognition shall be limited to the cases in the provisions reproduced above.

[4] "On the other hand, it must be ascertained that the request fulfills the requirements set forth in Resolution no. 9 of 4 May 2005 (Resolution no. 09/2005/STJ), more specifically the provisions in its Arts. 5 and 6, which read:

> '[The following] are indispensable requirements for the homologation of a foreign decision:
> I – that it was rendered by a competent authority;
> II – that the parties were summoned or that default was legally ascertained;
> III – that it has become res judicata;
> IV– that it is authenticated by the Brazilian consul and accompanied by a translation by an official translator or [a translator] sworn in Brazil.'
>
> *Art. 6*. A foreign decision and a letter rogatory that violate sovereignty or public policy shall not be recognized or given exequatur.'"

I. ANALYSIS

[5] "I now pass to the analysis of the case. I initially note that after Constitutional Amendment no. 45/2004, the competence to recognize foreign arbitral awards has been taken from the attributions of the Supreme Federal Court [STF] (in accordance with Art. 34 of Law no. 9.307, which was passed previously to the enactment of the Constitutional Amendment) and has been conferred upon this Superior Court of Justice (Federal Constitution, Art. 105(I)(*i*)).

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3. See fn. 2.

[6] "Having confirmed that this Court is competent to adjudicate the present request, I attest that Claimant has observed the procedure set forth in Art. 37 of the Law on Arbitration and submitted its initial petition together with the documents required by such provision (translated arbitral award [and] the executed version of the contract that contains the arbitration agreement).

[7] "Defendant objects to the request alleging, in sum, (i) invalidity of the arbitration clause in light of the adhesion nature of the agreement entered into with Claimant; (ii) violation of Art. 5 of Resolution no. 9/2005 and of Art. 6 of the Law on Arbitration; (iii) violation of national sovereignty; (iv) jurisdiction of the Brazilian courts to rule on any questions arising under the contract; (v) existence of a lawsuit pending before the state courts of Bahia, in which the legal relationship between the parties is under discussion.

[8] "I analyze first the allegations presented in the objection.

[9] "Defendant alleges that the arbitration clause is invalid because it violates the provision in Art. 4 Second Paragraph of the Law on Arbitration, which reads:

> '*Art. 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.
> (....)
> *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.'

[10] "In support of its allegation that there was a violation of the above-mentioned provision, Defendant argues that the sale and purchase agreement which it entered into with Claimant was an adhesion contract; hence, the arbitration clause therein is inoperative because there is no express agreement [to arbitrate] by means of an attached written document or in boldface type. It argues that this issue was already decided by this Superior Court in the judgments of SEC [Contested Foreign Judgment – *Sentença Estrangeira Contestada*] 967/GB, Reporting Justice José Delgado, DJ [*Diário da Justiça*] of 20 March 2006[4] and SEC 978/GB, Reporting Justice Hamilton Carvalhido, DJ of 5 March 2009.[5]

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4. Reported in Yearbook XXXVII (2012) pp. 169-170 (Brazil no. 15).
5. Reported in Yearbook XXXIV (2009) pp. 424-429 (Brazil no. 11).

[11] "I disagree with Defendant's reasoning. First, we must consider that the contract underlying the arbitral award whose recognition is sought was executed by both contracting parties and provided that

> 'this agreement is subject to the rules of ICA – International Cotton Association Ltd – in force at the date of this agreement. Those rules contain, among others, provisions related to the contract clauses and to the resolution of disputes by means of arbitration.'

[12] "Defendant alleges that *since this was an adhesion contract*, its signature should have been contained in an attached document or should have been in boldface type, or this clause should have been initialed specifically.

[13] "I stress that in proceedings for the homologation of a foreign award it is not possible to discuss the nature of the contractual instrument underlying the arbitral award whose enforcement is sought, since 'the judicial control over the homologation of a foreign arbitral award is limited to the requirements set forth in Arts. 38 and 39 of Law no. 9.307/96; the merits of the underlying substantive legal relationship which was the object of the award whose homologation is sought cannot be reviewed' (SEC 507/GB, Special Court, Reporting Justice Gilson Dipp, DJ of 13 November 2006).[6]

[14] "Thus, in principle, if the arbitration agreement was valid according to the law to which the parties have subjected it (Law no. 9.307/96, Art. 38(II)) and was accepted by the contracting parties when executing the contract, there is no room – within the proceeding for the homologation of the arbitral award resulting from such agreement – for questioning specific and intrinsic aspects related to the nature of the contract underlying the arbitral award whose homologation is sought.

[15] "This does not mean that a possible violation of Art. 4, Second Paragraph, of Law no. 9.307/96 falls without the scope of judicial review, especially in the case of a violation of public policy (Resolution no. 9/2005, Art. 6). The Superior Court of Justice itself has already refused to grant homologation requests similar to the one here, when it has found that there was a violation of the principle of party autonomy and public policy (SEC 978/GB, Special Court, Reporting Justice Hamilton Carvalhido; SEC 967/GB, Special Court, Reporting Justice José Delgado; SEC 885/US, Special Court, Reporting Justice Francisco Falcão; SEC 866/GB, Special Court, Reporting Justice Felix Fischer).[7]

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6. Reported in Yearbook XXXVII (2012) pp. 177-179 (Brazil no. 19).
7. Reported in Yearbook XXXIII (2008) pp. 371-380 (Brazil no. 4).

[16] "In SEC 978/GB, this Court found that *there was no proof of the manifest and autonomous declaration of will* to renounce court jurisdiction in favor of arbitration, because the contract was not signed. In that case, however, the arbitral award found that the parties were contractually bound despite the fact that there was no written document. One can read in the *voto* [decision] the following excerpt taken from the arbitral award:

> '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 were 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.'

[17] "In SEC 885/US, the request for homologation was denied because there was *no proof of the arbitration agreement*.
[18] "In SEC 967/GB, the request was denied because of the lack of acceptance of the arbitration clause. The Reporting Justice highlighted, on that occasion, that he had not ascertained 'in the documents presented by the claimant, the existence of an arbitration clause accepted by the defendant'. He also emphasized that, on that occasion, 'The arbitral tribunal denied this objection and held that it had jurisdiction, finding that according to English law "arbitral clauses in a contract have effect, *be they signed or not* by the parties".'
[19] "In those cases, there was a clear violation of the parties' autonomy to waive the jurisdiction of the state courts in favor of arbitration.
[20] "I was myself the Reporting Justice in a case (SEC 866/GB) in which the request for recognition of an arbitral award was denied because the contracts were negotiated orally between the parties. On that occasion, I emphasized that Brazilian law requires the arbitration clause to be agreed in writing in the contract, or in a separate document related to the contract. A non-written waiver of state court jurisdiction would not be acceptable, in light of the rule in the Law on Arbitration.
[21] "In the present case, however, none of the aforementioned situations aid Defendant, which seeks to set aside the arbitration agreement alleging that 'there are no attached documents or [parts] in bold-face type, signed or initialed especially for this clause'. The analysis of the documents submitted here reveals that contract no. INT-584/05, executed by the parties, provided for an arbitration clause ([see] pp. 145-146 of the translation, pp. 207-208 of the

original, in which one can see, among others, the contracting parties' initials at the end of the page, close to the clause 'Rules and Arbitration').

[22] "On the other hand, Defendant's allegation that the executed agreement was an adhesion contract and because of that the parties should have expressly agreed to the arbitration clause is also groundless. Even if one considered that such allegation could benefit one of the parties, it is not possible, in homologation proceedings, to examine the nature of the contract underlying the request that is sought to be recognized, in order to characterize it as an adhesion contract.

[23] "The Federal Supreme Court, when examining an issue identical to the present one, held that it was not possible to examine, in homologation proceedings, whether a contract was an adhesion contract for the purposes set forth in Art. 4, Second Paragraph, of Law no. 9.307/96.

[24] "Indeed, when adjudicating SEC 5.847, Justice Maurício Corrêa, Reporting Justice of that case, emphasized, in his opinion, that the characterization of an adhesion contract is an issue 'which concerns the merits and cannot be reviewed in homologation proceedings'. (Federal Supreme Court, Plenary Session, 5.847/GB, DJ of 17 December 1999).

[25] "In this regard, it is worth reaffirming that there is no room in homologation proceedings for discussing the substantive issues underlying the foreign award or even the merits of the dispute, because such matters exceed the scope of the homologation, exception being made for the analysis of aspects related to public policy, national sovereignty and due process of law.

[26] "The Federal Supreme Court, which was the competent court for the homologation of foreign judgments until the enactment of Constitutional Amendment no. 45/2004, has ruled on the scope of the review conducted in homologation proceedings. In this regard, I mention the following precedent:

> '*Foreign Judgment – Homologation – Limits of the Review – Requirements for Homologation – No Consular Certification That the Judgment Is Res Judicata – Losing Party to Pay Attorneys' Fees – Possibility – Request for Homologation Denied Due to Lack of a Requirement – Action Dismissed Without Decision on the Merits.*
> (....)
> The limited review system established by Brazilian law in relation to the homologation of foreign awards *does not allow the Federal Supreme Court, as the court of the forum, to examine the substantive issues or review the merits of the dispute underlying the foreign award, the only exception being the analysis of issues related to national sovereignty, public policy and good morals. The substantive law*

> *relationship underlying the foreign award whose homologation is sought is not in discussion in homologation proceedings*. [Emphasis in original]
> (….)'
> SEC 4738/EU, Plenary Session, Reporting Justice Celso de Mello, DJ of 7 April 1995).

[27] "The Superior Court of Justice's understanding of this issue is in line with the above-mentioned opinion (e.g., SEC 646/US, Special Court, Reporting Justice Luiz Fux, DJe (*Diário da Justiça Elêtronico*) of 11 December 2008; SEC 507/GB, Special Court, Reporting Justice Gilson Dipp, DJ of 5 February 2007).
[28] "Thus, the characterization of the contract underlying the arbitral award whose homologation is sought as an 'adhesion contract' must be made in the proper forum; such discussion is not allowed in homologation proceedings.
[29] "Having dealt with this question, I shall now examine the alleged violation of Art. 5(II) of Resolution no. 9/2005 and Art. 6 of Law no. 9.307/96. Defendant alleges in this respect that there was no unequivocal awareness [*ciência inequívoca*] of the commencement and subsequent acts of the arbitration. He concludes that the lack of a valid notification makes the arbitral proceedings underlying the present request invalid.
[30] "Art. 6 of Law no. 9.307/96 provides:

> '*Article 6*. If the parties fail to agree ahead of time on the form for instituting the arbitral proceedings, the interested party shall notify the other party, either by mail or through any other means of communication, with confirmation of receipt, of its intention to commence arbitral proceedings, fixing a date, time and place for the signature of the submission to arbitration.
> *Sole Paragraph:* If the notified party fails to appear, or if it refuses to sign the submission to arbitration, the other party may institute the action provided for in Article 7 of this Law, at the State Court originally competent to decide the case.'

In turn, Art. 5(II) of Resolution no. 9/2005 provides:

> Art. 5. [The following] are indispensable requirements for the homologation of a foreign decision:
> (….)
> II - that the parties were summoned or that default was legally ascertained[.]'

[31] "I do not see, in the present case, that there was the alleged disrespect of the legal rules mentioned by Defendant. As emphasized by the representative of the Office of the Public Prosecutor [*Ministério Público Federal*], the file contains copies of the notice of commencement of arbitration sent to Defendant's address. There was also a notice sent by electronic mail (email).
[32] "In this regard, I highlight the following excerpt from the said opinion [of the representative of the Office of the Public Prosecutor]:

> 'the defendant's argument that there was no service of process in the arbitral proceedings is without merit. The receipts supplied by the company responsible for the delivery – FEDEX – are sufficient to prove that the defendant was effectively served. The lack of the defendant's signature does not invalidate the delivery confirmation which, according to the evidence, was effectively delivered at the defendant's address. Besides, there is evidence that the notices were also carried out by email. Therefore, there is no invalid service of process or violation of due process [*direito de defesa*].'

[33] "In relation to this issue, it should be taken into consideration that the Superior Court of Justice has held that:

> 'Pursuant to Art. 39, Sole Paragraph, of the Law on Arbitration the allegation, in casu, that there must service of process by means of a letter rogatory or that there is no service of process is unfounded when it is proved that the commencement of the arbitral proceedings, as well as the subsequent acts carried out in those proceedings, were notified to the defendant through companies that provide courier services and also by electronic mail and fax (SEC 3.660/GB, Special Court, Reporting Justice Arnaldo Esteves Lima).'

[34] "In the above-mentioned judgment it was emphasized that:

> 'The Federal Supreme Court case law deemed necessary that the claimant prove that the defendant was served by means of a letter rogatory. After the enactment of Law 9.307/96 (Law on Arbitration), such issue received a different perspective, due to what is established in the Sole Paragraph of Art. 39:

> "The service of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including through mail with confirmation of receipt, shall not be considered as offensive to national public policy, provided the Brazilian party is granted sufficient time to exercise his right of defense."'

[35] "Thus, I deem that the issue of the notification of Defendant has been answered.

[36] "Defendant also alleges that the existence of a Rural Product Note [*Cédula de Produto Rural* – CPR] issued in favor of Claimant (buyer) and linked to the supply agreements entered into by Claimant, including the agreement under which the arbitral award whose homologation is sought was rendered, 'brings the entire legal relationship established between the parties within the scope of Brazilian law, also because [the CPR] is a national instrument of credit and has to be paid by delivery of goods in [Brazil]'. Thus, 'the inapplicability of the said arbitration provision [would remain] latent since, pursuant not only to the Introductory Law to the Civil Code but also to Art.88(II) of the Code of Civil Procedure, Brazilian jurisdiction cannot be derogated from when discussing a breach of the obligation to deliver cotton in [Brazil].'

[37] "This argument fails. When the parties entered into contract no. INT 584/05, a legal relationship was established, according to which the parties agreed to subject themselves to arbitration. The arbitral tribunal was asked to settle the dispute in respect of the breach of this legal relationship, in accordance with the parties' previous agreement.

[38] "In principle, nothing prevents a party from taking the matter to the Brazilian courts, since that is a right protected by the Constitution. In this case, however, a dispute in respect of the contract entered into by the parties, or even a dispute in respect of the arbitral award at issue, does not make the jurisdiction of the [Brazilian] courts exclusive, because this is a matter falling within the scope of a concurrent jurisdiction and there is none of the exclusive-jurisdiction cases provided for in Art. 89 CCP:

> 'Art. 89. The Brazilian Courts are exclusively competent, with the exclusion of any other, to:
> I - adjudicate any action related to real properties located in Brazil;
> II - rule on the inventory and apportionment of assets located in Brazil, even if the deceased person is a foreigner and had domiciled outside of the national territory.'

Thus, Defendant's argument based on the provision in Art. 88(II) CCP does not affect the arbitral tribunal's jurisdiction, previously agreed upon by the parties.
[39] "Finally, it must be emphasized that:

> 'The filing of a lawsuit, in Brazil, challenging the validity of an arbitration agreement on the ground that it is contained in an adhesion contract without being specifically highlighted, does not prevent the homologation of the foreign arbitral award which, in proceedings initiated in accordance with that arbitration agreement, deemed it to be valid' (SEC 854/GB, Special Court, Reporting Judge Nancy Andrighi, DJe of 14 April 2011).[8]

[40] "Therefore, Defendant's objection to the homologation of the present award based on action pending before the Brazilian courts 'challenging not only the contract underlying the present request for homologation, but the whole relationship between [the parties]' does not succeed.
[41] "Further, as correctly noticed by the Office of the Attorney-General [*Procuradoria-Geral*]:

> 'the fact that an action brought by the respondent is pending before the Brazilian courts is irrelevant:
>
> "the fact that a lawsuit is pending in Brazil in relation to the conflict of interests settled by a foreign judgment having force of res judicata does not constitute an impediment to the homologation of the latter (Federal Supreme Court, SEC 7.209/IT)";
> "Foreign judgment: the pendency before the Brazilian courts of a lawsuit between the same parties in relation to the same matter does not prevent [the foreign judgment's] homologation (Federal Supreme Court, SEC 2.727 AgR)."
>
> It should be emphasized that the injunction granted by the Third Lower Civil Court of Barreiras-Bahia does not make any specific reference to contract no. INT-584/05, underlying the present request for homologation, but only refers to contracts 2006-021, 2006-012 and 2007-94, which are unrelated to the contract which was the object of the award whose homologation is sought.'

8. Reported in Yearbook XXXVI (2011) pp. 587-589.

[42] "Hence, I vote in favor of the homologation of the present arbitral award, since all indispensable requirements for homologation of the request are met (Resolution no. 9/2005, Art. 5(I)-(IV)) and since the relief sought does not violate national sovereignty, public policy or good morals."

II. ATTORNEYS' FEES

[43] "In relation to the determination of attorneys' fees, I note that the proceeding for the homologation of a contested foreign award is limited to the analysis of formal requirements and does not concern the underlying legal relationship. Moreover, the determination of attorneys' fees based on the relief granted in the arbitral award would lead to a great prejudice for the defendant, since the request for homologation has no condemnatory nature [*natureza condenatória*].

[44] "On this issue, this Superior Court has already held that:

> 'VI – The homologation of a foreign award is limited to the analysis of its formal requirements. This means that the object of the proceedings for the homologation of a foreign award is not the same as the object of the proceedings that resulted in the foreign decision, since it does not have an economic content. An economic claim shall be pursued in the execution proceedings to be initiated after the foreign award has been homologated.
> VII – In the majority of cases involving the homologation of foreign judgments – more specifically those related to arbitral awards – the value attributed to the proceedings corresponds to the economic value of the arbitral award, which is usually high. Thus, when the homologation is contested, determining attorneys' fees as a percentage of the value of the matter in controversy may prove to be excessive.
> VIII – In the case of a contested foreign judgment, since there is no condemnation, the attorneys' fees shall be determined in accordance with Art. 20, Fourth Paragraph CCP, also taking into account the criteria set forth in [Art. 20, Third Paragraph]. Also, in accordance with this Court's understanding, the judge is not limited in this case to the percentage expressed in the said Third Paragraph.' (SEC 507-ED, Special Court, Reporting Justice Gilson Dipp, DJ 5 February 2007).

[45] "Hence, I order the defendant to pay the costs of the proceedings and attorneys' fees, which I determine in the total amount of BRL 5,000.00 pursuant to Art. 20, Third Paragraph under 'a', 'b' and 'c' and Fourth Paragraph CCP.…"

29. Superior Tribunal de Justiça [Superior Court of Justice], 18 April 2012, SEC No. 885 – US (2005/0034898-7) (f)

Parties:	Claimant: Kanematsu USA Inc. (US) Defendant: ATS – Advanced Telecommunications Systems do Brasil Ltda (Brazil)
Published in:	Diário da Justiça Eletrônico (DJe)13 August 2012
Articles:	IV; V(1)(*a*); V(2)(*a*); V(2)(*b*) (all by implication)
Subject matters:	– arbitration agreement "in writing" is condition for enforcement – submission agreement (*compromisso arbitral*) – judicial review of arbitrators' findings as to existence of arbitration agreement
Topics:	¶ 504; [1] = ¶ 401; [12] = ¶ 519; [31] = ¶ 522

Summary

Enforcement of an AAA award was denied because there was no proof that the parties had entered into an arbitration clause: the contract containing the clause was unsigned and claimant failed to prove the existence of a submission agreement, although the arbitral award did refer to such an agreement concluded by the parties. In a dissenting opinion, one of the Justices opined that although the sale and purchase contract was unsigned, the later contract entered into by the parties, which concerned payment and also contained an arbitration clause, was a valid submission agreement in respect of the dispute under the sale and purchase contract. It was irrelevant that the copy supplied by the claimant was signed only by the defendant, as this is the usual practice in business transactions.

NOTE GENERAL EDITOR: On 2 August 2010, the Superior Court rendered a decision in this case, which is reported in Yearbook XXXVI (2011) at pp. 258-259 (Brazil no. 13). As the judgment that led to this decision was not notified to the defendant, thereby violating its right to due process in that the defendant was not given full opportunity to present its case, the application had to be heard again by the Superior Court, leading to the present decision.

The majority opinion of the Court in this second decision of 18 April 2012 is identical to the opinion given in the 2 August 2010 decision; both were delivered by Justice Francisco Falcão. In the second proceedings, Justice Massami Uyeda, who had not participated in the first proceedings, rendered a dissenting opinion in favor of the recognition of the foreign award.

Kanematsu USA Inc. (Kanematsu) allegedly entered into a sale and purchase contract with ATS – Advanced Telecommunications Systems do Brasil Ltda (ATS) in respect of telecommunications equipment. The contract contained an arbitration clause. A dispute arose between the parties and was referred to arbitration at the American Arbitration Association (AAA). A sole arbitrator found that ATS was in breach of contract and rendered an award in favor of Kanematsu in the amount of US$ 1,348,939.05. Kanematsu sought enforcement of the AAA award in Brazil.

In its decision of 2 August 2010, the Superior Court of Justice, per Justice Francisco Falcão, denied recognition (homologation – *homologação*). The court adopted the reasoning of the Office of the Public Prosecutor for its decision and granted ATS's argument that the AAA arbitrator lacked jurisdiction as there was no valid arbitration agreement between the parties.

The court noted that under Law No. 9.307/96 of 23 September 1996, which applies to the recognition of foreign arbitral awards, arbitration proceedings must necessarily be founded on a freely given expression by the parties of their intent to submit to arbitration. Such manifestation of intent did not exist in the case at issue, since the contract between the parties, that contained the arbitration clause, was unsigned. Nor did Kanematsu prove its allegation that the parties entered into a submission agreement. It did not suffice that the arbitral award did refer to a submission agreement concluded by the parties on 31 March 1998.

Furthermore, ATS conditioned its acceptance to arbitrate the dispute in the submission agreement to the confirmation of the existence of the sale and purchase agreement by the sole arbitrator, which was not proved. The majority opinion concluded that the lack of unequivocal evidence of an arbitration agreement impeded recognition of the award.

This majority opinion – reported in Yearbook XXXVI (2011) at pp. 258-259 (Brazil no. 13) – is reproduced verbatim in the present decision, rendered on 18 April 2012.

In his dissenting opinion, delivered for the first time in the second proceedings leading to the present decision of 18 April 2012, Justice Massami Uyeda concluded that, on the contrary, recognition should be granted. The majority opinion disregarded the further agreement concluded by the parties, in which

ATS agreed that the dispute be settled by fixing the terms of payment as determined in the correspondence exchanged by the parties (the "payment contract"). The payment contract – reasoned Justice Uyeda – contained an arbitration clause and was therefore a valid submission agreement in respect of the dispute arising under the earlier sale and purchase contract. It was irrelevant that the copy of the payment contract supplied by Kanematsu before the Court was signed only by ATS: commercial contracts are not bound to strict formalities which would hinder the dynamism of business transactions. Usually, each party only signs the copy of the contract that will be held by the other party.

The dissenting opinion further noted that ATS was duly informed of the commencement of the arbitration and at any event, as confirmed by jurisprudence, voluntary appearance in the arbitration cures any possible defects in the notification.

Since all the necessary documents were supplied and recognition would not violate Brazilian public policy – in particular because an award may be unreasoned under the applicable AAA rules – Justice Uyeda concluded that recognition should be granted.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345027-n>.

BRAZIL NO. 29

Excerpt

(….)
[1] "[Claimant] has submitted the arbitral award whose homologation [*homologação*] is sought … together with the required consular stamp … and an official translation … and has supplied proof that the award is final…."

I. THE PARTIES' POSITIONS

[2] "In its statement of defense, Defendant argues, in brief: (a) that there is no contract signed by the parties and (b) that the award contains no reasons.
[3] "[Defendant] alleges in its defense that the American Arbitration Association (AAA) was not the competent body because it was not chosen by the parties. It does not deny that there was a negotiation – on the contrary, it supplies documents confirming it – but it maintains that there was no contract signed by the parties that submitted [the contract] to arbitration. It alleges that it stated in a timely manner its rejection of AAA arbitration, initially accepting mediation under reservation of the jurisdiction of the [arbitral tribunal] while requesting that the contract be remitted to the arbitral institution and to Claimant, and supplies documents showing its disagreement with the arbitration, the payment of the costs of the arbitration and the copy of minutes of the contract unsigned by the parties….
[4] "[Defendant] argues that the arbitral award is null and void and ineffective against ATS, because it violates the command of Law 9.307/96 (lack of arbitration clause and submission agreement [*compromisso arbitral*]) and also ignores the provision in Art. 217.I RISTF,[1] having been rendered by a judge or arbitrator lacking jurisdiction.

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1. Art. 217 of the Internal Rules of the Brazilian Federal Supreme Court [*Regimento Interno do Supremo Tribunal Federal* – RISTF] reads:

   "The following are requirements for the homologation [*homologação*] of a foreign judgment:
   Law no. 9.307/96: Art. 37 (requirements for the foreign arbitral award)
   I - that it was rendered by a judge having jurisdiction;
   II - that the parties were summoned or that default was legally ascertained;
   III - that it has become res judicata and that it meets the formal requirements for execution in the place of rendition;
   IV - that it is authenticated by the Brazilian consul and accompanied by an official translation."

[5] "[Defendant] alleges that the arbitral award completely lacks reasons, in violation of the provision of Art. 93.IX of the Federal Constitution.[2] It concludes for the inadmissibility of the request.
[6] "In its statement in reply, Claimant, in respect of the statement in defense [above], seeks to invalidate Defendant's arguments and supports its intention to obtain the homologation by reasons of fact and law.
[7] "[Claimant] maintains that it appears from the record that ATS 'voluntarily submitted to arbitration and filed statements in defense and evidence, and its right to due process was amply safeguarded'. It maintains that Defendant did not oppose arbitration and attaches [to this aim] letters sent by ATS.
[8] "[Claimant] even alleges that [ATS] confirmed the arbitration clause a posteriori in the arbitration proceeding by accepting that proceeding, so much so that it expressly asked the arbitrator '… that an award be rendered upholding the oral agreements, set down in writing by the highest authorities of both companies in Brazil, allowing the RIT equipment to be paid only if sold and upon receipt of the [sale] price'…. It adds that Art. 9 of Law 9.307/96[3] allows a judicial or extrajudicial submission agreement to be concluded, in the absence of an arbitration clause, even after a claim has been filed in state court. However, [Claimant] does not attach a submission agreement supporting the jurisdiction of the [arbitral] tribunal at issue.
[9] "[Claimant] says that the position of ATS, the defendant company, is contradictory because [ATS] at the same time alleges that there is no contract between the parties 'for lack of representation' and argues that this contract – though oral – existed between the signatories, whereby the representatives of the

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2. Art. 93(IX) of the Brazilian Federal Constitution reads:

> "A complementary Law, drafted at the initiative of the Federal Supreme Court, will set out the rules for the Judiciary, taking the following principles into account:
> ….
> IX - all judgments of the organs of the Judiciary shall be public, and all decisions shall be reasoned, under penalty of nullity.…"

3. Art. 9 of Brazilian Law No. 9.307 of 23 September 1996 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."

companies agreed on a manner of payment concerning the sale and purchase of the equipment.
[10] "[Claimant] explains that the parties exclusively discussed the clause relating to the date of payment in the arbitration, so that neither the existence of the contract nor of its terms was denied.
[11] "As to the lack of reasons, it relies on Rule 44 of the [AAA] Rules of Arbitration, as translated … and concludes reaffirming the validity and efficacy of the contract between the parties, which was never denied by defendant ATS, reaffirming that 'the dispute was restricted only to the recognition of the date on which ATS was to pay the credit of Claimant, thus complying with the principle of autonomy of the arbitration clause (Art. 8 Law 9.307/96)'."[4]
(….)

II. ANALYSIS

[12] "I adopt the thorough opinion of the [Office of the Public Prosecutor] as the basis for my decision:

(1) As remarked by the parties, Law 9.307/96 of 23 September 1996 governs the proceedings for the homologation of a foreign arbitral award.
(2) It is noted that the arbitration at issue concerned a patrimonial right of which the parties could freely dispose [*direito patrimonial disponível*], as is required by Brazilian law.
(3) In respect of the parties' arguments, it is worth noting that it is argued that the body that rendered the award at issue lacked authorization because it had not been agreed to by the buyer [ATS] and that as a consequence there has been a

4. Art. 8 Law No. 9.307/96 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."

violation of the principle of freedom of intent [*autonomia de vontade*], in violation of Art. 39.II Law 9.307/96[5] and Art. 217.I RISTF.
(4) The contract or 'minutes of a contract' submitted by Claimant, on which Claimant based its request for arbitration … is not signed by the parties; before the arbitral body – although there is record of the acceptance of a sole arbitrator, without any indication of or agreement on his name – Defendant timely objected that it was not bound to AAA arbitration under the contract.
(5) Art. 38 of [Law 9.307/96] and its paragraphs,[6] when setting out the grounds on which a foreign award can be denied [homologation], deliberately link these grounds to the arbitration clause or submission agreement.
(6) Since the arbitration agreement, which aims at settling disputes both between nationals and in respect of international contracts, is the basis for arbitration, it is necessarily founded on the freedom of intent of the parties, whereby the

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5. Art. 39 Law No. 9.307 reads:

> "The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court ascertains that:
> I - in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration;
> II - the decision is offensive to national public policy.
> *Sole Paragraph:* The service of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including through mail with confirmation of receipt, shall not be considered as offensive to national public policy, provided the Brazilian party is granted sufficient time to exercise his right of defence."

6. Art. 38 Law No. 9.307 reads:

> "The homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that:
> I - the parties to the agreement lacked capacity;
> II - the arbitration agreement was 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;
> III - it was not given proper notice of the appointment of the arbitrator or of the arbitral procedure, or there has been a violation of the principle of adversary proceedings rendering its full defense impossible;
> IV - the arbitral award has exceeded the terms of the arbitration agreement, and it is not possible to separate the portion exceeding the terms from what has been submitted to arbitration;
> V - the commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause;
> VI - the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made."

parties freely agree to submit existing or future disputes to an arbitrator, outside the state courts.…

(7) It certainly does not appear from the examination of the documentation supplied in this proceeding that there is proof of the existence of an arbitration clause, since there is no document that proves that the defendant agreed to [arbitration], lacking which it cannot be assumed that the tribunal that rendered the decision had jurisdiction (Art. 37.II[7] and Art. 39.II of Law no. 9.307 and Art. 217.I RISTF).

(8) The further documents supplied in the proceedings by Claimant concern the submission agreement whereby ATS allegedly agreed that the dispute be settled by fixing the terms of payment as determined in the correspondence exchanged by the parties. They include Claimant's request for arbitration, or more precisely its arguments before the arbitral tribunal, where it stated: 'The contracts as concluded by ATS are to be found in the following six pages and include the contract of payment and the relevant confirmation of sale.' …. Thus, [Claimant] both relies on the contract, which was not concluded by the parties, and alleges that there was a submission agreement, but fails to prove its allegation.

(9) It must be noted, however, that the arbitral award declares, in the translation …: 'I, the undersigned arbitrator, having been appointed in conformity with the Submission Agreement concluded between the above-mentioned parties on 31 March 1998.…'

(10) Claimant chose not to prove the contents of [a certain] judicial decision in its statements in the proceedings, deeming this inquiry unnecessary and irrelevant because neither the existence of the contract nor of its terms was denied, as in the arbitration the parties only discussed the clause concerning the date of payment. This is possible under Art. 9 of the Law on Arbitration. However, this [clause] is not in the files.

(11) [Claimant] alleges that the submission to arbitration was voluntary and confirmed the submission agreement, so that the principle of due process [*ampla defesa*] and adversarial proceedings was respected.

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7. Art. 37 Law No. 9.307 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 Article 282 of the Code of Civil Procedure, and must be accompanied by:
> I - the original arbitral award or a duly certified copy, authenticated by a Brazilian Consulate, as well as a sworn translation;
> II - the original or a duly certified copy of the arbitration agreement, as well as a sworn translation."

(12) We certainly do not wish to discuss the merits, which are to be heard in arbitration. However, the fact that this contract is not signed by the parties is undeniable proof that submission to arbitration was not compulsory, just as Defendant sought to prove in its statements in the proceedings.
(13) Indeed, the summary issued by the plenary session of this Court (Supremo Tribunal Federal) in respect of decision SE 6.753 (DJ 22-10-02) thus stated:

> 'Foreign Award. Arbitration Agreement. Non-existence. Jurisdiction Not Proved. Homologation. Impossibility.
> 1. The request for homologation of a foreign arbitral award must be accompanied by an arbitration agreement, without which the jurisdiction of the tribunal that rendered the decision cannot be assessed (Art. 37.II and Art. 39.II Law 9.307; Art. 217.I RISTF).
> 2. Sale and purchase contract not signed by the buyer and whose terms do not lead to the conclusion that an arbitration clause was agreed on, in the absence of any other document in writing to this purpose. Lack of proof of a manifest autonomous declaration of intent of the defendant to waive court jurisdiction in favor of private jurisdiction.
> 3. The jurisdiction of the tribunal that rendered the foreign award not having been proved, [the award's] homologation by the Federal Supreme Court is inappropriate.
> Request denied.'

(14) Because it applies completely, I ask permission to transcribe excerpts of the decision of the reporting judge Maurício Correa:

> '6. The core issue is whether the parties did in fact choose the Liverpool Cotton Association as their arbitration body, thereby granting it jurisdiction to render the award whose homologation is sought. As expressly required by Art. 37 of Law 9.307/96, the request for homologation must be necessarily accompanied by the foreign arbitral award and the arbitration agreement.
> 7. On the other hand, Art. 38 of said Law provides for the grounds on which the foreign award may be denied homologation by the Federal Supreme Court. All its paragraphs imply the existence of an arbitration agreement or, in other words, that the parties need to conclude an arbitration clause or that there is a submission agreement, without which the validity of the arbitral award may not even be contemplated.

8. The arbitration agreement is the basic source of … arbitration, a [means] which aims at the private resolution of disputes and is principally founded on the freedom of intent of the parties, who freely choose to submit the disputes that exist or may arise in respect of their relationship to an arbitrator, renouncing ordinary court jurisdiction.
9. This possibility, which applies to disputes concerning interests of which the parties can freely dispose [*interesses disponíveis*], means in practice an exclusion of the jurisdiction of state courts. Hence, because of its exceptionality and importance it must express the explicit and manifest intention of the contracting parties, in the form established by Arts. 4, 5 and 6 of the Law on Arbitration.
(….)
15. Arbitral jurisdiction may be presumed, but there are no elements at least to ascertain its terms. This presumption would follow from the agreement allegedly signed by the seller before the Liverpool Cotton Association, which submitted the parties to the rules and statutes of that institution, including [the rule] choosing it as the arbitrator. The record, however, does not include the alleged rules, so that it may be possible to confirm the existence of an agreement or ascertain its scope. In this perspective, even if it were possible to go beyond the *ascertained lack of signature in the contract*, it may not be said, based only on the clause, that arbitration was agreed.
(….)
19. In fact, there is no proof in the files that the buyer was aware of the existence of the arbitration clause, either by an exchange of correspondence or by any other document making it explicit.
20. Now, if the defendant did not agree to any arbitration clause, giving it its adhesion in a formal and complete manner, [such clause] cannot be held to have been concluded by one of the parties only, particularly because of the consequences resulting from it, especially the waiver of the natural jurisdiction of the State.
21. Although a strict solemn form is not required for an arbitration clause, at least according to [Brazilian] law, it is essential that the agreement, further than being in writing, arise from a meeting of intents. It is true that it is accepted that it may be concluded through an exchange of correspondence, telegrams, telefaxes or any other means by which, as stated by Carreira Alvim, "the proposal by one party and the acceptance by the other is proved".

22. By the way, in deciding on SEC [Contested Foreign Judgment – *Sentença Estrangeira Contestada*] 5.847, for which I wrote the opinion (*Diário da Justiça* (DJ) of 17 December 1999), I made clear when examining the constitutionality of Arts. 6 and 7 of Law 9.307/96 that an explicit arbitration clause concluded by the parties is essential to determine the scope of the waiver of the ordinary jurisdiction of state courts in relation to the contract. As well pointed out by Joel Dias Figueira Júnior, "arbitration shall always depend on the complete proof of the pre-existence of an arbitration clause concluded by the contracting parties".
23. It would be very reckless to contemplate a finding of jurisdiction on the mere basis of presumptions or the simple confirmation of the award in England, because the conditions for arbitration were not complied with.
(....)
27. On the other hand, the relevant Brazilian law requires a clear statement in writing by the parties as to the choice for arbitration (Arts. 3, 4 and 5, Law 9.307/97), so that in contracts of adhesion the arbitration clause must be separate and separately signed, and in agreements by reference the parties must refer explicitly to that choice. As a consequence, because of its exceptionality an arbitration agreement may not be concluded tacitly, implicitly and by reference as claimed.
28. In fact, once it received the arbitral award, the defendant filed a recourse against it, appointing an arbitrator to represent it. This fact does not mean that the alleged arbitration clause was tacitly accepted, as argued by the claimant, or even that a submission agreement was concluded, since the defendant preliminarily relied, in its grounds for appeal, on the lack of jurisdiction of the arbitral body that decided the claim.
29. Thus, we find that the defendant never accepted, not even tacitly, the jurisdiction of the arbitral tribunal to settle the dispute arising under the commercial contract in which it was the buyer. However, in any event, after relying on the lack of jurisdiction of the LCA [the defendant] dealt with the merits of the dispute, which contradicts its alleged confirmation of the arbitration agreement.
(....)
33. As to the further allegations of the defense, I note that the defendant had the opportunity to re-discuss the subject matter at issue in its entirety in the appeal, since the examination of the subject matter, in fact and in law, was entrusted [to the Appeal Committee], as it appears from reading the award of the Committee, which partially granted the appeal … saying nothing over estoppel. Although it is established that due process and

adversarial proceedings were safeguarded, the prejudicial issue of the lack of jurisdiction of the proceedings that led to the decision whose homologation is sought may not be set aside. It is therefore unnecessary to examine whether the notifications initially addressed by the LCA to the buyer were duly made.'"

III. DECISION

[13] "As we have seen, the lack of unequivocal evidence that an arbitration clause was concluded has a decisive impact on the jurisdiction of the AAA to settle the dispute between the parties.
[14] "Thus, since it is not proved that the foreign arbitration could settle the dispute, I reject the request for homologation. This is my decision."

Dissenting Opinion, Justice Massami Uyeda

I. BACKGROUND

[15] "[B]efore issuing this dissenting opinion, I must necessarily summarize the case under examination and the related legal facts.
[16] "The case concerns a Contested Foreign Judgment [*Sentença Estrangeira Contestada*] filed by [Kanematsu] seeking the recognition of a foreign arbitral award rendered by the AAA with the argument that at the end of the proceedings Defendant [ATS] was directed to pay US$ 1,348,939.05, legal costs, arbitrator's fees and administrative costs.
[17] "After being summoned, ATS filed an objection in which it argues that the arbitration in which the award whose recognition is sought was rendered lacked jurisdiction, because there is no arbitration clause or submission agreement [*compromisso arbitral*], besides a lack of reasons for the award rendered against it by the [AAA]; for these reasons, the arbitral award cannot be recognized.
[18] "In its reply, [Kanematsu] argued that Defendant's appearance before the AAA confirmed that an arbitration agreement was stipulated and that a contract existed; the dispensation from giving reasons is provided for in the Commercial Arbitration Rules of the AAA.
[19] "The Office of the Attorney General opined in favor of denying recognition.

[20] "[T]he Reporting Justice Francisco Falcão denied recognition and ordered Claimant to pay legal costs, assessed at BRL 3,000.00 because the arbitration lacked jurisdiction; Justices Nancy Andrighi, Laurita Vaz, João Octávio de Noronha, Teori Zavascki, Castro Meira and Arnaldo Esteves agreed…."

II. ANALYSIS

[21] "According to Art. 5 of Resolution no. 9 of 4 May 2005 of the Superior Court of Justice, indispensable requirements for the recognition of a foreign decision are:

> 'I – that it was rendered by a competent authority;
> II – that the parties were summoned or that default was legally ascertained;
> III – that it has become res judicata;
> IV– that it is authenticated by the Brazilian consul and accompanied by a translation by an official translator or [a translator] sworn in Brazil.'

[22] "With the utmost apologies to the Reporting Justice Francisco Falcão and to the Justices who agreed with him, I dare to differ from their Excellencies' opinion, since the conditions necessary for the recognition of the foreign arbitral award are present.

[23] "First, the AAA has jurisdiction to settle the disputes that may arise between Kanematsu, the present Claimant, and ATS, the present Defendant.

[24] "By examining the file, it appears that a 'payment contract' concluded between the parties was submitted to the file; [this contract] contains an arbitration clause, is signed in the field reserved to ATS, and all pages are initialed. The fact that the signature of Kanematsu does not appear on the document does not exempt ATS from complying with what has been agreed, including in respect of arbitration. As is well known, commercial contracts do without formalities, unless [otherwise] provided by law, because [formalities] are incompatible with the dynamism of business activities. It is uncommon, to my knowledge, that at the moment of conclusion the party signs its [copy of] the contract; as a rule, the contracting party signs the minutes that will be kept by the other contracting party and vice-versa; in the end, what each party is interested in is the obligation undertaken by the other.

[25] "In the present case, therefore, the signature of ATS on the minutes [of the contract] binds it to their terms. This assertions is corroborated by the reply of Defendant to the AAA, relating to the Request for Arbitration filed by Claimant,

in which [it says] in respect of the arbitrator that 'ATS agrees to continue the case with one arbitrator only' and, in respect of mediation, that 'ATS agrees with these proceedings and will await the next steps in order to help reach a consent'.
[26] "This was one of the bases on which the arbitrator found that the AAA had jurisdiction; verbatim (in translation):

> 'I, the undersigned arbitrator, having been appointed in conformity with the Submission Agreement concluded between the abovementioned parties on 31 March 1998, and with [the parties'] express consent to submit this case to a sole arbitrator, as evidenced by letter dated 16 March 2000 sent by ATS (henceforth, the defendant) to the American Arbitration Association, duly certified....'

[27] "Thus, daring to differ from the Reporting Judge, the AAA has jurisdiction to settle the disputes which happen to arise between the parties.
[28] "Having settled the issue of arbitral jurisdiction, I now examine the further requirements for recognition of the foreign arbitral award. It appears from the file ... that Defendant was informed of the proceeding commenced at the AAA. This said, we cannot forget the opinion of this Special Court that the voluntary appearance of the party in the arbitration cures possible irregularities in the notification (see appeal in Claim [*Agravo Regimental na Reclamação*] 5.198/RJ, Reporting Justice Castro Meira, DJe [*Diário da Justiça Eletrônico*] of 14 October 2011; SEC 4.464/FR, Reporting Justice Francisco Falcão, DJe of 28 February 2011 and SEC 4.746/US, Reporting Justice João Otávio de Noronha, DJe of 23 August 2010). In the present case, ATS was sent the request for arbitration, acknowledged its receipt and filed a reply. There is even a declaration of the Deputy Vice-President of the International Centre for Dispute Resolution of the American Arbitration Association that 'no notice or indication of appeal was received in respect of the Award mentioned above'.
[29] "Further, all the supporting documents attached to the initial application are authenticated by the Brazilian consul in New York and accompanied by a translation by an official translator or [translator] sworn in Brazil. Even the documents indicated under I and II of Art. 37 of the Law on Arbitration are supplied (with a translation).
[30] "Likewise, I cannot see that there are any of the obstacles listed at Art. 38 of that Law; the foreign arbitral award concerns patrimonial rights of which the parties can freely dispose.
[31] "It is appropriate to note that contrary to Defendant's argument in its objection, the lack of reasons in the arbitral award is due to the fact that the

procedure adopted by the AAA allows the award to be rendered without reasons, unless a party requires otherwise – as stressed by the arbitrator in his award and in the Commercial Arbitration Rules of the AAA.

[32] "In short, since the necessary conditions are met, the foreign arbitral award must be granted recognition…."

30. Superior Tribunal de Justiça [Superior Court of Justice], 15 August 2012, SEC No. 4.837 - EX (2010/0089053-1)[1]

Parties:	Claimant: YPFB Andina S/A (nationality not indicated) Defendant: UNIVEN Petroquímica Ltda (nationality not indicated)
Published in:	Diário da Justiça Eletrônico (DJe) 29 August 2012
Articles:	III; IV; V; V(1)(*e*) (all by implication)
Subject matters:	– review of merits of award (no) – estoppel from raising partiality of arbitrator defense not raised before arbitral institution – enforcement of award pending setting aside in country of origin – documents for requesting enforcement supplied (in general)
Topics:	¶ 303 + ¶ 502 + ¶ 516; [3] = ¶ 401

Summary

The Court granted recognition of an ICC award rendered in Uruguay. Claimant complied with the requirements for seeking recognition by supplying the duly authenticated award and the contract containing the arbitration clause, together with translations, and the ICC Rules. The objection that two arbitrators were not independent should have been raised by filing a challenge with the ICC Secretariat; the objection that the arbitrators incorrectly found that the claimant could rely on the force majeure clause in the contract to avoid performance related to the merits and could not be reviewed at the recognition phase. The award was final and binding: the defendant filed an annulment action against the award in the Uruguayan courts but failed to show that those courts decided on the matter.

1. The General Editor wishes to thanks Rafael Bittencourt Silva, Mattos Filho, Advogados, São Paulo, for his invaluable assistance in translating this decision from the Portuguese original.

On 26 July 2003, YPFB Andina S/A (Andina) and UNIVEN Petroquímica Ltda (UNIVEN) entered into a sale and purchase agreement under which Andina agreed to supply natural condensed gas to UNIVEN for a period of three years.

At the end of 2004, Andina suspended performance under the agreement, claiming that a regulation issued by the Bolivian government, which sought to secure gas distribution for Bolivian refineries, entitled Andina to invoke the force majeure clause in the agreement. On 4 August 2005, UNIVEN commenced International Chamber of Commerce (ICC) arbitration in Uruguay. On 12 September 2007, an ICC tribunal rendered a final award and an addendum rejecting UNIVEN's claims: the arbitrators held that Andina validly relied on the force majeure clause to suspend performance and was therefore not liable for the ensuing damages, as specifically provided for in the sale and purchase agreement. UNIVEN filed an annulment action in the Uruguayan courts, which was pending at the time of the present decision. Andina sought recognition of the award in Brazil.

The Superior Court of Justice, in an opinion by Justice Francisco Falcão, granted recognition (*homologation – homologaçaõ*) of the ICC award.

Andina complied with the requirements for seeking recognition, by supplying the final award and the addendum, together with translations; all documents were duly authenticated by the Brazilian consular authority in Montevideo. Andina also supplied the Sale and Purchase Agreement containing the arbitration clause, together with a translation, and the ICC Rules on Arbitration (the Rules).

UNIVEN argued that recognition should be refused because two of the arbitrators – one of whom was the arbitrator appointed by UNIVEN – failed to disclose certain facts allegedly proving that they were not independent from Andina. Also, there was no force majeure event, rather Andina used its political power to cause the Bolivian government to make a policy decision that allowed Andina to breach its contractual duties, while in fact its motivation was the soaring prices of oil barrels in the international market. This, Andina argued, constituted a violation of public policy.

The Superior Court – adopting the reasoning of the Federal Attorney's Office – dismissed this contention. It first noted that under the ICC Rules challenges to the arbitrators must be made by written statement to the Secretariat, specifying the facts and circumstances on which the challenge is based. In the present case, the parties were notified of the appointment of arbitrators and did not make any objection to such appointments.

As to the argument that there was no real force majeure event, this issue had been examined and adjudged by the arbitral tribunal, which reached the opposite

conclusion. Reviewing the arbitrators' decision would mean reviewing the merits of the award, which is not allowed in recognition proceedings.

The Superior Court last rejected UNIVEN's claim that the award was unenforceable because of the pending annulment action in Uruguay. The Court held that the award was final – as evidenced by the submission of a final award – and binding upon rendition pursuant to the applicable ICC Rules; UNIVEN failed to show that the Uruguayan courts had decided on its request for annulment.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345028-n>.

BRAZIL NO. 30

Excerpt

I. BACKGROUND

[1] "[Andina] requests recognition [homologation – *homologaçaõ*] of a foreign arbitral award rendered in Uruguay by the Court of Arbitration of the International Chamber of Commerce (ICC) on 12 September 2007; [UNIVEN] is the Defendant in the present proceedings.
[2] "The award stems from a sale and purchase agreement entered into by the parties on 26 July 2003, under which Andina agreed to supply natural condensed gas to UNIVEN for a period of three years, on a daily basis of 2,300 barrels, each barrel costing at least US$ 15 and at most US$ 30. A guarantee for the contract's performance was posted by the buyer in the amount of US$ 1,155,750.00.
[3] "Mr. Edson Oliveira de Almeida, Vice-Attorney General for the Republic, further reported:

> 'Andina requests the recognition of an arbitral award against UNIVEN regarding a sale and purchase agreement for natural condensed gas, signed by both parties on 26 July 2003. The Claimant states that on 4 August 2005, UNIVEN ([henceforth, Defendant]) initiated arbitration proceedings against Andina. The Claimant also states that all requirements for the recognition of this arbitral award are duly fulfilled.
>
> The case records contain the arbitral award, consisting of a main award and an addendum ([with translations]), all of which are duly authenticated by the Brazilian consular authority in Montevideo. They also contain the Sale and Purchase Agreement ([with translation]) and the International Chamber of Commerce Rules of Arbitration.
>
> The Defendant was summoned and argued that the arbitral award is not to be recognized because it was "drafted by arbitrators whose impartiality was compromised", as two of the arbitrators did not disclose certain facts which prove they were not independent from the Claimant, thus making the arbitral award null and void. The Defendant also alleges that upon performance of the contract, near the end of 2004, the Claimant notified the Defendant that supply of the product would be suspended in light of a Bolivian government's regulation, which sought to secure distribution for [Bolivian] refineries. The Defendant submits that the Claimant considered this situation to be a "force majeure" event that would exempt it from its obligation to supply, when, in fact, according to UNIVEN, the Claimant used its political power to find a way to breach its contractual duties,

because of the soaring prices of oil barrels in the international market. In this sense, UNIVEN highlights that there were offenses to public policy, since a Bolivian Government policy decision resulted in a breach of contract by the Claimant. The Defendant also argues that setting-aside proceedings against the arbitral award are pending before the Uruguayan judiciary and that the "*Tribunal de Apelaciones en lo Civil de 1er Turno*" is yet to rule on the matter.

In its reply, Andina states in regard to the allegation of arbitrator partiality that at no time during the arbitration proceedings questions as to bias or arbitrator partiality were raised. Moreover, the Claimant argues that it is not within the Superior Court of Justice's competence to hear any dispute over the impartiality or independence of the arbitrators who issued the award. In regard to the Bolivian government policy, the Claimant states that this was the exact object of the dispute brought to arbitral tribunal by the Defendant. Therefore, the analysis of the "force majeure" clause by the Superior Court of Justice would entail a review on the merits by this Court. Regarding the alleged offense to public policy, the Claimant emphasizes that "recognizing the force majeure event that prevented the performance of the agreement does not hold any relation to a violation of national public policy".'

[4] "The Federal Attorney's Office's representative stated that the request for recognition ought to be granted.
[5] "The Defendant supplies several copies of documents, such as the certified translation of the brief for appeal in the setting aside proceedings it has filed before the '*Tribunal de Apelaciones en lo Civil de 1er Turno*' in Montevideo, Uruguay (at pp. 487/570).
[6] "This is the report."

II. ANALYSIS

[7] "I hold that the request for recognition must be granted.
[8] "The Federal Attorney's Office's representative addressed the matter well, and I adopt that reasoning, which reads as follows, as part of this decision:

'With respect to the alleged partiality of the arbitrators, it is worth noting that the Rules of Arbitration of the International Chamber of Commerce state in Art. 11 that "a challenge of an arbitrator, whether for an alleged

lack of independence or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based". The arbitral award whose recognition is sought … states that the parties were notified of the appointment of arbitrators on 30 November 2005 and did not make any objection to such appointments. Furthermore, the award makes reference to the fact that one of the arbitrators, D. Eugenio Hernández, was appointed by the Claimant in the arbitration, the current Defendant in these proceedings which now alleges partiality of this arbitrator.

Concerning the Claimant's alleged breach of contract due to a "force majeure" event and consequent violation of public policy, the Claimant correctly points out that this issue was examined and adjudged by the Arbitral Tribunal, whose award states:

"Finally, the Arbitral Tribunal concluded that Andina validly avoided the Agreement for a supervening impossibility, in accordance with Art. 14 of the Agreement and, as provided for in Art. 14.1.1. of the Agreement, without becoming liable for damages arising out of the automatic avoidance of the Agreement by reason of such impossibility (Arts. 14.2.3 and 14.3 of the Agreement). Accordingly, Claimant's [UNIVEN's] claims that: (1) the Agreement be declared effective and its performance ordered, and (2) the compensation for damages sought by UNIVEN be measured in light of breaches to the agreement attributed to Andina, shall be dismissed."

Moreover, we must also emphasize that judicial review in the recognition of a foreign arbitral award is limited to the aspects provided for in Arts. 38 and 39 of Law No. 9.307/96,[2] which means that the merits of the dispute submitted to arbitration may not be reviewed. In this particular case, in order to eventually analyze the claim of breach of contract caused by a "force majeure" event, it would be necessary to examine the merits and the substantive-law contractual relation between the parties, which is unfeasible in these current proceedings. In this sense, see SEC [*Sentença Estrangeira Contestada* – Contested Foreign Judgment] 507/GB, Reporting Justice Gilson Dipp, judgment of 18 October 2006.[3]

2. *Note General Editor.* Art. 38 and Art. 39 of Brazilian Law No. 9.307 of 23 September 1996 reflect the grounds in Art. V(1)-(2) of the 1958 New York Convention.
3. Reported in Yearbook XXXVII (2012) pp. 177-179 (Brazil no. 19).

> Regarding the allegation that the award's enforceability is suspended – despite there being a request for its enforcement – [the argument is invalid, since] the finality [requirement] was proved by means of the submission of the final award….
>
> It is noteworthy that regarding the pending appeal in the setting aside proceedings brought before a Uruguayan court, the Defendant has merely presented a copy of its brief in Spanish, without any documents demonstrating that the Uruguayan Judiciary has made any judgment on the matter. Furthermore, according to Art. 28(6) of the Arbitration Rules of the International Chamber of Commerce:
>
> "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."'

[9] "Finally, the documents supplied at pp. 487/570 cannot refute the grounds stated above.

[10] "Based on the foregoing, the conclusion is that the legal requirements, including those listed in Resolution No. 9 of the Superior Court of Justice of 4 May 2005 relating to the formal regularity of the arbitral proceedings at issue, have been fulfilled. I therefore grant the application for recognition of the foreign arbitral award.

[11] "This is my vote."

31. Superior Tribunal de Justiça [Superior Court of Justice], 6 February 2013, SEC No. 6.365 - EX (2011/0100599-0)

Parties:	Claimant: Mandate Holdings LLC (US) Defendant: Consórcio Europa (Brazil)
Published in:	Diário da Justiça Elêtronico (Dje) 2 May 2013; available online at <www.stj.jus.br/webstj/Processo/Justica/detalhe.asp?numreg=201101005990&pv=00 0000000000>
Articles:	IV; V; V(1)(*a*); V(1)(*b*); V(1)(*e*)
Subject matters:	– documents for requesting enforcement supplied (in general) – requirements for enforcement (in general) – arbitration agreement "in writing" – confirmation of award by court of state of enforcement before seeking enforcement (no) – award final and binding upon rendition – review of merits of award (no) – adhesion contract – due process and lack of letter rogatory
Topics:	[8] = ¶ 504; [8]-[9] = ¶ 401; [12]-[13] = ¶ 514; [14] = ¶ 502; [15]-[18] = ¶ 509

Summary

An award of the Independent Film & Television Alliance (IFTA) in California, US, was granted recognition. The formal requirements were met: the arbitration clause was contained in the contract between the parties and was therefore in writing; the award had been rendered by the competent authority chosen by the parties in their contract, was accompanied by a translation, was certified by the Brazilian consulate and was final and binding. The issue whether the contract was an adhesion contract could not be examined at the recognition stage as it concerned the merits of the dispute. There was no violation of due process because when, as here, the defendant is notified by email, courier and fax of both the commencement of the arbitration and its development, there is no need for summons by letter rogatory.

On 17 March 2003, Mandate Holdings LLC (Mandate) and Consórcio Europa concluded a licensing contract in respect of the rights for the distribution of the movie *O Grito* (The Grudge). The contract provided for arbitration of disputes at the Independent Film & Television Alliance (IFTA).

A dispute arose between the parties. Mandate commenced IFTA arbitration as provided for in the licensing contract. Consórcio Europa, which in the meantime had been succeeded by another company, Cannes S/A, was notified of the commencement of the arbitration but did not participate in the proceedings. An IFTA tribunal issued an award in favor of Mandate in the amount of US$ 1,448,452.24. Consórcio Europa/Cannes S/A (Defendant) did not participate in the arbitration. Mandate sought recognition (homologation – *homologação*) of the award in Brazil.

The Superior Court of Justice, in an opinion by Justice Eliana Calmon, granted recognition, finding that Mandate complied with the conditions for seeking recognition and dismissing Defendant's contentions that the award was not binding; that the arbitration clause was not valid because it was contained in an adhesion contract; and that Defendant had not been guaranteed due process in the arbitration.

The Superior Court held first that the formal requirements for recognition were met: there was an arbitration agreement in writing as the contract contained an IFTA arbitration clause; the arbitral award had been rendered by a competent authority, that is, IFTA, the arbitral institution chosen by the parties in their contract; the award was accompanied by a Portuguese translation by a certified translator and was certified by the Brazilian Consulate.

Defendant argued that the award could not be recognized because it had not been confirmed by a California state court as required under Californian law. The Superior Court disagreed, noting that the only requirement under Brazilian law is that the arbitral award be recognized by the Superior Court of Justice (formerly by the Federal Supreme Court) prior to its enforcement. Since the arbitration clause in the contract provided that any award would be final and binding on the parties, the Court found that the award at issue was final and binding at the moment of rendition.

The Superior Court also rejected Defendant's contention that the licensing contract was an adhesion contract requiring stricter formalities for the validity of an arbitration clause therein. The Court held that the nature of the underlying contract – in casu, whether it is an adhesion contract – is a matter concerning the merits of the dispute decided in arbitration and cannot be reviewed at the recognition stage.

Equally unsuccessful was Defendant's contention that it had not been validly notified of the arbitration. The Court noted that there is no need for summons by letter rogatory where it is proved that the defendant was informed of the commencement of the arbitration and the arbitration acts by courier, email and fax. Here, Defendant was duly informed by email, courier and fax both of the commencement of the arbitration and of its development.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345029-n>.

BRAZIL NO. 31

Excerpt

[1] "This is a request for the recognition [homologation – *homologação*] of a foreign arbitral award rendered by the arbitral tribunal of the Independent Film & Television Alliance (IFTA), Los Angeles County, California, USA, between Mandate Holdings LLC, USA, and Consórcio Europa, a legal entity with seat in Brazil."

I. THE PARTIES' POSITIONS

[2] "Claimant asserts that the arbitral award conforms with public policy and complies with the legal requirements; hence, it requests recognition [homologation – *homologação*] of the document in order to enforce it [in Brazil].
[3] "Defendant was summoned and filed a statement in reply alleging, preliminarily: (a) that the legal entity [Mandate] was not properly represented in the proceedings because there is no document in the file proving that Mr. Wayne Levin was its Vice-President, nor is there proof that he was granted the power to appoint counsel to defend [Mandate's] interest; (b) lack of standing [*interesse processual*], because Mandate did not submit the arbitral award to the Supreme Court of California, in violation of Art. 1285 of the Code of Civil Procedure of that American State, which requires confirmation by a California court for an arbitral award to become an executory title.
[4] "On the merits, [Defendant] alleges that as the award was not subjected to judicial confirmation, [Defendant] was damaged by the absence of adversary proceedings [*contraditório*]. Further, Mandate failed to file a copy of the res judicata force of the arbitral and court proceedings, nor did it file any document proving that Defendant was summoned [in Brazil] to defend itself, if it wished to do so, in the arbitration, thereby violating Art. 15 LICC.[1] [Defendant] refers here

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1. Art. 15 of the Brazilian *Lei de Introdução ao Código Civil* (Introductory Law to the Civil Code) – since 31 December 2010, *Lei de Introdução às Normas do Direito Brasileiro* (Introductory Law to the Norms of Brazilian Law) – reads:

   "A decision rendered abroad shall be enforced in Brazil if it complies with the following requirements:

   (a) it has been rendered by a competent authority;
   (b) the parties were summoned or that default was legally ascertained;
   (c) it has become res judicata and meets the necessary formalities needed for enforcement at the place of rendition;

to SEC [Contested Foreign Judgment – *Sentença Estrangeira Contestada*] 867/EX and the cassation appeal in SEC 568/EX. It also asserts that it did not have the opportunity to discuss the clauses of the licensing contract, which is an adhesion contract harming the interests of Defendant. Finally, it requested that the application for recognition be denied.

[5] "Claimant was notified and filed a reply in which it states that the arbitral award whose recognition is sought results from a contract for the licensing of cinematographic rights concluded between Claimant and Consórcio Europa for the distribution of the movie '*O Grito* [The Grudge]'. It alleges that Consórcio Europa was dissolved before the contractual obligations were performed and was succeeded by Cannes S/A, an undisputed fact admitted in [Defendant's] statement in reply. It alleges that before signing the contract the parties, being experienced in their respective business branches, amply discussed its content, including the arbitration clause. It says that, the arbitration commenced, Cannes S/A refused to participate or at least appear in the arbitration, although it was given all the opportunities to present its case, notified as it was of all the phases of the arbitration. It refutes the allegation that [Defendant] was coerced into agreeing to the arbitration clause in the licensing contract, which was discussed at length before the contract was signed; [Defendant] agreed completely with the clauses of the agreement, after suggesting modifications to some of the negotiated items.

[6] "On the merits, Claimant states that

(a) the jurisprudence of the Superior Court of Justice, except in cases where there are doubts, does not require legal entities to prove the power of attorney for representation in the proceedings. It refers to REsp [Special Appeal – *Recurso Especial*] 219688/SP and REsp 621.861/AL;

(b) the power of attorney filed by Mandate is backed by a notary public of the State of California;

(c) Mandate is a legal entity constituted pursuant to the laws of the United States of America; the submission of its acts of incorporation would not help proving the powers of Mr. Wayne Levin. Further, the acts of incorporation of a US legal entity are regulated in a different manner from a Brazilian [legal entity], especially in respect of the appointment of its legal representatives;

(d) it has ben translated by a certified translator;

(e) it has been recognized by the Supreme Federal Court. (see Art. 105(I)(i) of the Federal Constitution)."

(d) pursuant to Summary [*Súmula*] 259 of the Supreme Federal Court, the registration of foreign public acts in the Register of Titles and Documents [*Registro de Títulos e Documentos*] is unnecessary;
(e) Cannes S/A opposes recognition of the arbitral award on grounds that are not provided for in the relevant legal provisions;
(f) recognition of a foreign arbitral award may be refused only if there are any of the grounds listed in Art. V of the [1958] New York Convention;
(g) the arbitral award under examination for recognition complies with the requirements provided for in the New York Convention and Law no. 9.307/96;
(h) Cannes S/A had all the opportunities to present its case in the arbitration, as it was notified not only by Mandate but also by the [IFTA];
(i) there is no violation of due process if Defendant did not allege an impediment of the arbitrators or the invalidity of the arbitration agreement at the appropriate time;
(j) the issue of the adhesion nature of the contract and of the weaker position [*hipossuficiência*] of Defendant cannot be heard in this instance as it involves a review of the merits, which is forbidden by the legal instruments regulating the recognition of a foreign award;
(k) Defendant has an established experience in the international marketplace of the distribution and licensing of audiovisual works and invoiced US$ 6,755,232.02 for the distribution of the film licensed in the contract discussed in the arbitration;
(l) the parties were on equal footing at the time of the negotiation of the contract, an agreement which was negotiated jointly over a long time, six months, as shown by an email …;
(m) contrary to the opinion of Defendant, Claimant is not a member of IFTA (International Film & Television Association), whose arbitral tribunal was chosen by the parties when agreeing on the contract;
(n) the notification was sent to Cannes S/A by Claimant on 19 November 2009 and by IFTA on 22 December 2009, with a list of suggested arbitrators for the case;
(o) the burden to prove the irregularity of the notifications is on Defendant;
(p) there is no need for judicial confirmation of the award in the country where the arbitration took place (Arts. 34 and 35 of Law no. 9.307/96), as in Californian law there is no such requirement for the award to be recognized abroad and the award complies with the requirements of the New York Convention and Law no. 9.307/96.

[Claimant] then requests recognition of the arbitral award."

(….)

II. ANALYSIS

[7] "The arbitration proceeding in which the award whose recognition is sought was rendered was commenced by [Mandate] against [Consórcio Europa] because of an alleged breach of the obligations under a licensing contract.
[8] "It appears from the contract (translated into [Portuguese] by a certified translator and certified by the Brazilian Consulate) that the parties agreed on arbitral jurisdiction to solve possible disputes arising from the contract (arbitration clause …). Thus, the requirement in Art. 4 First Paragraph of Law No. 9.307/96 [of 23 September 1996] is complied with, which provides:

> 'The arbitration clause shall be in writing contained in the contract itself or in a separate document referring thereto.'

[9] "The arbitral award was rendered by a competent authority (chosen by he parties … in the licensing contract); [the award] was translated into [Portuguese] by a certified translator and certified by the Brazilian Consulate).
[10] "We have examined the formal requirements of the award; now we must examine the opposition of Defendant, which relies on the following arguments:

(1) Mandate was not properly represented in the proceedings because there are no documents proving that Wayne Levin is its Vice-President with special powers to appoint counsel to defend Mandate's interest;
(2) lack of standing of [Mandate] because, in violation of Art. 1285 of the Californian Code of Civil Procedure, the award was not submitted to the Supreme Court of California, which [submission] was necessary for making it an executory title, besides violating [the principle of] adversary proceedings;
(3) Mandate failed to submit a copy of the proof that the arbitration and court proceedings are res judicata;
(4) the licensing contract is an adhesion contract concluded to the detriment of the interests of Defendant;
(5) Mandate did not supply a document proving the summons of Defendant [in Brazil].

[11] "There is no lack of representation as alleged. As well noted by the Office of the Attorney General in its opinion, the legitimate status of Wayne Levin was

attested by a notary public of Los Angeles, and this document was certified by the Brazilian consular authority.

[12] "As to the argument that in order to be valid in [Brazil] the arbitral award must be submitted to the review of the foreign judicial power, we answer by citing Brazilian law. See Arts. 31, 34 and 35 of Law No. 9.307/96:

> '*Art. 31*. The arbitral award shall have the same effect on the parties and their successors as a judgment issued by a State Court, and if it includes an obligation for payment, it shall constitute an enforceable instrument therefor.
>
> '*Art. 34*. A foreign arbitral award shall be recognised or enforced in Brazil pursuant to international treaties effective in the national legal system, or, if non existent, strictly in accordance with the present Law.
> *Sole Paragraph:* A foreign arbitral award is an award made outside of the national territory.
>
> *Art. 35*. In order to be recognised or enforced in Brazil, a foreign arbitral award is subject only to homologation by the Federal Supreme Court.'[2]

See, in this sense, the cassation appeal in SE [*Sentença Estrangeira*] 5206/EP, Reporting Justice Sepúlveda Pertence, Plenary Session, DJ [*Diário da Justiça*] of 12 December 2001.

[13] "As concerns the final and binding nature of the arbitral award, we note that the arbitration clause … in the licensing contract provides that 'the award rendered in that arbitration shall be final and binding on the contracting parties and shall be executed in any court at the request of any party'. I understand therefore, in the wake of the opinion of the Office of the Attorney General, that the arbitral award was final and binding at the moment of rendition.

[14] "As to the nature of the contract between the parties (whether it is an adhesion contract or not), we must remember that the recognition of the foreign award is limited to an analysis of formal requirements, the review of the merits

2. *Note General Editor.* Since Constitutional Amendment No. 45 of 8 December 2004 and Superior Court of Justice Resolution No. 9 of 4 May 2005 the Superior Court of Justice is the correct court for homologation applications.

of the foreign decision whose effectiveness in [Brazil] is sought being unacceptable.[3]

[15] "These points having been settled, we must now examine the question of the validity of the notification of Defendant in the arbitration commenced in the United States. On this point, I stress that there is no need of summons by letter rogatory in the context of arbitral proceedings. See the provision of Art. 39, Sole Paragraph, of Law No. 9.307/96:

> '*Sole Paragraph:* The service of summons on a party resident or domiciled in Brazil, pursuant to the arbitration agreement or to the procedural law of the country in which the arbitration took place, including through mail with confirmation of receipt, shall not be considered as offensive to national public policy, provided the Brazilian party is granted sufficient time to exercise his right of defence.'

[16] The Superior Court of Justice has explicitly decided on this specific issue in the decision whose summary is quoted below:

> *Foreign Decision. Arbitration. International Contract Concluded with Arbitration Clause. Failure to Perform under Contract. Law No. 9.307/96 (Law on Arbitration). Arts. 38(iii) and 39, Sole Paragraph. Recognition Granted.*
> 1. International supply contract between Brazilian farmer and French company, with express arbitration clause. Arbitration proceeding commenced for breach of contract by the Brazilian party.
> 2. Pursuant to Art. 39, Sole Paragraph, of the Law on Arbitration, the allegation, in casu, of the need for summons by letter rogatory or of lack of summons is inappropriate where it is proved that the defendant was informed of the commencement of the arbitration as well as of the acts thereof, both by courier service and by email and fax.
> 3. The defendant did not meet its burden under Art. 38(III) of the same law, that is, to prove that it was not notified of the arbitration or that the principle of adversary proceedings was violated, making it impossible to defend itself fully.
> 4. Doctrine and precedents of the Special Court.

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3. The court referred to and quoted from its own decisions of 16 May 2012 in SEC 5.042/EX, Reporting Justice Maria Thereza De Assis Moura, Special Court, DJe [*Diário da Justiça Eletrônico*] of 25 May 2012, and 21 March 2012 in SEC 6.335/EX, Reporting Justice Felix Fischer, DJe of 12 April 2012 [reported in this Yearbook XXXVIII (2013) pp. 334-337 (Brazil no. 28)].

> 5. Arbitral award recognized.' (SEC 3660/GB, Reporting Justice Arnaldo Esteves Lima, Special Court, 28 May 2009, DJe [*Diário da Justiça Eletrônico*] of 25 June 2009)[4]

[17] "Rather, Defendant – Cannes S/A (the legal entity successor of Consórcio Europa in the performance of the licensing contract, with seat at the same address as [Consórcio Europa], where the notifications were sent during the arbitration) – was duly informed by email, courier and fax, both of the commencement of the arbitration and of its development. There is no case of curtailed defense or violation of the principle of adversary proceeding.

[18] "See on this point the opinion of this Court:

> '*Recognition of Contested Foreign Arbitral Award. Competence of the Superior Court of Justice (see Art. 105(I)(i); Law no. 9.307/96, Art. 35). Request duly supported by documents. Granted.*
> (….)
> IV. There is no lack of notification and curtailed defense "when it is proved that the defendant was informed of the commencement of the arbitration as well as of the acts thereof, both by courier and by email and fax. (SEC 3.660/GB, Special Court, Reporting Justice Arnaldo Esteves Lima, DJe of 25 June 2009.)
> (…)
> VI. Having established that there are the indispensable conditions for the recognition of the foreign decision (Resolution no. 9/2005, Arts. 5 and 6),[5] the request must be granted.

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4. Reported in Yearbook XXXVII (2012) pp. 187-188 (Brazil no. 23).
5. Art. 5 of Resolution no. 9/2005 of the Superior Court of Justice, of 4 May 2005, reads:

"[The following] are indispensable requirements for the homologation of a foreign decision:

I - that it was rendered by a competent authority;
II - that the parties were summoned or that default was legally ascertained;
III - that it has become res judicata;
IV - that it is authenticated by the Brazilian consul and accompanied by a translation by an official translator or [a translator] sworn in Brazil."

Art. 6 Resolution no. 9/2005 reads:

"A foreign decision or a letter rogatory that violates sovereignty or public policy shall not be homologated or given exequatur."

Foreign award recognized. (SEC 6.335/EX, Reporting Justice Felix Fischer, Special Court, 21 March 2012, DJe of 12 April 2012.)

[19] "On the basis of these consideration, the formal requirements of Arts. 5 and 6 of Resolution no. 9/2005 having been complied with, I grant the request for recognition of the present foreign decision…."

CHINA PR

Accession: 22 January 1987
1st and 2nd Reservation

7. Intermediate People's Court, Zhejiang Province, Ningbo, 22 April 2009, Case no. 4 of 2008[1]

Parties:	Applicant: Duferco S.A. (Switzerland) Respondent: Ningbo Arts and Crafts Import and Export Corp. (PR China)
Published in:	No information available
Articles:	I(1); III; V(1)(*b*)
Subject matters:	– nondomestic award – due process – estoppel from raising defense of lack of valid arbitration agreement not raised in the arbitration
Topics:	¶ 102 + ¶ 303 + ¶ 509

Summary

An ICC award made in Beijing was recognized and enforced under the 1958 New York Convention. The court found that although the award was made in China, it was a non-domestic award pursuant to Art. I(1) of the Convention. Applying the Convention, the court dismissed the allegation of a violation of due process on the facts of the case and further found that respondent was estopped under Chinese law from raising the objection of lack of a valid arbitration agreement as it had not raised it in the arbitration.

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1. The General Editor wishes to thank Dr. Fan Yang, LLMArbDR Programme Leader and Assistant Professor, School of Law, City University of Hong Kong, for her invaluable assistance in providing this decision, summarizing it and translating it from the Chinese original.

On 23 January 2003, Duferco S.A. (Duferco) and Ningbo Arts and Crafts Import and Export Corp. (Ningbo) entered into a Contract under which Duferco sold and Ningbo purchased 1,500 metric tons (± 10 percent) of prime cold-rolled steel sheets to be shipped on or before 15 April 2003. The Contract, which was drafted in English and Chinese, contained an arbitration clause. The English arbitration clause read:

> "Arbitration: all disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached the case in dispute shall then be submitted to The Arbitration of the International Chamber of Commerce in China, and the arbitration shall be conducted in accordance to the United Nations Convention on Contracts of the International Sale of Goods, the award of which be accepted as final and binding upon both parties. The fee for arbitration shall be borne by the losing party unless otherwise awarded by the Commission."

The Chinese arbitration clause provided that

> "any disputes concerning the execution of the Contract or any disputes in relation to the Contract should be submitted to Arbitration Commission of the Chamber of International Commerce established in Beijing, China, and the arbitration shall be conducted in accordance to the United Nations Convention on Contracts of the International Sales of Goods".

Ningbo opened a letter of credit in favor of Duferco pursuant to the terms of the Contract. Duferco shipped the goods on or prior to the contractual shipment date of 15 April 2003. Upon shipment, documents were tendered by Ningbo to the issuing bank for payment under the letter of credit. However, the issuing bank refused to make payment on the grounds that the packing list named the vessel as "MARY" instead of "FLORIANA" as stated on the bill of lading, and that there was an error in the spelling of Ningbo's name on the courier receipt. Ningbo did not take delivery of the goods. Having urged Ningbo to take delivery of the goods and to instruct its bank to accept the documents on 5 June 2003 and 11 July 2003 without success, Duferco declared the Contract voided on 24 July 2003 and subsequently sold the goods to another buyer for US$ 577,818.37.

On 12 September 2005, Duferco commenced arbitration against Ningbo at the ICC International Court of Arbitration claiming for:

(1) compensation of US$ 133,706.39, comprising:
(i) US$ 128,448.62, being the loss resulting from its sale of the goods to the third party buyer, and
(ii) US$ 5,257.77, being interest on the price of the goods at the rate of Libor 1.18 percent plus 1.5 percent from 15 April 2003, the due date of payment, to 7 July 2003, the date of payment by the alternative buyer;
(2) interest on the sum of US$ 133,706.39 for such period and at such rate as the tribunal shall determine; and
(3) costs of the arbitration.

On 18 November 2005, the ICC Court determined, among other things, that the arbitration should proceed in accordance with Art. 6(2) of the ICC Rules of Arbitration (the ICC Rules) and that the matter should be submitted to a sole arbitrator. The ICC Court further fixed Beijing, PR China as the place of arbitration and appointed Lian Chin Chiang as the sole arbitrator. The sole arbitrator later determined that the language of the arbitration shall be English and the arbitration shall be conducted on the basis of documents submitted pursuant to Art. 20(6) of the ICC Rules.

Ningbo did not participate in the arbitration proceedings despite repeated invitations to do so. On the facts available, the sole arbitrator was satisfied that Ningbo made a deliberate decision not to participate in the arbitration despite being in receipt of the documents in the arbitration.

The sole arbitrator rendered an award on 21 September 2007. In deciding whether he had jurisdiction over the dispute, he found that the English arbitration clause, on the one hand, clearly referred disputes to ICC arbitration, with a seat of arbitration in China. The Chinese arbitration clause, on the other hand, referred disputes to the "Arbitration Commission of the Chamber of International Commerce established in Beijing, China". The arbitrator noted that the China International Economic and Trade Arbitration Commission (CIETAC) is also known as the Arbitration Court of the China Chamber of International Commerce (CCOIC). In answering the question, to which institution did the parties intend to refer their disputes, the sole arbitrator found it necessary to determine which version/language of the Contract should prevail in the event of inconsistency. Having decided that the English version of the Contract prevailed, the sole arbitrator found that the parties intended to refer disputes to ICC arbitration, not to CIETAC.

The sole arbitrator then discussed the issue of the validity of the arbitration clause. Applying the law of PR China, as the law of the seat of arbitration, he found that the arbitration clause contained an express stipulation of an arbitration

institution and that in light of the Supreme People's Court (SPC) decision, as well as the SPC Judicial Interpretations No. 2006/7, Art. 4, it was a valid arbitration agreement under Chinese law.

As to the merits of the case, the sole arbitrator found that Ningbo was liable and ordered it to pay Duferco:

(1) damages in the sum of US$ 128,448.62;
(2) interest on US$ 577,818.37 at 8 percent per annum for the period of 15 April 2003 to 7 July 2003 and interest on US$ 128,448.62 at 8 percent per annum from 15 April 2003 to date of payment; and
(3) costs of the arbitration comprising:
(a) US$ 20,000 for the costs of arbitration fixed by the ICC Court; and
(b) US$ 30,000 for Duferco's legal and other costs.

By an application of 4 December 2007, Duferco sought enforcement of the ICC award in China.

The Ningbo Intermediate People's Court in Zhejiang Province granted Duferco's application. The court first found that Ningbo was estopped from raising the objection that there was no valid arbitration agreement between the parties, since it did not object to the validity of the arbitration agreement prior to the first arbitration hearing. In this case, the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China provides that the Chinese courts shall not accept a late objection filed at the enforcement court stage.

Nor was there as alleged a violation of due process, as there was proof that the sole arbitrator sent – and Ningbo received – the terms of reference and a tentative timetable for the arbitration.

The court then held that the award at issue was a non-domestic award within the meaning of Art. I(1) of the 1958 New York Convention, and that the Convention consequently applied to its enforcement.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345030-n>.

Excerpt

[1] "On 21 September 2007, the International Chamber of Commerce (ICC) International Court of Arbitration rendered an arbitral award no. 14006/MS/JB/JEM (the Award) in Beijing concerning the dispute under the sale and purchase contract between the Applicant, [Duferco] and the Respondent, [Ningbo].
[2] "On 4 December 2007, the Applicant, [Duferco], made an application to this Court, seeking recognition and enforcement of the Award. After the case was filed into this Court on 27 February 2008, a collegial panel was legally constituted to hear the case and has now reached its conclusion."

I. THE PARTIES' POSITIONS

1. The Applicant's Submissions

[3] "On 21 September 2007, the ICC International Court of Arbitration rendered arbitral award no. 14006/MS/JB/JEM concerning the sale and purchase contract signed by the Applicant and the Respondent on 23 January 2003. The Respondent was ordered to pay the Applicant:

(1) damages in the sum of US$ 128,448.62;
(2) interest on US$ 577,818.37 at 8 percent per annum for the period of 15 April 2003 to 7 July 2003 and interest on US$ 128,448.62 at 8 percent per annum from 15 April 2003 to date of payment;
(3) US$ 20,000 for the costs of arbitration fixed by the ICC Court; and
(4) US$ 30,000 for the Seller's legal and other costs.

[4] "The Applicant requested this Court to recognize and enforce the award made by the ICC International Court of Arbitration, ordering the Respondent to pay the following fees:

(1) damages in the sum of US$ 128,448.62;
(2) interest on US$ 577,818.37 at 8 percent per annum for the period of 15 April 2003 to 7 July 2003 and interest on US$ 128,448.62 at 8 percent per annum from 15 April 2003 to date of payment;
(3) US$ 20,000 for the costs of arbitration fixed by the ICC Court;
(4) US$ 30,000 for the Seller's legal and other costs; and

(5) the interest of US$ 28.15 per day from 21 September 2007 up to the actual day of payment."

2. The Respondent's Reply

[5] "Conducting arbitration by the ICC within the territory of China is in violation of the PR Chinese Law, and the true intention of the arbitration clause in this case is to submit disputes to China International Economic and Trade Arbitration Commission for arbitration. During the arbitral process, the Respondent was not given proper notice on the nomination of the arbitrator or the arbitration proceedings, thus the Respondent was deprived of the right to be heard. The Respondent requests this Court to reject the Applicant's application for recognition and enforcement of the foreign award."

II. FACTUAL BACKGROUND

[6] "On 23 January 2003, [Ningbo] and the Applicant [Duferco] signed a contract for the sale and purchase of 1,500 metric tons (± 10 percent) of cold-rolled steel plate (the Contract) in Ningbo City, China, in which the Contract is written in both Chinese and English. The Contract stipulated the price of each unit of goods, date of delivery, conditions to payment, obligations in case of breach, etc.

[7] "As for the arbitration clause contained in the Contract, the Chinese text read:

> 'any disputes concerning the execution of the Contract or any disputes in relation to the Contract should be submitted to Arbitration Commission of the Chamber of International Commerce established in Beijing, China, and the arbitration shall be conducted in accordance to the United Nations Convention on Contracts of the International Sales of Goods'.

The English text read:

> 'shall … be submitted to the Arbitration of the International Chamber of Commerce in China, and the arbitration shall be conducted in accordance to the United Nations Convention on Contracts of the International Sales of Goods'.

[8] "Due to a dispute between the parties, the Applicant [Duferco] commenced the ICC arbitration in Paris, France on 12 September 2005. On 21 September 2007, the ICC Court of Arbitration rendered arbitral award no.14006/MS/JB/JEM in Beijing, China, in respect of the Sale and Purchase Contract signed by the Applicant and the Respondent on 23 January 2003. According to the Award, the Respondent was ordered to pay the Applicant: (1) damages in the sum of US$ 128,448.62; (2) interest on US$ 577,818.37 at 8 percent per annum for the period of 15 April 2003 to 7 July 2003 and interest on US$ 128,448.62 at 8 percent per annum from 15 April 2003 to the date of payment; and (3) costs of the arbitration comprised of (a) US$ 20,000 for the costs of arbitration fixed by the ICC Court; and (b) US$ 30,000 for the Seller's legal and other costs."

III. ANALYSIS

[9] "The People's Republic of China acceded to the [1958 New York Convention] on 2 December 1986. The People's Republic of China is a Contracting State of the New York Convention. Foreign arbitral awards shall be recognized and enforced in compliance with the Convention and the relevant laws of the People's Republic of China.

[10] "In relation to the issue of the validity of the arbitration agreement in this case, the arbitral tribunal had already delivered the Terms of Reference and the tentative timetable to [Ningbo] via email and fax, in accordance with the arbitral rules. There was also proof that [Ningbo] had received the above-mentioned documents. [Ningbo] did not make any objections to the validity of the arbitration agreement within the prescribed time limit, and the ICC Court of Arbitration had subsequently decided on the existence of a valid arbitration agreement in the arbitral award. According to the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, Art. 13 stipulates:

> 'As required by Art. 20(2) of the Arbitration Law, if a party concerned fails to object to the validity of the arbitration agreement prior to the first hearing in the arbitration, and then applies to the people's court for finding the arbitration agreement invalid, the people's court shall not accept such applications. Where, after the arbitration institution decides on the validity of the arbitration agreement, a party concerned applies to the people's court for decision on the validity of the arbitration agreement for annulling

the arbitration institution's decision, the people's court shall not accept such applications.'

[11] "Thus, the proposition, made by [Ningbo], that the arbitration agreement is invalid cannot stand.
[12] "Concerning the issue of whether the 1958 New York Convention is applicable in this instance, Art. 1(1) of the 1958 New York Convention defines two circumstances where the Convention applies: first, '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'; second, 'It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.' In interpreting 'not considered as domestic awards', it should be juxtaposed with 'the State where their recognition and enforcement are sought'.
[13] "Since the arbitral award in this case was not a domestic award of our country, the 1958 New York Convention should apply."

IV. CONCLUSION

[14] "In conclusion, there is no valid ground to refuse recognition and enforcement of the arbitral award in this case. In pursuant to the Civil Procedure Law of the People's Republic of China Art. 267 and Art. 140(1)(11), this Court orders:

(1) Enforce and recognize the arbitral award no. 14006/MS/JB/JEM made by the ICC Court of Arbitration on 21 September 2007 in Beijing, China;
(2) The Respondent, [Ningbo] shall bear the costs of RMB 19,523 for the enforcement of this case."

8. Intermediate People's Court, Guangdong Province, Shenzhen, 20 November 2012, Case No. 226 of 2012[1]

Parties:	Applicant: Hong Kong Jia XX Development Co. (Hong Kong) Respondent: Shenzhen Yong XX Co. (PR China)
Published in:	English excerpt in Shenzhen Court of International Arbitration (SCIA) Arbitration News (Volume 2, 8 January 2013)
Articles:	II(3) (by implication)
Subject matters:	– arbitration agreement "null and void" for failure to determine arbitral institution (no) – successor arbitral institution – nonsignatory defendant bound to arbitration clause (by performing in lieu of original party pursuant to later contract)
Topics:	¶ 220 + ¶ 226

Summary

The court held that the arbitration agreement in an agency agreement between the parties was valid under Chinese law as it expressed the parties' intent to submit to arbitration, clearly defined the matters to be referred and indicated the competent arbitral institution. The court noted in this respect that the reference in the agreement to the CIETAC South China Sub-Commission in Shenzhen meant a reference to the South China International Economic and Trade Arbitration Commission (or Shenzhen Court of International Arbitration), as the latter is the new name of the former. A party which was not a signatory to the agency agreement was held to be bound by the arbitration clause herein as a later agreement allowed it to perform under the agency agreement in lieu of the original party.

1. The General Editor wishes to thank Terence Wong, Hogan Lovells International LLP, Shanghai, for his invaluable assistance in providing this decision and translating it from the Chinese original.

On 23 February 2006, Shenzhen Yong XX Co. (Shenzhen Yong) and Hong Kong Jia XX Pharmaceutical Co. (Jia Pharmaceutical) entered into an Agency Agreement. Art. 12(2) of the Agency Agreement provided that all disputes "arising in connection with this Agreement" that could not be resolved through amicable consultations would be referred to arbitration at "the China International Economic and Trade Arbitration Commission Shenzhen Sub-Commission".

On 15 December 2007, Shenzhen Yong and Jia Pharmaceutical also entered into a Supplementary Agreement. On 24 June 2010, Shenzhen Yong and Jia Pharmaceutical concluded a third contract, the Contract Supplementary Terms and Conditions Agreement (the 24 June Agreement), to which Hong Kong Jia XX Development Co. (Jia Development) was also a party. The 24 June Agreement contained supplementary terms and conditions with respect to the Agency Agreement and the Supplementary Agreement. It also formed an integral part of, and contained supplementary terms and conditions with respect to, a Purchase Contract that Jia Development had concluded with Shenzhen Yong at the request of Jia Pharmaceutical. The 24 June Agreement further stated that Shenzhen Yong acknowledged that Jia Development had the right to perform under the Agency Agreement and the Supplementary Agreement in lieu of Jia Pharmaceutical.

A dispute arose between the parties under the Agency Agreement. On 17 September 2012, Shenzhen Yong commenced arbitration at the China International Economic and Trade Arbitration Commission (CIETAC) against Jia Pharmaceutical and Jia Development. On 10 October 2012, Jia Development in turn filed an application with the Intermediate People's Court for the Guangdong Province, Shenzhen, seeking a declaration that there was no arbitration agreement between Jia Development and Shenzhen Yong.

The Intermediate People's Court, before Qiu Mingyan, Presiding Judge, and Zhu Ping and Liang Lele, JJ, dismissed Jia Development's application, holding that there was a valid arbitration agreement between Shenzhen Yong on the one hand and Jia Pharmaceutical and Jia Development on the other, and that this agreement referred disputes to the South China International Economic and Trade Arbitration Commission (or Shenzhen Court of International Arbitration), the new name of CIETAC South China Sub-Commission.

The court first reasoned that pursuant to the People's Republic of China Arbitration Law, an arbitration agreement must contain the parties' expression of intent to submit their dispute to arbitration and must indicate the subject matter of the arbitration and the chosen arbitral institution. All these conditions were complied with in the present case, since the arbitration clause in the Agency

Agreement expressed the parties' intention to submit to arbitration, clearly defined the disputes to be referred and indicated the competent arbitral institution. The court noted in this respect that "CIETAC South China Sub-Commission has changed its name to the South China International Economic and Trade Arbitration Commission (or Shenzhen Court of International Arbitration)."

The court held that although Jia Development was not a party to the Agency Agreement, neither the Purchase Contract nor the 24 June Agreement contained an arbitration clause, and the 24 June Agreement allowed Jia Development to perform the Agency Agreement in lieu of Jia Pharmaceutical.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345031-n>.

Excerpt

[1] "Applicant Hong Kong Jia XX Development Co. [Applicant] filed an application with the Court to confirm that there is no arbitration agreement between the Applicant and Respondent Shenzhen Yong XX Co. [Respondent]. After accepting the application, the Court formed a collegiate panel in accordance with law and conducted a review of [Applicant's] application. The review process has now been concluded.

[2] "[Applicant] claims that the China International Economic and Trade Arbitration Commission (henceforth, CIETAC) accepted an application for arbitration filed by [Respondent] on 17 September 2012. [Applicant] maintains that there is no arbitration agreement between [Respondent] and [Applicant] in relation to the aforementioned arbitration case, thus the case does not fall under the jurisdiction of CIETAC. Applicant therefore requested the Court to render a decision in accordance with the law confirming that there is no arbitration agreement between [Applicant] and [Respondent].

[3] "[Respondent] argued that … an effective arbitration agreement exists between [Respondent] and [Applicant]; therefore, the claim filed by Applicant in the present case is untenable, and Respondent requests the Court to dismiss the application.

[4] "Following a review, the Court established that:

(1) [Respondent] and Hong Kong Jia XX Pharmaceutical Co. [Jia Pharmaceutical] entered into an agency agreement on 23 February 2006, Art. 12(2) of which stipulated:

> 'All disputes arising out of or in connection with this Agreement shall be first resolved by the parties through amicable consultations; if consultations fail, either party may submit the relevant dispute to the China International Economic and Trade Arbitration Commission Shenzhen Sub-Commission for arbitration in accordance with the arbitration rules of such commission. The arbitral award shall be final and binding on the parties. During the course of arbitration, the parties shall continue to perform this Agreement, other than the parts of this Agreement involved in the dispute.'

On 24 June 2010, [Respondent] entered into a Contract Supplementary Terms and Conditions Agreement with [Applicant] and [Jia Pharmaceutical], which provided:

> 'whereas, [Jia Pharmaceutical] and [Respondent] entered into an agency agreement on 23 February 2006 and a Supplementary Agreement on 15 December 2007, and [Jia Pharmaceutical] entrusted [Applicant] to enter into a purchase contract with [Respondent], the parties hereby enter into supplementary terms and conditions with respect to such contracts. [Respondent] acknowledges that [Applicant] has the right to perform each of the clauses contained in the terms and conditions of the agency agreement and the Supplementary Agreement in place of [Jia Pharmaceutical]. This Contract Supplementary Terms and Conditions Agreement shall form an integral part of the purchase contract, and constitute all terms and conditions entered into in relation to the purchase contract.'

(2) CIETAC accepted the agency agreement dispute between [Respondent] and [Jia Pharmaceutical] (case no. SZX20120004) based on the application for arbitration filed by [Respondent]. On 25 September 2012, the CIETAC Secretariat served the relevant notices and materials on [Jia Pharmaceutical] and [Applicant]. On 10 October 2012, [Applicant] submitted an application to the Court, requesting confirmation that there was no arbitration agreement between [Applicant] and [Respondent].

[5] "The Court is of the opinion that, pursuant to Art. 16 of the People's Republic of China Arbitration Law,[2] an arbitration agreement must contain the following elements: (i) an expression of intent to apply for arbitration; (ii) the arbitrable subject matter; and (iii) the selected arbitration commission.
[6] "In the present case, [Respondent] and [Jia Pharmaceutical] agreed in Art. 12(2) of the agency agreement that:

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2. Arbitration Law of The People's Republic of China, Adopted at the 9th Session of the Standing Committee of the 8th National People's Congress of the People's Republic of China, and promulgated by the President, on 31 August 1994, effective from 1 September 1995 reads:

   "An arbitration agreement includes an arbitration clause included in the contract, and an agreement on submission to arbitration that is concluded in other written forms before or after the dispute arises.

   An arbitration agreement shall contain the following particulars:
   (1) an expression of the intention to apply for arbitration;
   (2) matters for arbitration; and
   (3) a designated arbitration commission."

> 'Any dispute arising in connection with this Agreement shall be resolved by the parties through amicable consultations. If the dispute cannot be resolved through amicable consultations, it shall be submitted to the CIETAC South Sub-Commission [the Court notes: CIETAC South China Sub-Commission has changed its name to the South China International Economic and Trade Arbitration Commission (or Shenzhen Court of International Arbitration)] for arbitration.'

[7] "Said arbitration clause contains a clear expression of intent to apply for arbitration; the arbitrable subject matter is provided for, and the name of the arbitration institution is accurate. Therefore, such clause should be deemed valid in accordance with law.
[8] "Although [Applicant] is not a party to the agency agreement, the Contract Supplementary Terms and Conditions Agreement has confirmed the right of [Applicant] to perform the agency agreement in lieu of [Jia Pharmaceutical], while neither the purchase contract nor the Contract Supplementary Terms and Conditions Agreement contains a separate arbitration clause. Furthermore, [Jia Pharmaceutical] and [Applicant] failed to subsequently reach a new arbitration agreement with [Respondent]. Therefore, the arbitration clause in the agency agreement is valid and binding on [Applicant], and the South China International Economic and Trade Arbitration Commission (or Shenzhen Court of International Arbitration) has jurisdiction over the related case.
[9] "[Applicant] has no factual or legal basis to apply for confirmation that there is no arbitration agreement between it and [Respondent], thus its application shall be dismissed by the Court.
[10] "Pursuant to Arts. 16 and 17 of the People's Republic of China Arbitration Law, and Art. 140(1) no. (11) and Art. 140(2) of the People's Republic of China Civil Procedure Law, the Court rules as follows:

(1) to dismiss the application of Applicant to find that there is no arbitration agreement between it and Respondent.
(2) the acceptance fee for the present case in the amount of RMB 400 shall be borne by Applicant.

This Judgment is final."

9. Intermediate People's Court, Jiangsu Province, Suzhou, 7 May 2013, Case No. 0004 of 2013[1]

Parties:	Applicant: Jiangxi LDK Solar Hi-Tech Co., Ltd. (PR China) Respondent: CSI Solar Power (China) Inc. (PR China)
Published in:	No information available
Articles:	V(1)(*a*) (by implication)
Subject matters:	– arbitral institution no longer part of arbitral institution agreed on by parties – arbitral institution lacked jurisdiction
Topics:	¶ 507 (arbitral institution separated from institution chosen by parties)

Summary

The court denied enforcement of an award rendered by CIETAC Shanghai because the parties' agreement provided for arbitration at CIETAC, Shanghai Sub-Commission; since CIETAC Shanghai became a separate arbitral institution from CIETAC before the award at issue was rendered, it was no longer the institution stipulated by the parties and it lacked jurisdiction to render an award in their dispute.

In October 2007, CSI Solar Power (China) Inc. (CSI), the Chinese subsidiary of Canadian Solar Inc., a Canadian company, and Jiangxi LDK Solar Hi-Tech Co., Ltd. (LDK) entered into Solar Power Battery Silicon Wafer Supply Agreement No. CSI-LDK071012 for a period of three years (the Three-Year Contract). The Three-Year Contract contained a clause providing for arbitration of disputes at "the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission".

1. The General Editor wishes to thank Terence Wong, Hogan Lovells International LLP, Shanghai, for his invaluable assistance in providing this decision and translating it from the Chinese original.

On 27 June 2008, the parties entered into Multicrystalline Silicon Wafer Long-Term (10 Years) Supply Contract No. CSIC-LDK2008-6-3 (the First Ten-Year Contract) and Multicrystalline Silicon Wafer Long-Term (10 Years) Supply Contract No. CSIC-LDK2008-6-6 (the Second Ten-Year Contract). Both contracts stipulated that where a dispute

> "could not be resolved through consultations, the parties agree to submit the dispute to the China International Economic and Trade Arbitration Commission (place of arbitration: Shanghai, China) for arbitration in accordance with the arbitration rules of such commission in effect at the time when the application for arbitration is filed".

On 14 February 2009, the parties entered into a Supplementary Agreement in respect of the Three-Year Contract, which provided that the 2010 supply under the Three-Year Contract was consolidated with the First Ten-Year Contract. On 7 December 2009, the parties entered into an Agreement Concerning the Termination of the Three-Year Contract and its Supplementary Agreement, pursuant to which the 2010 supply under the Three-Year Contract was consolidated with the First Ten-Year Contract and the Second Ten-Year Contract, and the Three-Year Contract was otherwise terminated.

A dispute arose between the parties concerning the ownership of a RMB 60 million down payment and the termination of the two Ten-Year Contracts. On 23 July 2010, a request for arbitration was filed with the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission (CIETAC Shanghai). On 28 July 2010, pursuant to the 2005 CIETAC Arbitration Rules, CIETAC Shanghai sent the parties a notice of acceptance of the case, together with a copy of the 2005 Rules and a Roster of Arbitrators. On 7 December 2012, an arbitral panel of the CIETAC Shanghai rendered Arbitral Award China Trade Arbitration Shanghai No. 452 of 2012, which found in favor of LDK.

In the meantime, on 6 December 2011, CIETAC Shanghai filed for registration with the Shanghai Bureau of Justice and obtained a People's Republic of China Arbitration Commission Registration Certificate on 8 December 2011. On 31 March 2012, CIETAC Shanghai promulgated its own China International Economic and Trade Arbitration Commission Shanghai Sub-Commission Arbitration Rules (the 2012 Rules). The 2012 Rules, applicable to arbitrations commenced after 1 May 2012, stipulate that CIETAC Shanghai has the right to establish its own roster of arbitrators and the right to make decisions concerning the existence and validity of arbitration agreements, as well as decisions on

jurisdiction over arbitration cases. On 8 April 2013, CIETAC Shanghai changed its name to the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center).

The Intermediate People's Court of Jiangsu Province in Suzhou denied LDK's application for enforcement, holding that following its registration as a separate entity, CIETAC Shanghai no longer had any authority to continue adjudicating the case in question or to render an arbitral award.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345032-n>.

Excerpt

[1] "The Court formed a collegiate panel in accordance with the law and held a public hearing on 9 April 2013 to conduct a trial. Zhang Yongquan and Huan Jun, the attorneys for the party challenging enforcement, CSI, and Wan Wei, the attorney for the party filing for enforcement in the original case, LDK, were present during the hearing. The trial of the present case has been concluded.
[2] "The Court is of the opinion that the dispute between the parties concerning whether or not CIETAC Shanghai has jurisdiction over the present case involves the following three issues:

(1) the arbitration institution the parties agreed to select;
(2) the relationship between CIETAC Shanghai and the China International Economic and Trade Arbitration Commission (henceforth, CIETAC) prior to CIETAC Shanghai registering and obtaining the People's Republic of China Arbitration Commission Registration Certificate;
(3) the relationship between CIETAC Shanghai and CIETAC following CIETAC Shanghai's registration and obtaining of the People's Republic of China Arbitration Commission Registration Certificate."

I. SELECTION OF ARBITRAL INSTITUTION

[3] "The Court is of the opinion that:

(i) the Parties concluded three supply contracts in the present case, and terminated the Three-Year Contract after performing a portion thereof;
(ii) the remainder of the Three-Year Contract was incorporated into the two subsequent Ten-Year Contracts which were also amended due to the addition of the remaining portion of the Three-Year Contract;
(iii) in terms of the dispute between the parties concerning the ownership over a RMB 60 million down payment and the termination of the two Ten-Year Contracts, the nature of their dispute relates to the terms of the amended Ten-Year Contracts; therefore the dispute should be arbitrated by the arbitration institution determined in the two Ten-Year Contracts;
(iv) since both Ten-Year Contracts specified that disputes are to be submitted to 'the China International Economic and Trade Arbitration Commission' for arbitration, the true intent of the parties with respect to the selection of the arbitration institution was to submit disputes to 'the China International

Economic and Trade Arbitration Commission' for arbitration, with Shanghai as the selected location."

II. RELATIONSHIP BETWEEN CIETAC AND CIETAC SHANGHAI BEFORE THE ISSUANCE OF THE REGISTRATION CERTIFICATE

[4] "The Court is of the opinion that the Arbitration Rules of the China International Economic and Trade Arbitration Commission formulated by CIETAC prior to 2010 (henceforth, the Arbitration Rules) clearly addressed the relationship between the two Commissions.... Following the establishment of CIETAC Shanghai, the 1994 Arbitration Rules stipulate that 'CIETAC is located in Beijing. CIETAC ... has established a Sub-Commission in Shanghai. CIETAC and its Sub-Commissions are a single entity.' The subsequent 1995 Arbitration Rules, 1998 Arbitration Rules, 2000 Arbitration Rules and 2005 Arbitration Rules state that 'CIETAC's Sub-Commissions form an integral part of CIETAC'. Said Arbitration Rules also confirm that the Arbitration Rules and the Roster of Arbitrators uniformly apply to CIETAC and its Sub-Commissions.

[5] "Furthermore, in the original arbitration case, as required under the 2005 Arbitration Rules, CIETAC Shanghai did indeed serve on the parties an acceptance notice, the 2005 Arbitration Rules and the Roster of Arbitrators as prepared by CIETAC, and carried out proceedings in accordance with such Rules.

[6] "Therefore, prior to registering and obtaining the People's Republic of China Arbitration Commission Registration Certificate, CIETAC Shanghai and CIETAC were considered a single entity, of which CIETAC Shanghai constituted an integral part."

III. RELATIONSHIP BETWEEN CIETAC AND CIETAC SHANGHAI AFTER THE ISSUANCE OF THE REGISTRATION CERTIFICATE

[7] "The Court is of the opinion that pursuant to the People's Republic of China Arbitration Law and the Interim Measures on the Registration of Arbitration Commissions, CIETAC Shanghai already possessed the formal conditions to become an independent arbitration institution when registering and obtaining the People's Republic of China Arbitration Commission Registration Certificate on 8 December 2011. Furthermore, the formulation and the application by CIETAC Shanghai of the China International Economic and Trade

Arbitration Commission Shanghai Sub-Commission Arbitration Rules and Roster of Arbitrators also confirmed the independent status of CIETAC Shanghai in terms of substantive conditions.

[8] "As a result, CIETAC Shanghai legally became an independent arbitration institution as of 8 December 2011, and it no longer formed a single entity with, or constituted an integral part of, the China International Economic and Trade Arbitration Commission after registering and obtaining the People's Republic of China Arbitration Commission Registration Certificate.

[9] "The Court is of the opinion that the authority to have jurisdiction over a case falls to the arbitration institution agreed upon and selected by the parties. The parties in the present case selected the 'China International Economic and Trade Arbitration Commission' as the arbitration institution for resolving disputes. Since CIETAC Shanghai was a part of CIETAC prior to its registration, CIETAC Shanghai would have had jurisdiction over the case when the parties filed for arbitration in 2010.

[10] "However, such authority changed once CIETAC Shanghai registered to become an independent arbitration institution in 2011. Both parties favored CIETAC, yet the nature of CIETAC Shanghai was changed during the course of the proceedings when it became an independent arbitration institution, at which point, it was no longer an integral part of CIETAC, and was naturally no longer the arbitration institution originally agreed upon by the parties. As a result, it no longer had jurisdiction over the case.

[11] "Following its registration, CIETAC Shanghai should have sent notice to the parties informing them of the change in the institution's nature, and inquired as to whether they wished to reselect the arbitration institution. However, CIETAC Shanghai failed to perform the aforementioned obligation of disclosure, thereby infringing on the right of the parties to be informed and going against the true intentions of the parties with respect to selecting an arbitration institution. Therefore, following its registration, CIETAC Shanghai no longer had any authority to continue adjudicating the case in question or to render an arbitral award with respect thereto."

IV. CONCLUSION

[12] "The grounds for challenging enforcement as raised by the Party Filing to Challenge Enforcement are tenable and shall be upheld by the Court....

[13] "In view of the above, the Court hereby makes the following decision in accordance with Art. 137(2) no. (2) of the People's Republic of China Civil Procedure Law:

– The Court will not enforce the Arbitral Award China Trade Arbitration Shanghai No. 452 of 2012 in respect of which Applicant Jiangxi LDK Solar Hi-Tech Co., Ltd. filed for enforcement."

CROATIA

Succession: 26 July 1993
1st and 2nd Reservation

1. Vrhovni sud Republike Hrvatske [Supreme Court of the Republic of Croatia], 27 February 2006, No. Gž 5/04-2[1]

Parties:	Appellant/Claimant: T. T. G. i L., B. (Germany) Respondent/Defendant: M. d. d., Z. (nationality not indicated)
Published in:	Available online at <www.vsrh.hr>
Articles:	V(1)(*a*) (by implication)
Subject matters:	– arbitral institution ceased to exist – existence of arbitration agreement (no)
Topics:	¶ 507 (arbitral institution ceased to exist; no arbitration agreement for new arbitral institution)

Summary

The Court affirmed the lower court's decision denying enforcement of a Serbian award. The 1986 contract between the parties provided for arbitration at the Foreign Trade Court of Arbitration at the Federal Chamber of Commerce in Belgrade (FTCA Belgrade) – a 1990 Law replaced FTCA Belgrade with the Foreign Trade Court of Arbitration at the Chamber of Commerce of Yugoslavia (FTCA Yugoslavia 1990). This arbitral institution ceased to exist in respect of Croatia in 1992, when Croatia enacted a law providing that the 1990 Law establishing FTCA Yugoslavia 1990 no longer applied. As the award had been rendered by FTCA Yugoslavia 1992, an institution established by a 1992 Law, and the parties'

1. The General Editor wishes to thank Michael Wietzorek, Lawyer in Düsseldorf, for his invaluable assistance in providing this decision and translating it from the Croatian original.

arbitration clause did not provide for arbitration at that institution, enforcement should be denied for lack of a valid arbitration agreement.

On 30 May 1986,[2] T. T. G. i. L., B. (Appellant) and M. d. d., Z. (Respondent) entered into a contract. The contract incorporated the 1969 General Conditions for the Delivery of Goods between Organizations of the German Democratic Republic and the Socialist Federal Republic of Yugoslavia (the General Conditions), whose Art. 52 provided for arbitration of disputes at the Foreign Trade Court of Arbitration at the Federal Chamber of Commerce in Belgrade (FTAC Belgrade).

A dispute arose between the parties. In the meantime, following the initial stages of the dissolution of Yugoslavia, a Law of 1990 had replaced the FTCA Belgrade with the Foreign Trade Court of Arbitration at the Chamber of Commerce of Yugoslavia (FTCA Yugoslavia 1990). A Law of 1992 subsequently established a new Foreign Trade Court of Arbitration at the Chamber of Commerce of Yugoslavia (FTAC Yugoslavia 1992).

By an award rendered on 29 November 2002, an arbitral tribunal of the FTCA Yugoslavia 1992 found in favor of the present Appellant, which then sought enforcement of the award in Croatia.

On 8 October 2003, the Commercial Court in Zagreb denied the application, holding that recognition would be contrary to public policy because it would give effect to the decision of an arbitral institution which Croatia does not recognize, pursuant to the Decision of the Parliament of the Republic of Croatia of 8 October 1991 on the Breaking of State Law Connections with the Other Republics That Formed the Former Socialist Federal Republic of Yugoslavia.

The Supreme Court of Croatia dismissed the appeal from the Zagreb court's decision. It reasoned that the arbitration clause in the contract between the parties referred disputes to arbitration at the FTCA Belgrade – later the FTAC Yugoslavia 1990. Only this arbitral institution could render an award between the parties, or could have done so before 17 December 1991, when the Croatian Law on the Croatian Chamber of Commerce came into force. Pursuant to this Law, as from that date the Law on the Chamber of Commerce of Yugoslavia – which had established the FTAC Yugoslavia 1990 – no longer applied. After that date, the FTAC Yugoslavia 1990 could no longer render an award that could be recognized in Croatia. The award whose recognition was sought here was

2. This is the date repeatedly indicated in the decision. When summarizing Appellant's submissions, however, the Supreme Court also referred to presumably the same contract as concluded on 30 September 1986.

rendered on 29 November 2002. Further, the award was rendered by the FTAC Yugoslavia 1992. As there was no agreement between the parties to have their disputes settled by this institution, enforcement should be refused because of the lack of a valid arbitration agreement, as argued by Respondent.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345033-n>.

Excerpt

(….)
[1] "The appeal is not founded.
[2] "The first instance court applied the law correctly when it refused to recognize award No. T-87/90 of 29 November 2002 of the Foreign Trade Court of Arbitration of the Chamber of Commerce of Yugoslavia in Belgrade,[3] rendered in the dispute between [Appellant and Respondent].
[3] "In their contract No. … of 30 May 1986 – of which the General Conditions for the Delivery of Goods between Organizations of the German Democratic Republic and the Socialist Federal Republic of Yugoslavia [the General Conditions] form an integral part – the parties agreed, in Art. 52 of the said General Conditions, on the jurisdiction of the Foreign Trade Arbitration Court at the Federal Economic Chamber in Belgrade [FTAC Belgrade] for the settlement of disputes arising out of that contract.
[4] "The FTAC Belgrade is an institutional arbitration [court], established by the [1976] Law on the Association of Organizations of Associated Labor in General Associations and in the Yugoslav Chamber of Commerce (*Službeni list SFRJ* No. 54/76). Only this arbitration [court] – respectively the Foreign Trade Arbitration Court at the Chamber of Commerce of Yugoslavia, established by the [1990] Law on the Chamber of Commerce of Yugoslavia (*Službeni list SFRJ* No. 42/90) [FTAC Yugoslavia 1990] – could have rendered a legally valid award on the basis of the arbitration clause in Art. 52 of the General Conditions of contract No. … of 30 May 1986.
[5] "This institutional arbitration [court] (FTAC Belgrade, respectively FTAC Yugoslavia 1990) ceased to exist on 17 December 1991, when the Law on the Croatian Chamber of Commerce (*Narodne Novine* No. 66/91) came into force, which provides in its Art. 24 that from the day of coming into force of that Law, the [1990] Law on the Chamber of Commerce of Yugoslavia (*Službeni list SFRJ* No. 42/90) shall not be applied.
[6] "It follows from the above that the FTAC Belgrade, respectively the FTAC Yugoslavia 1990, could have rendered a valid arbitral award, with the legal force of a final and binding court decision, only until 17 December 1991.
[7] "This institutional arbitration [court] … did not render an award in this dispute before 17 December 1991. [Rather,] the award for which an application

3. The Foreign Trade Court of Arbitration of the Chamber of Commerce of Yugoslavia in Belgrade, established in 1992 by the Law on the Chamber of Commerce of Yugoslavia (*Službeni list SR Jugoslavije* No. 53/92).

for recognition was filed was rendered on 29 November 2002 by [the FTAC Yugoslavia 1992], established by the [1992] Law on the Chamber of Commerce of Yugoslavia (*Službeni list SR Jugoslavije* No. 53/92).

[8] "In the arbitration clause in Art. 52 of the General Conditions of contract No. … of 30 May 1986, there is no agreement on the jurisdiction of the FTAC Yugoslavia 1992, which has rendered the award No. T-87/90 of 29 November 2002 in question. This means that there is no arbitration agreement.

[9] "Art. 40(1) of the Law on Arbitration provides that a foreign arbitral award shall be recognized unless the court, upon a request by the opposing party, establishes one of the grounds in Art. 36(2)(1) [of this Law]. Art. 36(2)(1)(a) of the Law on Arbitration provides that an arbitral award may be set aside, respectively in this case, denied recognition, if no agreement to arbitrate was concluded at all or [such agreement] was not valid.

[10] "As [Respondent] has argued that no arbitration agreement was concluded, and the court has established that there is no arbitration agreement agreeing on the jurisdiction of the FTCA Yugoslavia 1992, which rendered the arbitral award in question, a refusal of the application for recognition was justified, based on Art. 40(1) together with Art. 36(2)(1)(a) of the Law on Arbitration.

[11] "This decision is based on Art. 49 of the Law on Arbitration[4] and Art. 368 Law on Adversary Proceedings."

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4. Art. 49 of the Croatian Law on Arbitration reads:

"*Decision on claims for recognition and enforcement*

1. While ruling on claims for recognition or enforcement, the court shall confine itself to determining whether the requirements referred to in Arts. 39, 40, 47 and 48 of this Law have been met, and if it considers it necessary, it may seek an explanation from the arbitral tribunal which rendered the award, from the parties, or from a court or a notary public or other person with which the award was deposited pursuant to an agreement referred to in Article 46, paragraph 1 of this Law.

2. The court shall provide an opportunity to the opposing party to be heard in the proceedings where recognition of the award is the main issue.

3. The court shall provide an opportunity to the opposing party to be heard with regard to a claim for enforcement on the basis of an award unless this would jeopardize the successful implementation of enforcement.

4. A decision on recognition and/or enforcement shall contain grounds for the decision.

5. An appeal against a decision rendered in the proceedings where recognition is the main issue may be submitted to the Supreme Court of the Republic of Croatia within fifteen days from the delivery of the decision on recognition."

CZECH REPUBLIC

Succession: 30 September 1993
1st Reservation

1. Nejvyšší Soud České Republiky [Supreme Court of the Czech Republic], 26 March 2001, Case No. 21 Cdo 753/2000[1]

Parties:	Claimant: F&G.A S.R. (Austria) Defendant: O.L., s.r.o. (Czech Republic)
Published in:	Available online at <www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/03C5FB6E08D249F0C1257A4E0066F5C2?openDocument&Highlight=0>
Articles:	V(1)(*c*)
Subject matter:	– excess of authority of arbitrators (no)
Topics:	¶ 512

Summary

The Court affirmed the lower court's decision enforcing an ICC award. It held that the rights and obligations under a license contract concluded by a state enterprise (including the arbitration clause contained in the contract) were transferred to the defendant when the defendant acquired the ownership right to the assets of the state enterprise in the context of a privatization. It was unnecessary that a separate transfer agreement be concluded in respect of the industrial and other intellectual property rights under the license contract. Hence, the ICC arbitrators did not decide, as alleged by the defendant, on a matter falling outside the scope of the arbitration agreement.

1. The General Editor wishes to thank JUDr. Monika Feigerlová, PhD, LL.M., advokát, Prague, for her invaluable assistance in providing this decision and translating it from the Czech original.

By a license contract of 25 February 1991, F&G.A S.R. (F&G.A) licensed the intellectual property rights relating to certain inventions to O.L., s.p.L., CSFR, a Czechoslovak state enterprise (the state enterprise). The license contract contained a clause for ICC arbitration of disputes.

Subsequent to the conclusion of the license contract, Czech state enterprises underwent a process of privatization; on 5 January 1994, O.L., s.r.o. (O.L.), a privately owned Czech company, purchased part of the assets of the state enterprise from the National Property Fund of the Czech Republic. By six contracts of 4 February 1994, the state enterprise transferred all patents owned by the state enterprise to O.L. On 3 April 1998, the state enterprise was dissolved and its assets were transferred by way of a merger to its legal successor K., s.p., also a Czech company.

A dispute arose between F&G.A, K., s.p. and O.L. regarding certain alleged breaches of the license contract. F&G.A submitted the dispute to ICC arbitration in Paris as provided for in the license contract. On 8 July 1998, an award was made in favor of F&G.A, which then sought enforcement in the Czech Republic.

On 30 March 1999, a Czech district court granted leave to enforce the ICC award, holding that F&G.A. complied with the formal conditions for seeking recognition and enforcement under the 1958 New York Convention. A court of appeal affirmed the enforcement decision. O.L. lodged an extraordinary appeal on a point of law with the Supreme Court of the Czech Republic, arguing that the merits courts failed to recognize that the ICC award dealt with a dispute not contemplated by the arbitration agreement.

The Supreme Court dismissed the appeal. O.L. contended that the arbitration agreement only concerned disputes relating to rights arising from the license contract. No such rights – it alleged – had been transferred to O.L., because the Czech Act on the Conditions of the Transfer of National Property to Other Persons provides that industrial and other intellectual property rights are transferred to the privately owned company through an agreement the privately owned company concludes with the entity being privatized. In the present case, O.L. did not conclude such agreement with the state enterprise, nor was it a signatory to the license contract; hence, the ICC arbitral tribunal decided a dispute falling outside the scope of the arbitration agreement within the meaning of Art. V(1)(*c*) of the 1958 New York Convention.

The Supreme Court disagreed, holding that in the privatization process, the rights and obligations arising from a license contract are transferred to the privately owned entity together with the ownership right to the privatized assets. In the case at hand, O.L. acquired the ownership right to the movable and immovable property of the state enterprise, together with all rights, obligations

and receivables arising from the state enterprise's business activities in respect of commercial, civil, administrative and labor law matters; hence, it also assumed the rights and obligations arising from the license contract concluded by the state enterprise with F&G.A on 25 February 1991, including the rights and obligations arising from the arbitration agreement, which was part of the license contract.[2]

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345034-n>.

2. See also the decision in a case involving the same claimant reported in this Volume XXXVIII (2013) at pp. 363-364 (Czech Republic no. 2).

Excerpt

[1] "[O.L.] contests the decision of the appellate court, alleging that the appellate court applied Act No. 97/1963 Coll. and the 1958 New York Convention wrongly and that it dealt incorrectly with [O.L.'s] objection that no rights arising from the license contract dated 25 February 1991 had been transferred to [O.L.]. As a result, the International Arbitration Court in Paris had no jurisdiction over the dispute. In [O.L.'s] view, the purpose of the license contract is the transfer of rights to use certain industrial property. According to Art.1.2 of the license contract, the acquirer acquires the right to use certain industrial property. As such right is obviously an industrial property right or an intellectual property right, it falls under the scope of Sect. 16 of Act No. 92/1991 Coll., on the Conditions of the Transfer of National Property to Other Persons. Given the fact that [O.L.] was not a party to the license contract and no rights arising from the license contract had ever been transferred to it after the conclusion of the license contract, there was no jurisdiction of the International Arbitration Court in Paris over the dispute between O.L. and F&G.A.

(....)

[2] "[T]he Supreme Court finds that the appeal on a point of law is groundless.

(....)

[3] "[T]he Supreme Court disagrees with [O.L.'s] objection that no rights arising from the license contract of 25 February 1991 had been transferred to [O.L.] after the conclusion of the license contract and that the International Arbitration Court in Paris whose arbitral award of 8 July 1998 was the object of the enforcement proceedings had no jurisdiction over the dispute.

[4] "In the case at hand, [F&G.A] demands the enforcement of the arbitral award issued on 8 July 1998 by the International Arbitration Court, International Chamber of Commerce in Paris under case no. 8789/JK. Since this is an arbitral award issued in a foreign state, and since the license contract containing the agreement that all disputes arising out of the license contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris by one or more arbitrators appointed in accordance with the said Rules (the arbitration clause) was concluded on 25 February 1991, Act No. 98/1963 Coll., on Arbitration in International Commerce and Enforcement of Arbitral Awards must be applied (see Sect. 48 of Act No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards).

[5] "In accordance with Sect. 35 of Act No. 98/1963 Coll., on Arbitration in International Commerce and Enforcement of Arbitral Awards, the provisions of

the Act shall apply only if a binding international treaty does not provide otherwise.

[6] "[T]he 1958 New York Convention entered into force for the Czechoslovak Republic on 10 October 1959 and was published under Regulation of the Ministry of Foreign Affairs No. 74/1959 Coll.... Subsequently, the Convention became part of the legal order of the Czech Republic (see Sect. 1 of Constitutional Act No. 4/1993 Coll., on Measures Related to the Dissolution of the Czech and Slovak Federative Republic). As the 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 (first sentence of Art. I(1) of the Convention), the Convention applies to the case at hand in accordance with Sect. 35 of the Act No. 98/1963 Coll.

[7] "[O.L.] claims that the arbitral award deals with a dispute not contemplated by the arbitration agreement.

[8] "In accordance with Art. V(1) of the Convention, the 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 are sought, proof that.... [Quotation of Art. V(1) Convention omitted.]

[9] "For the assessment of the case it is important to ascertain whether [O.L.] (or its legal predecessor) concluded the arbitration agreement and whether the rights and obligations arising from the concluded arbitration agreement were transferred to [O.L.].

[10] "The license contract, including Art. 12 containing the arbitration agreement, was concluded between [the state enterprise] (as the licensee) and F&G.A (as the licensor) on 25 February 1991.

(....)

[11] "The Supreme Court disagrees with [O.L.'s] opinion that the transfer of rights and obligations arising from the license contract falls under the scope of Sect. 16 of the Act No. 92/1991 Coll., on the Conditions of the Transfer of National Property to Other Persons.

[12] "In accordance with Sect. 15(1) of Act No. 92/1991 Coll., on the Conditions of the Transfer of National Property to Other Persons, the acquirer of an asset in the privatization process acquires the ownership right to the privatized assets together with all rights and obligations relating to the privatized asset. In accordance with Sect. 16 of the Act No. 92/1991 Coll., on the Conditions of the Transfer of National Property to Other Persons, industrial property rights and other intellectual property rights are transferred to the

acquirer based on an agreement concluded between the acquirer and [the privatized entity].

[13] "Act No. 527/1990 Coll., No. 527/1990 Coll. on Inventions and Rationalization Proposals, as follows from amendments implemented by Act No. 519/1991 Coll. (that is, in the wording valid as on 5 January 1994 when the purchase contract between the National Property Fund of the Czech Republic and [O.L.] was concluded) distinguishes between the inventor, the applicant and the owner of the patent. The inventor is the person who has made the invention by means of his own creative work (see Sect. 8(2) of the Act on Inventions and Rationalization Proposals). The applicant is the person who files an invention application with the Industrial Property Office (see Sect. 24 of the Act on Inventions and Rationalization Proposals). The patent owner is the applicant to whom the Industrial Property Office granted a patent in the sense of Sect. 34(3) of the Act on Inventions and Rationalization Proposals. The patent owner has the exclusive right to use the invention, to authorize others to use the invention or to assign the patent to others (Sect. 11(1) of the Act on Inventions and Rationalization Proposals). The patent owner has absolute rights to the patent as set out by the Act on Inventions and Rationalization Proposals and as registered with the Industrial Property Office. The patent owner's rights include the right to provide a license, i.e. to authorize the exploitation of an invention protected by a patent based on a written (license) contract (Sect. 14(1) of the Act on Inventions and Rationalization Proposals).

[14] "Under an industrial property license contract, the licensor authorizes the licensee to exercise (intangible) industrial property rights to an agreed extent and within an agreed territory, and the licensee undertakes to provide monetary or other material values (payment in kind) in return (see Sect. 511(1)-(2) of the Commercial Code). The licensee, thus, possesses only relative rights relating to the patent and is only entitled to use the patent in accordance with the terms of the license contract. This means that Sect. 16 of Act No. 92/1991 Coll., on the Conditions of the Transfer of National Property to Other Persons, does not apply to rights arising from the license contract because such rights do not represent industrial property rights or other intellectual property rights. Only rights of the patent owner listed in Sect. 11(1) of the Act on Inventions and Rationalization Proposals qualify as industrial property rights.

[15] "As a result, in the privatization process the rights and obligations of the licensee are transferred to the acquirer together with the ownership right to the privatized assets in accordance with Sect. 15 of Act No. 92/1991 Coll., on the Conditions of the Transfer of National Property to Other Persons.

[16] "This conclusion is supported by the fact that [the state enterprise] and O.L. concluded six separate contracts on 4 February 1994. Based on the six contracts, relevant patents, patent applications and all rights and obligations relating to the patents, more specifically to the inventions were transferred from [the state enterprise] to [O.L.].

[17] "If, based on Art. IX of the purchase agreement and Sect. 15 of Act No. 92/1991 Coll., [O.L.] acquired the ownership right to the movable and immovable property together with all rights, obligations and receivables arising from the business activities [of the privatized entity] in respect of commercial, civil, administrative and labor matters, then [O.L.] must have also assumed rights and obligations arising from the license contract concluded on 25 February 1991, including rights and obligations arising from the arbitration agreement (forming part of the license contract).

[18] "[O.L.'s] objection that the arbitral award deals with a dispute not contemplated by the arbitration agreement (Art. V(1)(*c*) of the 1958 New York Convention) is, thus, incorrect.

[19] "As follows from the above, after having examined the invoked grounds of appeal, the decision of the Court of Appeal is correct.... [T]he Supreme Court refuses the application in accordance with Sect. 243b(1), the first part of the sentence before the semi-colon, of the Code of Civil Procedure."

(....)

2. Nejvyšší Soud České Republiky [Supreme Court of the Czech Republic], 29 March 2001, No. 21 Cdo 1511/2000[1]

Parties:	Claimant: F&G.A S.R. (Austria) Defendant: K, s.p. (Czech Republic)
Published in:	Available online at <www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/45E850D1CC282739C1257A4E006584E0?openDocument&Highlight=0>
Articles:	III; V(2)(*b*)
Subject matter:	– review of merits of award (no)
Topics:	¶ 502; [10] = ¶ 301

Summary

The Court affirmed the lower court's decisions granting enforcement of an ICC award, finding that the defendant's public policy objection sought in reality a review of the merits of the award, which is not allowed in the enforcement proceedings.

By a license contract of 25 February 1991, F&G.A S.R. (F&G.A) licensed the intellectual property rights relating to certain inventions to O.L., s.p. L., CSFR, a Czechoslovak state enterprise (the state enterprise). The contract contained a clause for ICC arbitration of disputes.

On 5 January 1994, O.L., s.r.o. (O.L.), a privately owned Czech company, purchased part of the assets of the state enterprise from the National Property Fund of the Czech Republic. On 3 April 1998, the state enterprise was dissolved and all its remaining assets, rights and obligations were transferred by way of a merger to its legal successor K., s.p. (K).

A dispute arose between the parties regarding certain alleged breaches of the license contract. The dispute was submitted to ICC arbitration in accordance with the arbitration clause in the contract. On 8 July 1998, a sole arbitrator

1. The General Editor wishes to thank JUDr. Monika Feigerlová, PhD, LL.M., advokát, Prague, for her invaluable assistance in providing this decision and translating it from the Czech original.

rendered an award in favor of F&G.A. F&G.A sought enforcement of the ICC award in the Czech Republic.

On 30 March 1999, a district court granted leave of enforcement, holding that F&G.A complied with the formal conditions for seeking recognition and enforcement under the 1958 New York Convention. This decision was affirmed by a court of appeal. K then lodged an extraordinary appeal on a point of law with the Supreme Court of the Czech Republic.

By the present decision, the Supreme Court dismissed the appeal. K argued that enforcement of the ICC award would violate public policy because the arbitrator erred in applying Austrian, rather than Czech, law to the guarantee of its predecessor for O.L's performance under the license contract.

The Court held that this objection aimed in fact at a review of the merits of the award, did not relate to public policy and could not be dealt with by the enforcement court.[2]

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345035-n>.

2. See also the decision in a case involving the same claimant reported in this Volume XXXVIII (2013) at pp. 360-362 (Czech Republic no. 1).

Excerpt

(….)

[1] "K contests the decision of the appellate court, pointing out that the appellate court applied Sect. 36 of Act no. 97/1963 Coll. wrongly and dealt incorrectly with [K's] objection that the award whose enforcement is sought violates Czech public policy. As a result, the enforcement of the award in respect of [K] should have been denied in accordance with Art. V(2)(*b*) of the [1958 New York Convention] (regulation no. 74/1959 Coll.).

[2] "[K] confirms that based on the arbitral award (the legal predecessor of) [K] was jointly and severally liable, together with O.L., as the second defendant, for the breach of the license contract dated 25 February 1991. [K] further confirms that the contractual parties agreed in accordance with Sect. 9(1) of Act no. 97/1963 Coll. that Austrian law would govern the license contract. [K] alleges that all the rights and obligations arising from the license contract dated 25 February 1991 were transferred to O.L. in the context of the privatization process.

[3] "[K] further claims that the arbitrator arrived at the wrong conclusion in the arbitral award when ruling that Austrian law also governed the guarantee given by [the state enterprise] for the fulfillment of the obligations arising from the license contract which the other contractual party (O.L.) breached. [K] maintains that this amounts to a violation of Czech public policy because [K] could not influence the performance of the license contract [by O.L.] after the privatized assets were assumed by [O.L.], as O.L. became an entity independent of [K]. Moreover, the Austrian company knew about the transfer of the rights and obligations to the new contractual party, with which it conducted all meetings regarding the license contract. [K] asserts that the legal relationship between [K] and O.L. is a pure domestic relationship between Czech companies which must be governed by Czech law. It is impossible that such a relationship be governed by Austrian law. As a result, the award of the ICC Court of Arbitration in Paris cannot be deemed to be enforceable against [K]….

[4] "The Supreme Court finds that this appeal on a point of law is groundless….

[5] "In the case at hand, [F&G.A] demands the enforcement of the arbitral award issued on 8 July 1998 by the International Arbitration Court, International Chamber of Commerce in Paris under file no. 8789/JK. Since this is an arbitral award issued in a foreign state, and since the license contract containing the agreement that all disputes arising out of the license contract shall be finally settled under the Rules of Conciliation and Arbitration of the International

Chamber of Commerce in Paris by one or more arbitrators appointed in accordance with the said Rules (the arbitration clause) was concluded on 25 February 1991, the Act No. 98/1963 Coll., on Arbitration in International Commerce and Enforcement of Arbitral Awards must be applied (see Sect. 48 of Act No. 216/1994 Coll., On Arbitration and the Enforcement of Arbitral Awards).

[6] "In accordance with Sect. 35 of Act No. 98/1963 Coll., on Arbitration in International Commerce and Enforcement of Arbitral Awards, the provisions of the Act shall apply only if a binding international treaty does not provide otherwise.

[7] "…. The 1958 New York Convention entered into force for the Czechoslovak Republic on 10 October 1959 and was published under Regulation of the Ministry of Foreign Affairs No. 74/1959 Coll.… Subsequently, the Convention became part of the legal order of the Czech Republic (see Sect. 1 of Constitutional Act No. 4/1993 Coll., on Measures Related to the Dissolution of the Czech and Slovak Federative Republic). As the 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 (first sentence of Art. I(1) of the Convention), the Convention applies to the case at hand in accordance with Sect. 35 of Act No. 98/1963 Coll.

[8] "The Supreme Court disagrees with [K]'s objection that the appellate court applied Act no. 97/1963 Coll. incorrectly because 'the relationship between [K] and O.L. was a relationship between Czech companies and as such had to be governed by the Czech law'.

[9] "In accordance with Sect. 36 [Public Policy] of Act No. 97/1963 Coll., on Private International Law, as amended, the legal regulations of a foreign state may not be applied if the effects of such an application are contrary to those principles of the social and governmental system of the Czech Republic and its laws, whose observance must be required without exception.

[10] "In accordance with the first sentence of Art. III of the New York Convention, 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 (Arts. IV and V).

[11] "In the case at hand, neither the appellate court nor the court of the first instance applied either Sect. 36 (or any other provision) of Act no. 97/1963 Coll., on Private International Law, as amended, or any foreign law. Both courts rightly applied to the recognition and enforcement of the arbitral award an

international treaty (the New York Convention), which … is part of the Czech legal system, and Sect. 251 et seq. of the Code of Civil Procedure (see the first sentence of Art. III of the New York Convention), that is, the Czech legal rules.
[12] "The applicant disregards the fact that the courts did not review the substantive relationship between [K] and O.L., but merely reviewed whether the title for enforcement (arbitral award no. 8798/JK dated 8 July 1998) issued by a foreign body could be enforced in the Czech Republic.
[13] "Given the above, neither the Court of Appeal nor the District Court applied in the enforcement proceedings legal regulations of a foreign state (including Austrian law). The objection of the 'incorrect use of Act No. 97/1963 Coll.'and the 'application of Austrian law' is, therefore, not justified.
[14] "In accordance with Art. V(2)(*b*) of the Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement are sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country.…
[15] "When deciding on the motion for judicial enforcement of a decision on monetary compensation, the court reviews – within the scope of the substantive review – whether the decision (or another appropriate legal title) whose enforcement is sought was issued by a competent body; whether the decision is materially and formally enforceable; whether the entitled party and the obligated party have standing; whether enforcement is sought to an extent sufficient for the satisfaction of the entitled party's claim; whether another enforcement method, either ordered or proposed, suffices for the satisfaction of the entitled party's claim; whether the right to enforcement did not expire; and whether the proposed method of enforcement of the decision appears to be inappropriate.
[16] "In the enforcement proceedings the court is not authorized to review the material correctness of the decision or of another legal title whose enforcement is being sought. The content of the decision (or of another legal title) whose enforcement is sought – that is, the ruling [dictum] – is binding upon the court and the court is obliged to follow it.
[17] "In reality [K] does not challenge the requirements for the enforcement of an award (which can be the only subject of our review) but rather the correctness of the merits of the award, when it objects

(i) that the arbitral award violates the public policy of the Czech Republic on the ground that the arbitrator concluded in the reasoning of the award that 'the guarantee of [the state enterprise] for the fulfillment of the obligations arising from the license contract which the other contracting party (O.L.) had breached

would be also governed by the Austrian law', even though '[K] could not have possibly influenced the performance of the license contract by the new contracting party after the transfer of the privatized assets' and in the situation where 'the Austrian party knew about the transfer of the rights and obligations to a new contracting party and conducted with it meetings regarding the license contract'; and
(ii) that for this reason the enforcement of the arbitral award should have been denied against [K] in accordance with Art. V(2)(*b*) of the New York Convention).

[18] "Such a question – as rightly stated by the appellate court – does not relate to the public policy of the Czech Republic and the court is not entitled to deal with it in the proceedings on an order for enforcement."
(….)

3. Nejvyšší Soud České Republiky [Supreme Court of the Czech Republic], 28 January 2004, Case No. 20 Cdo 456/2003[1]

Parties:	Claimant: Ch. N.M.T.C. (PR China) Defendant: S., a.s. (Czech Republic)
Published in:	Available online at <www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/C78577A0DA238476C1257A4E00653E2B?openDocument&Highlight=0>
Articles:	III; V (in general)
Subject matters:	– petition for enforcement v. petition for execution of award – grounds for refusal of enforcement to be raised in opposition to execution
Topics:	¶ 301 + ¶ 500

Summary

The question whether the arbitrators applied the wrong (substantive) law to the dispute is irrelevant at the stage of the proceedings for leave of enforcement, where the court examines only whether the requirements for seeking enforcement are met (Art. IV of the 1958 New York Convention) and, ex officio, the grounds listed in Art. V(2). The defendant may raise the grounds listed in Art. V(1) of the Convention – which it has the burden to prove – at the later stage of the proceedings for the discontinuance of execution. The objection that the arbitral tribunal applied the wrong law can only be raised at that second stage, "if at all possible" under Art. V(1) of the Convention.

On 15 December 1994, Ch. N.M.T.C., as the buyer, and S., a.s., as the seller, entered into a sale and purchase contract. The contract provided for arbitration of disputes at the Foreign Trade Arbitration Commission Attached to the China Council for the Promotion of International Trade (which subsequently became the China International Economic and Trade Arbitration Commission –

1. The General Editor wishes to thank JUDr. Monika Feigerlová, PhD, LL.M., advokát, Prague, for her invaluable assistance in providing this decision and translating it from the Czech original.

CIETAC). The arbitration clause provided that arbitration may take place in a third country, and specifically in Stockholm, by agreement of the parties.

A dispute arose between the parties. When no agreement could be reached on ad hoc rather than institutional arbitration in Stockholm, proceedings were held before the CIETAC. By an award of 1 June 1999, a CIETAC arbitral tribunal found in favor of Ch. N.M.T.C. and against S., a.s. in the amount of US$ 115,964.

On 22 April 2004, a Czech district court granted leave to enforce the Chinese award in the Czech Republic. This decision was affirmed by a court of appeal, which found that Ch. N.M.T.C. (Claimant) complied with the formal conditions for seeking recognition and enforcement of an arbitral award set by Art. IV of the 1958 New York Convention, by submitting a duly certified copy of the arbitral award and a duly certified copy of the arbitration agreement. S., a.s. (Defendant) lodged an extraordinary appeal on a point of law with the Supreme Court of the Czech Republic.

By the present decision, the Supreme Court dismissed the appeal. Defendant contended that the arbitrators erroneously applied Chinese, rather than Czech law to the merits of the dispute. As no governing law was stipulated in the contract, according to Czech private international law Czech law should have been applied, being the law of the seat of the seller at the time of the conclusion of the contract.

The Supreme Court held that the question whether the arbitrators applied the wrong (substantive) law is irrelevant in the context of proceedings for leave of enforcement, in which the court examines, on the basis of documents and without a hearing, only whether the requirements for seeking enforcement are met and, ex officio, the grounds listed in Art. V(2)(*a*)-(*b*) of the 1958 New York Convention. As the burden of proving the grounds listed in Art. V(1)(*a*)-(*e*) of the Convention is on the defendant, these grounds can be raised in the subsequent proceedings for discontinuance of execution. Hence, an objection that the arbitral tribunal applied the wrong law can only be raised in these latter proceedings, "if it is at all possible to submit such objection under Art. V(1) of the Convention".

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345036-n>.

Excerpt

(….)
[1] "[Defendant] contests the decision of the appellate court on the grounds that the [enforcement] proceedings were affected by errors that resulted in an erroneous decision on the merits; the decision was based on facts lacking support in relevant evidence; the decision was based on a wrong assessment of the matter as to the points of law.…
[2] "In [Defendant's] opinion, based on the review of the arbitration clause contained in the contract dated 15 December 1994, the appellate court should have come to the conclusion that the parties' intention was to submit the dispute to arbitration proceedings in Stockholm – however, not to the arbitration institution (the Arbitration Institute of the Stockholm Chamber of Commerce) but rather to ad hoc arbitration. The appellate court omitted to verify the connection between the arbitration body that issued the arbitral award and the arbitration body named in the arbitration clause.
[3] "[Defendant] further argues (invoking the ground of appeal set out in Sect. 241a(2)(b) of the Code of Civil Procedure) that the arbitral award was issued based on the application of Chinese law, although the contract had not stipulated the governing law. Such a case needs to be assessed in accordance with Sect. 10(2)(a) of the Act on 97/1963 Coll., on Private International Law, as amended, in favor of Czech law. The law of the seat of the seller at the time of the conclusion of the contract, thus Czech law, needs to be applied. [Defendant] demands that the decisions of the District Court and the Court of Appeal be annulled and the matter remanded to the District Court for further proceedings.
(….)
[4] "The Supreme Court finds that the appeal on a point of law is inadmissible.
(….)
[5] "An objection of incorrect use of (substantive) law by the arbitration body during the hearing and decision-making of the dispute arising from contract no. 94 LQCZA/12 X042CS executed by the parties on 15 February 1994 involves a question which is irrelevant in the context of the proceedings preceding the enforcement order.
[6] "An international treaty which is binding on the Czech Republic (here, the 1958 New York Convention) has priority over the provisions of Act No. 98/1963 Coll., on Arbitration in International Commerce and Enforcement of Arbitral Awards (see Sect. 35).
[7] "In accordance with Art. IV of the Convention, the party applying for recognition and enforcement shall supply to the court at the time of the

application the duly authenticated original award or a duly certified copy thereof and the original agreement referred to in Art. II (i.e., an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams) or a duly certified copy thereof (sub-section 1). 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 (Sub-sect. 2).

[8] "In accordance with Art. V(1) of the Convention, the 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 are sought, proof that.... [Quotation of Art. V(1) omitted.] In accordance with Art. V(2) of the Convention, 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.... [Quotation of Art. V(2) omitted.]

[9] "In enforcement proceedings – in which the court of the first instance as well as the appellate court do not need to order a hearing (see Sect. 52(1) of Act No. 120/2001 Coll., Sects. 253(2) and 214(2)(c) of the Code of Civil Procedure) – the court examines the requirements for allowing the petition seeking an order of enforcement solely based on the documents, without taking evidence. It follows from the above that when considering whether to enforce a foreign arbitral award (Sect. 40(1)(c) of Act No. 120/2001 Coll.) the court examines ex officio only the grounds listed in Art. V(2)(*a*) and (*b*) of the Convention. As the burden of proving the existence of the obstacles to recognition and enforcement specified in Art. V(1)(*a*)-(*e*) of the Convention is on the defendant, the focus of their invocation lies in the proceedings on discontinuance of execution (Sect. 55(1) of Act No. 120/2001 Coll., Sect. 268(1)(h) of the Code of Civil Procedure). An objection that the arbitration body applied a different law when deciding the dispute (in the dispute at hand Chinese law instead of Czech law) could only be of importance in the proceedings on discontinuance of execution, if it is at all possible to submit such objection under Art. V(1) of the Convention.

[10] "As the decision of the Appellate Court (or more precisely the question the solution of which the requesting party challenged) is not of fundamental importance on points of law within the meaning of Sect. 237(1)(c) of the Code of Civil Procedure and other grounds for the admissibility of the extraordinary appeal on a point of law were excluded above, the Supreme Court dismisses the

application (first sentence of Sect. 243b(5), and Sect. 218(c)) without a hearing (first sentence of Sect. 243a(1))."
(….)

4. Ústavní Soud České Republiky [Constitutional Court of the Czech Republic], 17 January 2006, Case No. IV. ÚS 467/05[1]

Parties:	Claimant: Frontier Petroleum Services Ltd (Canada) Defendant: Letecke Zavody, a.s. (Czech Republic)
Published in:	Available online at <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=50737&pos=3&cnt=4&typ=result>
Articles:	V(2)(*b*)
Subject matter:	– public policy and bankrupt award debtor
Topics:	¶ 524 (bankruptcy)

Summary

The Constitutional Court held that the district court's decision to deny enforcement of an award against a bankrupt company did not violate the claimant's constitutional rights. The Court noted that the 1958 New York Convention, on which the claimant relied, provides that enforcement may be denied on grounds of public policy.

On 31 July 2001, Frontier Petroleum Services Ltd (Frontier Petroleum) and Moravan – Aeroplanes a.s. (Moravan) concluded a Unanimous Shareholder Agreement (USA) for the establishment of a joint venture in the aviation industry. The USA provided that Frontier Petroleum grant a loan to Moravan, and that Moravan (i) buy shares in LET a.s. (LET), a Czech company owning certain aviation assets; (ii) contribute the LET shares to Letecke Zavody, a.s. (Letecke Zavody), a newly established company; and (iii) transfer 49 percent of the shares in Letecke Zavody to Frontier Petroleum. Moravan was also to grant security interest in Moravan's property to Frontier Petroleum as a security for the loan.

1. The General Editor wishes to thank JUDr. Monika Feigerlová, PhD, LL.M., advokát, Prague, for her invaluable assistance in providing this decision and translating it from the Czech original.

Moravan allegedly failed to perform under the USA. On 30 March 2004, Letecke Zavody was declared bankrupt. Frontier Petroleum registered its claims arising from the USA in the bankruptcy proceedings and commenced arbitration proceedings in Stockholm against both Letecke Zavody and Moravan. While the arbitration was pending, on 18 June 2004, Moravan was also declared bankrupt.

On 30 December 2004, an arbitral tribunal rendered an award holding that Frontier Petroleum, as a secured creditor, had priority right to the assets of LET and Moravan, and directing the bankruptcy trustees of both bankrupt companies – Letecke Zavody and Moravan – to establish a security interest in favor of Frontier Petroleum upon issuance of the arbitral award.

When the bankruptcy trustees refused to conclude the relevant pledge agreements in its favor, Frontier Petroleum seized a Czech district court with a request to order the bankruptcy trustees to fulfill the obligations arising from the final arbitral award. The court rejected the application, holding that the arbitral award was contrary to Czech bankruptcy law and enforcement should therefore be denied on grounds of public policy within the meaning of the Czech Arbitration Act. Frontier Petroleum filed an appeal with the Constitutional Court of the Czech Republic, arguing that the lower court's decision violated its right to due process and fundamental rights and basic freedoms.

The Constitutional Court of the Czech Republic denied Frontier Petroleum's appeal, finding that the constitutional complaint was unfounded. The district court correctly held that the Swedish award could not be recognized and enforced on grounds of public policy because it imposed a performance which was legally impossible or illegal under Czech law. The 1958 New York Convention, on which Frontier Petroleum relied, provides that recognition and enforcement of an arbitral award may be refused if recognition or enforcement would be contrary to the public policy of the forum state.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345037-n>.

Excerpt

[1] "[Frontier Petroleum] argues that the decision of the District Court violates Art. III of [the 1958 New York Convention] (published as a Regulation of the Ministry of Foreign Affairs under no. 74/1959 Coll.). According to Art. III of the New York Convention, 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. Frontier Petroleum further invokes the Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments concluded on 15 November 1990 and published as Regulation no. 333/1992 (the Canada-CSFR BIT).

(....)

[2] "In its submission, the District Court states that the arbitral award cannot be recognized and enforced because the satisfaction of [Frontier Petroleum's] claim [as granted in the award] would be contrary to Act No. 328/1991 Coll., and would impair creditors' rights.

(....)

[3] "The bankruptcy trustee ... fully agrees with the ruling as well as with the reasoning of the challenged decision of the District Court. The bankruptcy trustee submits that the arbitral award violates the Czech Constitution (Sect. 96(1)), the Charter of Fundamental Rights and Basic Freedoms (Sects. 37(3) and 38(1)), the 1958 New York Convention, the principle of equal treatment of participants to contract law relationships and the principle of autonomy of will. The debtor (Letecke Zavody) was considered a participant in the arbitration proceedings even though the debtor had never become a party to the Unanimous Shareholder Agreement. Therefore, the jurisdiction of the arbitral tribunal was established and Canadian law was applied against the debtor's will. The participation of the debtor in the arbitration proceedings was established in violation of the above-mentioned provisions of the Charter, thereby removing the debtor against its will from the jurisdiction of the lawful judge.

(....)

[4] "The Constitutional Court states that it already decided a similar matter in respect of the same petitioner (same facts save for the entity of the debtor) in ruling ref. no. I. ÚS 448/05 dated 20 December 2005. The Constitutional Court finds no reason to depart from the reasoning given in that ruling.

[5] "As repeated in a number of its rulings, the Constitutional Court is the judicial body responsible for the protection of constitutionality (Art. 83 of the Constitution). The Constitutional Court is not part of the system of ordinary

courts. Its functions do not include the supervision of the decision-making practice of the ordinary courts. With respect to the decisions of the ordinary courts, the Constitutional Court has jurisdiction only over constitutional complaints against final court decisions infringing petitioner's constitutionally guaranteed fundamental rights and basic freedoms. As the petitioner alleged violation of its right to due process and demanded protection of fundamental rights and basic freedoms, the Constitutional Court reviewed the challenged decision.... The Constitutional Court finds that the constitutional complaint is manifestly unfounded.

[6] "The Constitutional Court states that the District Court issued the challenged decision within its supervisory powers in accordance with Sect. 12 of the Bankruptcy Act No. 328/1991 Coll. The purpose of the court's supervisory activity is to ensure due conduct of the bankruptcy proceedings and compliance with the rules by all participants in the bankruptcy proceedings. When deciding, the District Court applied Sects. 31(f) and 39(b) of the Arbitration Act No. 216/1994 Coll. According to these provisions, the recognition and enforcement of a foreign arbitral award shall be denied, if, among others, the award imposes a performance which is (legally) impossible or illegal under Czech law.

[7] "The decision of the District Court did not affect the monetary claim awarded to the petitioner (Frontier Petroleum) against the debtor (Letecke Zavody) in the arbitral award. Consequently, the challenged decision neither violates the 1958 New York Convention nor the Canada-CSFR BIT.

[8] "In accordance with Art. III of the 1958 New York Convention, 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. The Convention further provides for the grounds for refusal of the recognition and enforcement of the award. According to Art. V(2)(*b*), the recognition and enforcement of an arbitral award may be refused if the recognition or enforcement of such award would be contrary to the public policy of the relevant country.

[9] "As regards the Canada-CSFR BIT, the Constitutional Court states that the Agreement was concluded for the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party and that it contains no provision concerning decisions of ordinary courts.

[10] "None of these documents protects the petitioner from business risk. In the Constitutional Court's view, the petitioner is responsible for choosing his business partners, the contracts he decides to enter into and the obligations he decides to undertake.

[11] "As to the petitioner's alleged breach of the above provisions of the Constitution, the Charter and the International Covenant on Civil and Political Rights, the Constitutional Court states that these documents guarantee the right to have a case decided before a court, the right to a fair trial and the right to due process. No breach of the above rights as asserted by the petitioner was found.
(….)
[12] "Without holding an oral hearing and without the parties being present, the Constitutional Court rejects the petition as manifestly unfounded."
(….)

5. Ústavní Soud České Republiky [Constitutional Court of the Czech Republic], 10 May 2010, Case No IV. ÚS 189/10[1]

Parties:	Appellant/Defendant: Not indicated Appellee/Claimant: Not indicated
Published in:	Available online at <www.nalus.usoud.cz>; English excerpt in Czech (& Central European) Yearbook of Arbitration, Volume III (2013) pp. 149-151
Articles:	V(2)(*b*)
Subject matter:	– narrow concept of public policy
Topics:	¶ 518

Summary

The Court affirmed the decision of a lower court granting enforcement of an LCIA award, finding that none of the objections raised by the defendant constituted a violation of public policy within the narrow meaning of this concept in the context of the enforcement of a foreign arbitral award.

The claimant sought enforcement of an LCIA arbitral award in the Czech Republic and obtained an order of execution from a district court. The defendant appealed.

By the present decision, the Constitutional Court affirmed the decision of the lower court. The Court stated at the outset that the courts of the state where enforcement is sought may review a foreign award for compliance with the state's fundamental principles of law, such as the right to due process. However, public policy must be given a narrow interpretation in this context: a mere difference in the procedural laws of a foreign arbitral tribunal and the enforcement state do not lead to a public policy violation.

1. The General Editor wishes to thank Prof. Alexander Belohlavek, Law Offices Belohlavek, Prague, for his invaluable assistance in providing this decision and translating it from the Czech original.

The appellant argued that the LCIA award was neither final nor enforceable; that it lacked reasons; that it was not stamped with a confirmation that it was binding and enforceable; that its delivery by a messenger service could not be deemed proper delivery under the Czech Code of Civil Procedure; that it was contrary to public policy because of the excessive cost of the arbitration proceedings to be paid by the appellant; and that it was unacceptable that the applicant should share the costs for the disqualification of an arbitrator whom the applicant did not challenge.

The Constitutional Court found that none of these grounds constituted a violation of the appellant's right to a fair trial. As a consequence, enforcement of the LCIA award would not violate public policy.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345038-n>.

Excerpt

[1] "The state of recognition is allowed to review the arbitral award from the perspective of compliance of its effects with the fundamental principles of the state's law.

[2] "Due to the absence of any uniform and internationally recognized definition of public policy, the term must be interpreted consistently with jurisprudence and practice in the particular country of recognition and enforcement. Generally, a conflict with public policy would occur if the enforceability of the arbitral award were contrary to the fundamental principles of the constitutional and legal order, the social order and public policy as such, and the breach would concern an interest which must be insisted on, unequivocally and in every respect.

[3] "A conflict with public policy arises in those cases where the fundamental rights of the party to the proceedings were breached in the proceedings in which the respective decision of the foreign court was rendered. Insistence on the protection of the individual's fundamental rights undoubtedly belongs to such essential principles of Czech law.[2]

[4] "The concept of public policy ought to be interpreted in a relatively restrictive manner; mere differences in the procedural laws of a foreign arbitral tribunal and the state of recognition do not establish a conflict with public policy.[3]

[5] "Therefore, an argument stating that other parties to the proceedings were represented by more legal counsel and consequently incurred higher costs of proceedings, focuses only on the issue of interpretation. Application of the words "reasonable" or "adequate" regarding the costs of proceedings, as such, cannot establish a conflict with constitutional law.

[6] "If the applicant argues that the costs which the applicant incurred in the part of the proceedings in which the tribunal ruled on the disqualification of an arbitrator for being biased were unreasonable, then such objection cannot be

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2. The Constitutional Court referred to its own judgment in Case No. I. ÚS 709/05, published in SbNU [Reports of Judgments and Resolutions], Vol. 41, p. 143.
3. The Constitutional Court added that "if the court of the state of origin proceeded in compliance with procedural laws, a conflict with public policy is only possible in the most exceptional cases." The Court referred to V. VAŠKE, *Uznání a výkon cizích rozhodnutí v České republice* [Recognition and Enforcement of Foreign Decisions in the Czech Republic] (C.H. Beck 2007) p. 44. In this connection, the Constitutional Court again confirmed that "the public policy exception under Art. V(2)(*b*) of the New York Convention should rather be interpreted as a procedural public policy exception".

found to be justified. It is certainly in the interest of all parties to the proceedings, including the applicant, to make sure that the proceedings and the decision on the merits do not suffer from any defect which would undermine their correctness and equitableness. It is only natural that the costs are paid by the party who did not have a defensible position on the merits and did not succeed in the proceedings.

[7] "An objection criticizing the delivery of an arbitral award by a messenger service, not by the holder of a postal license or in any other manner provided for in the [Czech] Code of Civil Procedure, is formalistic and groundless. The main point is that the arbitral award entered the sphere of the applicant, or his or her legal counsel, in compliance with the [applicable] rules.

[8] "An objection that the arbitral award is not stamped with a confirmation of legal force and effect and the confirmation of enforceability is incongruous. The reason is that the [1958 New York Convention], which prevails over statutes, namely Sect. 39 [of the Czech Arbitration Act],[4] does not prescribe any such requirement (see Art. IV [of the New York Convention]). It is sufficient if the arbitral award is final and binding upon the parties and the parties undertake to perform under the award without delay [under the applicable rules].

[9] "It is in the interests of all participants in the proceedings for the proceedings and decision on the merits to be free of any defect casting doubt on the correctness and fairness thereof. Proceedings on the disqualification of an arbitrator are therefore [a stage of the] proceedings conducted in the interests of all parties."

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4. Sect. 39 of the Czech Republic Annex I Act No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards (The Arbitration Act) reads:

   "Recognition or enforcement of a foreign arbitral award shall be refused if –
   (a) the arbitral award is not of legal force or enforceable according to the laws of the rendering country,
   (b) the arbitral award is affected by an error stated in Section 31,
   (c) the arbitral award is against public policy."

6. Nejvyšší Soud České Republiky [Supreme Court of the Czech Republic], 31 May 2011, Case No. 29 Cdo 265/2010[1]

Parties:	Petitioner/Claimant: S. R. (Czech Republic) Respondent/Defendant: Agro Spektrum (Czech Republic)
Published in:	Available online at <www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/215D90DA2BD92233C1257A4E0068F5D9?openDocument&Highlight=0>
Articles:	V(1)(*b*)
Subject matter:	– due process
Topics:	¶ 508

Summary

A Belarusian award was relied on as a set off in Czech court proceedings. The Supreme Court held that the lower courts erred in admitting the existence of the award without examining whether it could be recognized under the 1958 New York Convention, in light of the claimant's objection that there had been a violation of due process in the arbitration.

By an award of 29 June 1999, an arbitral tribunal of the International Arbitration Court attached to the Belarusian Chamber of Commerce and Industry in Minsk directed Motor Písek s.r.o. (Motor Písek), a Czech company, to pay US$ 47,302.92 to Atlant, a Belarusian company. Motor Písek allegedly did not take part in the arbitration. By an assignment agreement, Atlant subsequently assigned part of the receivable under the award to Agro Spektrum.

On 7 February 2001, Motor Písek and Agro Spektrum concluded a separate Agreement on Acknowledgment of Debt under which Agro Spektrum acknowledged that it owed Motor Písek a certain sum. Motor Písek subsequently

1. The General Editor wishes to thank JUDr. Monika Feigerlová, PhD, LL.M., advokát, Prague, for her invaluable assistance in providing this decision and translating it from the Czech original.

commenced court proceedings in a district court in the Czech Republic, seeking payment of the sum owed under this Agreement.

On 10 December 2001, Agro Spektrum sought to set off the amount receivable under the award against the amount claimed by Motor Písek in the court proceedings. On 24 February 2003, Motor Písek assigned its claim under the Agreement on Acknowledgment of Debt to Mr. S. R.

The district court recognized the existence of the receivable under the award, holding that the award was a "valid decision" within the meaning of the 1982 Czechoslovakia-USSR Treaty on legal assistance. The court concluded that the award had been validly assigned to Agro Spektrum, and admitted the set off. A court of appeal affirmed the lower court's decision.

By the present decision, the Supreme Court of the Czech Republic reversed the decisions below and remanded the case to the district court. The Court reasoned that when verifying the existence of the receivable on which Agro Spektrum relied for the set-off, the appellate court erred in applying the Czechoslovakia-USSR Treaty, which does not concern the requirements for the recognition of foreign arbitral awards. The court below should have applied the 1958 New York Convention instead and should have ascertained whether, as alleged by Mr. S. R., there had been a violation of due process in the Belarusian arbitration and thus enforcement should be denied under Art. V(1)(*b*) of the Convention. Mr. S.R. and Motor Písek repeatedly objected in the course of the court proceedings that Motor Písek did not take part in the arbitration proceedings and did not have the opportunity to present its case. The appellate court, concluded the Supreme Court, should have dealt with this objection before finding that Agro Spektrum held the receivable used for the set-off against Motor Písek's claim.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345039-n>.

Excerpt

[1] "Mr. S. R. contests the decision of the appellate court alleging that the appellate court 'did not deal with the existence of the claim used by [Agro Spektrum] as its defence'. The appellate court 'considered the claim granted in the Award as proved'. According to the appellate court, 'it was not necessary to prove the existence of the receivable imposed by the Award due to the fact that the Award was a valid decision in accordance with Art. 11 of [the Treaty between the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, which was signed in Moscow on 12 August 1982 (published under no. 95/1983 Coll.) – the Treaty]'. In the view of [Mr. S. R.], this conclusion is incorrect as the 'relevant claim decided in the Award was a claim arising from a commercial relationship between the plaintiff's and the defendant's legal predecessors [Motor Písek and Atlant, respectively] in connection with their business activities' whereas 'the Treaty was inapplicable to commercial relationships'.

[2] "[Mr. S. R.] further alleges that 'the courts did not address the requirements for recognition of the Award and, in particular, [Mr. S. R.]'s objection that its legal predecessor [Motor Písek] was not given an opportunity in the arbitration proceedings to present its case. [Mr. S. R.] as well as [Motor Písek] always objected to the existence of the receivable used for the set-off. The courts should have treated the set-off objection as ineffective because [Agro Spektrum] did not prove the existence of the receivable used for the set-off.'

(....)

[3] "[T]he Supreme Court finds that the appeal on a point of law is justified.

[4] "When verifying the existence of [Agro Spektrum]'s receivable used for the set-off, the appellate court applied only Art. 11 of the Treaty which is still binding upon the Czech Republic and the Republic of Belarus (see notification of the Ministry of Foreign Affairs no. 79/2009 Coll. of Int. Treaties). Based on the above Article, the appellate court considered the Award a 'valid decision'. Consequently, the appellate court considered Atlant to be the owner of the receivable granted by the Award without making any further enquiries. The appellate court only examined whether the receivable was assigned to [Agro Spektrum].

[5] "According to Art. 11 of the Treaty, documents executed or certified in the territory of one Contracting State by a judicial or other organ or a specifically authorized person, within their competences, in the prescribed form and bearing a seal or stamp of the relevant official body, shall be used in the territory of another Contracting State without any further verification.... Documents

considered as public documents in the territory of one Contracting State shall have the probative value of public documents also in the other Contracting State (Art. 11(2)).

[6] "Based on the findings of the first instance court, the appellate court qualified the International Arbitration Court Attached to the Belarusian Chamber of Commerce and Industry as 'an independent, non-state and non-commercial organization'. The Supreme Court, however, disapproves that the appellate court applied Art. 11(1) to the document issued by the above institution (Award) without further verification. The appellate court provided no explanation as to how it arrived at the conclusion that the above arbitration court is 'a judicial or other organ or specifically authorized person' within the meaning of Art. 11(1) of the Treaty.

[7] "Irrespective of the above, Art. 11(1) of the Treaty does not address the content of the document or conditions for the recognition of a foreign arbitral award. It merely stipulates that upon fulfilment of certain conditions the documents 'executed or certified in the territory of one Contracting State by a judicial or other organ or a specifically authorized person', shall be used in the territory of another Contracting State without any further verification.

[8] "The recognition of the arbitral award in the case at hand should have been examined according to the [1958 New York Convention], published under no. 74/1959 Coll., binding upon the Czech Republic and the Republic of Belarus (see Sect. 47 Act No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards).

[9] "In accordance with Art. V(1)(*b*) of the New York Convention, recognition and enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that 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 its case.

[10] "[Mr. S. R.] and [Motor Písek] repeatedly objected in the course of the court proceedings that [Motor Písek] had not taken part in the arbitration proceedings and had not had the opportunity to present its case. They repeatedly questioned the validity of the receivable used for the set-off (see, for example, minutes from the meeting, file no. 59, or appeal against the first instance court decision, file no. 199). Despite the above, the Court of Appeal did not deal with [Mr. S. R.]'s arguments and used the Award without any further assessment.

[11] "[The Supreme Court states that] it is not possible to apply the Award and to conclude on its basis that [Agro Spektrum] held the receivable used for the set-

off against [Mr. S. R.]'s claim, unless the court has dealt with [Mr. S. R.]'s objections. Therefore, the legal assessment made by the Court of Appeal is incomplete and, thus, incorrect.

(….)

[12] "[T]he Supreme Court revokes the decision of the Court of Appeal (Sect. 243b(2) of the Code of Civil Procedure)…. As the reasons for the revocation apply to the decision of the District Court as well, the Supreme Court annuls it and remands the matter to the District Court for further proceedings….

[13] "The Supreme Court's opinion is binding for both the appellate court and the court of first instance (Sect. 243d(1), the part of the first sentence following the semicolon, and Sect. 226(1) Code of Civil Procedure).

[14] "In further proceedings, the courts shall take regard of the fact that the assessed legal relationships contain an international element. Therefore, the courts need to consider the question of the applicable law (see in particular Sects. 1, 9, 10 and 13(2) of the Act No. 97/1963 Coll., on Private International Law).

[15] "The courts will also take into consideration the opinion of the Supreme Court on the interpretation of Czech law made in rulings published under no. 49/2008 (a reservation of ineffectiveness of relevant legal act) and no. 61/2010 (conditions upon which a debtor can invoke an objection of the invalidity of an assignment agreement)."

(….)

FRANCE

Accession: 26 June 1959
1st Reservation

54. Cour d'Appel [Court of Appeal], Paris, Pole 1 – Chambre 1, 15 January 2013

Parties:	Appellant: Otkrytoye Aktsionernoye Obshestvo "Tomskneft" Vostochnoi Neftyanoi Kompanii (Russian Federation) Respondent: Yukos Capital (Luxembourg)
Published in:	Available online at <www.dalloz.fr> (subscription required); reproduced in B. Derains, *A contribution by the ITA Board of Reporter*s, Kluwer Law International
Articles:	V; V(1)(*b*) (by implication)
Subject matters:	– impossibility of enforcement no ground for refusal – due process and notification of hearing and procedural orders
Topics:	[1]-[2] = ¶ 501; [3]-[10] = ¶ 511 (no proof of receipt of communications)

Summary

Enforcement of an ICC award rendered in the United States was denied on grounds of violation of due process. The file did not contain proof of receipt by defendant, inter alia, of the notification of the hearing and of procedural orders setting the timetable for the arbitration and certain time limits for the parties; however, communication to a defendant that does not participate in the proceedings – as was the case here – not only of the terms of reference, but also of all procedural orders establishing the arbitration's timetable and the date and place of the hearing is necessary to meet the arbitrator's obligation to guarantee due process. Further, it was irrelevant to claimant's standing (intérêt à agir) that defendant had no assets in France and the award therefore could not be enforced.

By three contracts of 20 and 27 July and 4 August 2004, Yukos Capital (Yukos) granted three loans to Otkrytoye Aktsionernoye Obshestvo "Tomskneft" Vostochnoi Neftyanoi Kompanii (Tomskneft). The loan agreements were governed by Russian law; they contained a clause for arbitration of disputes in Russia at the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry.

By three additional contracts signed in November 2005, the parties agreed to modify the applicable law clause in favor of the law of the State of New York State and the arbitration clause in favor of ICC arbitration in New York City.

On 1 December 2005, Yukos sought anticipated repayment of part of the loans, as was allowed under the loan agreements in case Tomskneft was in a financial situation that cast doubts on its capability to repay the loans on the due date. When Tomskneft did not comply, Yukos commenced ICC arbitration on 12 January 2006. Tomskneft did not appear in the arbitration proceedings.

By an award rendered in New York City on 12 February 2007, an ICC sole arbitrator directed Tomskneft to comply with Yukos's request; to pay a per day penalty as from 1 December 2005; to bear the costs of the arbitration; and to reimburse Yukos's legal costs.

On 8 July 2010, Yukos applied for recognition and enforcement of the award in France. On 20 July 2010, the President of the Paris Court of First Instance granted the application. On 22 February 2011, Tomskneft filed an appeal.

The Paris Court of Appeal, before Acquaviva, President, and Guihal and Dallery, JJ, reversed the decision below and denied enforcement of the ICC award on grounds of due process.

The court found that there was no proof in the file of receipt by Tomskneft of several communications relating to the arbitration, including a procedural order that modified the provisional timetable for the arbitration, extending the time limits granted to claimant and defendant for filing their initial statements; a procedural order inviting the parties to a hearing; and the arbitrator's decision to close the proceeding and grant a time limit to defendant to react to new evidence submitted by claimant at the hearing. The file also did not contain proof of receipt by Tomskneft of a copy of the documents supplied by claimant and the transcript of the recording of the hearing.

The court noted that arbitrators must ensure that the principle of adversary proceedings (*principe de la contradiction*) is observed. To this aim, they must inform the party which does not appear in the proceeding of the terms of reference and all procedural orders in which the timetable of the arbitration and the date and place of the hearing are established. This was not the case here.

The court of appeal also denied Tomskneft's argument that Yukos lacked standing (interest to act) – and its request was therefore inadmissible – because Tomskneft has no assets in France and the award could not be executed there. The court noted that French law does not contemplate the lack of assets of the defendant as a ground for denying recognition of a foreign award.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345040-n>.

FRANCE NO. 54

Excerpt

I. LACK OF INTEREST TO ACT

[1] "Pursuant to Art. 1498 CCP, in the [old] version applicable in the present case:

> 'Arbitral awards shall be recognized in France if their existence is proven by the party relying thereon and if such recognition is not manifestly contrary to international public policy (*ordre public*).
>
> Subject to the same conditions, such awards shall be declared enforceable in France by the enforcement judge.'

This article grants the parties the right to seek the recognition of an award, that is, its insertion in the French legal system, as a main claim [*à titre principal*]; it is of little importance that [the award] cannot be executed [in France] because the debtor has no assets [there].

[2] "Hence, the non-admissibility objection raised by Tomskneft against Yukos on the basis of a lack of standing [*intérêt à agir*] must be rejected."

II. DUE PROCESS

[3] "Pursuant to Art. 1502(4) CCP old version, which applies here, an appeal is available from a decision granting enforcement of a foreign arbitral award if due process [*principe de la contradiction*] has not been respected.

[4] "The arbitrator's obligation to ensure strict compliance with this principle requires that, when the defendant contests [arbitral] jurisdiction and does not express its intention to participate in the proceeding, that party not only be informed of the approved terms of reference but also be notified of the procedural orders determining a timetable for filing statements and the date and place of the hearing, so that the party in default is put in the position to effectively present its case if necessary.

[5] "In the present case,

(i) the arbitral institution notified the request for arbitration, received on 17 January 2006, together with its annexes to Tomskneft on 20 January 2006 by letter sent by DHL and delivered on 26 January;

(ii) by letter of 20 March 2006, in reply to the letter of the institution of 20 February 2006 delivered by DHL on 10 March 2006, which forwarded the request of Yukos to appoint a sole arbitrator, [Tomskneft] communicated that it did not oppose this suggestion, only suggesting to organize

> 'an unofficial meeting with the aim of formulating mutually acceptable solutions in order to settle and discuss the financial responsibilities [of Tomskneft] under the loan agreement concluded in 2004';

(iii) [Tomskneft] acknowledged that it received, by fax of 13 April 2006, the letter of 2 April 2006 informing it of the costs of the arbitration; it reiterated on this occasion that it refused to recognize the validity of the arbitration clauses in the additional contracts and requested the application of the arbitration clauses in the loan agreements;
(iv) [Tomskneft] received by fax a letter of the ICC of 13 April 2006, informing it that notwithstanding its objections to jurisdiction, the Court decided at its sitting of 31 March 2006 that in accordance with Art. 6(2) of its Rules the arbitration will proceed;
(v) by a letter delivered by DHL on 31 June 2006, [Tomskneft] received from the arbitrator the draft terms of reference attached to [the arbitrator's] letter of 27 June 2006; then on 24 July 2006, by the same means, the final version of the terms of reference attached to [the arbitrator's] letter of 21 July 2006;
(vi) [Tomskneft] received by fax and by DHL the letter of the arbitrator dated 24 August informing it of the provisional timetable established by [the arbitrator] pursuant to Art. 18(4) of the Rules;
(vi) finally, [Tomskneft] received the original final award rendered on 12 February 2007 by the sole arbitrator by letter of 13 February 2007, delivered by DHL on 14 February 2007.

[6] "These communications, however, may not be deemed sufficient to comply with [the principle of] adversary proceedings and due process. Notwithstanding the indications in the award stating that there was notification by fax and DHL, there is no proof of the receipt by any means of:

(i) Procedural Order no. 1 of 28 September 2006, which modified the provisional timetable established earlier, granting an additional time limit to claimant to file its initial statement and extending the time limit granted to defendant to file its statement in reply to 8 November 2006;

(ii) the letter allegedly addressed by the arbitrator to defendant on 12 October 2006, reminding it of the time limit above;
(iii) Procedural Order no. 2 of 23 November 2006, inviting the parties to a hearing at the ICC headquarters in Paris on 14 December 2006;
(iv) the decision of the arbitrator to close the proceeding and authorize defendant to communicate before 5 January 2007 its remarks on the documents filed at the oral hearing by claimant, which handed two new documents over to the arbitrator; and
(v) the sending to defendant of a copy of the transcript of the recording of the hearing and of [a copy of] the documents supplied by claimant….

[7] "Proof of receipt of these notifications, which [receipt] is formally denied by Tomskneft, cannot be deduced, as argued by Yukos, from the fact that if he had received a notice from DHL indicating that it was impossible to deliver to Tomskneft any of these communications, Mr. Briner [the sole arbitrator] would have undoubtedly informed the ICC of this in the meticulous report of his communications he gave in his award.
[8] "Besides, Tomskneft's failure to participate in the organizational and evidence-collecting phases of the proceeding – which cannot be deemed to manifest an unequivocal intention to remove itself from the arbitration for good, or to derive from a deliberately dishonest behavior – could not, in any manner, exempt the arbitrator from notifying [Tomskneft] of the final procedural timetable he had established; summoning it to appear before him at the hearing whose date and place he had determined; and making it aware of the new elements filed at the hearing by claimant.
[9] "Thus appellant, which was not regularly summoned, may rely on the ground based on the violation of its fundamental right to the necessary discussion in adversary proceedings of all the factual and legal claims of its counterpart.
[10] "The disregard by the arbitrator of the principle of adversary proceedings hinders the recognition in France of the award rendered in New York on 12 February 2007 by the arbitral tribunal constituted by Mr. Robert Briner, sole arbitrator. The appealed decision must be annulled and the request of Yukos denied."

III. COSTS

[11] "Yukos, which as the losing party must bear the costs [of this proceeding], cannot request the application in its favor of the provisions of Art. 700 CCP[1] and must be directed on this same basis to pay an amount of € 30,000."
(….)

1. Art. 700 of the French Code of Civil Procedure reads:

"As provided for in Art. 75(1) of Law no. 91-647 of 10 July 1991, the court shall in all degrees direct the party which is to bear the costs [of the proceedings] or, lacking this, the losing party to pay to the other party a sum determined by the court for other expenditures not included in the costs. The court shall take into account equity or the economic situation of the party which has to pay. The court may, even on its own initiative and based on the above considerations, not so direct."

55. Cour d'Appel [Court of Appeal], Paris, Pole 1 – Chamber 1, 19 February 2013

Parties:	Claimant: Lao People's Democratic Republic Defendants: (1) Thai-Lao Lignite (Thailand) Co., Ltd (Thailand); (2) Hongsa Lignite (Lao PDR) Co. Ltd (Laos)
Published in:	2007 Revue de l'arbitrage p. 229; available online at <www.dalloz.fr> (subscription required)
Articles:	V(1)(*a*)
Subject matters:	– existence of arbitration agreement (no) – award set aside
Topics:	¶ 507 (no arbitration agreement); [2]-[3] = ¶ 516

Summary

The order granting enforcement of a Malaysian ad hoc award was annulled. The arbitrators did not decide in part on the basis of an arbitration agreement because they awarded damages taking into account also investment costs incurred in the performance of earlier contracts between the parties, related but explicitly meant to be separate, which did not contain an arbitration clause.

The facts of this case are also reported in Yearbook XXXVI (2011) at pp. 491-495 (US no. 748) and Yearbook XXXVII (2012) at pp. 409-411 (US no. 774). On 29 May 1992, the Lao People's Democratic Republic (Lao PDR) and Thai-Lao Lignite Co, Ltd (TLL) concluded a mining concession contract granting TLL a concession to exploit a lignite deposit in the Hongsa region of Laos. The parties established a Laotian company, Hongsa Lignite Lao Co. Ltd (HLL), jointly owned by TLL (75 percent) and Lao PDR (25 percent). An addendum of 21 July 1993 extended the area of the concession and authorized TLL to research the construction of a lignite-fired electricity generation plant. On 22 July 1994, Lao PDR and TLL entered into a Project Development Agreement (PDA) for the concession of the construction of this plant. The PDA contained a clause

referring disputes to ad hoc arbitration in Malaysia according to the UNCITRAL Arbitration Rules.

The electricity generation plant was not built due to the financial crisis of Thailand in the late 1990s. By two letters of 5 and 11 October 2006, Lao PDR terminated the PDA and the mining concession, respectively. On 26 June 2007, TLL and HLL filed a joint request for arbitration against Lao PDR on the basis of the arbitration clause in the PDA. By an award rendered in Kuala Lumpur on 4 November 2009, an ad hoc arbitral tribunal held that Lao PDR improperly terminated the PDA and directed it to pay damages in the amount of US$ 56,210,000 to TLL and HLL, as well as US$ 1,000,000 for the costs of the arbitration.

TLL and HLL sought enforcement of the Malaysian award in the United States and France. In the United States, the US District Court for the Southern District of New York granted enforcement on 3 August 2011; this decision is reported in Yearbook XXXVI (2011) pp. 491-495 (US no. 748). On 13 July 2012, the US Court of Appeals for the Second Circuit affirmed the enforcement decision; this decision is reported in Yearbook XXXVII (2012) pp. 409-411 (US no. 774).

In France, on 15 July 2010, the President of the Court of First Instance of Paris granted enforcement of the Malaysian award.

By the present decision, the Paris Court of Appeal, before Acquaviva, President, Guihal and Dallery, JJ, annulled the enforcement decision of the court below, finding that the arbitrators' decision, which granted damages on the basis of costs incurred under prior contracts between the parties, was not based in part on an arbitration agreement, that is, the arbitration clause in the PDA.

The court reasoned first that it appeared from the text of the PDA, though not devoid of ambiguities, that the parties intended the PDA to be autonomous from the contracts previously concluded between the parties, making clear that the rights under those contracts were not affected.

The award at issue was rendered in Kuala Lumpur in proceedings commenced on the basis of the arbitration agreement in the PDA. The arbitrators, having held that Lao PDR's termination of the PDA was improper, determined that the concession nevertheless should be terminated because it could no longer be performed. They then awarded damages to TLL and HLL on the basis of the provision in the PDA which provided for the possibility of an indemnification in case of termination, on the basis of "the total investment cost borne by TLL". The arbitrators based the indemnification particularly on the construction of roads and, in respect of the legal and research costs, on the entirety of the road works, though most of these works were completed before the PDA was signed.

The court agreed with the argument made by Lao PDR before the arbitrators that the "total investment cost" on which indemnification could be based referred exclusively to costs incurred under the PDA. Any costs incurred under prior contracts, which were separate from the PDA and provided for different responsibility rules and manners to calculate indemnification, could not be taken into account.

The court therefore concluded that by awarding damages under contracts separate from the PDA, the arbitrators decided without basing part of their decision on an arbitration agreement. Enforcement should therefore be denied.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345041-n>.

FRANCE NO. 55

Excerpt

[1] "On 14 February 2012, the Court of Appeal asked the parties to supply a translation, either by a sworn translator or by mutual agreement, of the documents they intended to supply to the Court, in particular, the mining concession and its addendum, the PDA, the statements before the arbitral tribunal, the witness statements rendered in the course of the arbitration, and the minutes of the hearings.
(....)
[2] "On 11 January 2013, Lao PDR filed a statement requesting the revocation of the closing of the debate [*clôture*] decided on 20 December 2012, so that the decision rendered on 28 December 2012 by the High Court of Kuala Lumpur, which annulled the award at issue, could be taken into account."

I. APPLICATION TO REVOKE THE ORDER CLOSING THE DEBATES

[3] "The annulment of a foreign award by the courts of the state of rendition is not a ground for refusing recognition in France. Hence, there is no reason to revoke the order closing the debate so that a decision allegedly annulling the award at issue, rendered in Kuala Lumpur, the seat of the arbitration, can be submitted to the file."

II. LACK OF ARBITRATION AGREEMENT

[4] "Lao PDR claims that the mining concession contract of 29 May 1992 and the PDA concluded on 22 July 1994 are two entirely separate contracts, which provide for incompatible dispute settlement clauses and for the application of different substantive rules. Consequently, by granting damages to TLL and HLL in respect of their investments on the basis of both the PDA and the mining concession, the arbitrators did not decide on the basis of an arbitration agreement.
[5] "The enforcement court reviews the arbitral tribunal's decision on its own jurisdiction by searching for all legal and factual elements which allow to assess whether an arbitration agreement exists. On 29 May 1992, Lao PDR granted TLL a concession to exploit a lignite deposit in the Hongsa region, in the north-west of Laos. Under the concession, the investor was financially responsible for supplying the necessary capital, materials and equipment for exploiting the mine,

as well as for building a thirty-km-long road to the Thai border (Art. 23) and laying out the roads in the exploitation area. Art. 31 of the mining concession contract provided that disputes would be referred to the Laotian Board of Economic Conciliation, to the Laotian courts, or to the Laotian Court of International Economic Dispute Settlement Organization, an investment arbitration center established by the Laotian authorities, with its own arbitration rules. Art. 2 of the concession provided for the exclusive application of Laotian law; Art. 30 specified that:

> 'the conditions for terminating the agreement and the operation or terminating the agreement in advance shall be governed by the law on foreign investments in Laos'.

[6] "By the PDA concluded on 22 July 1994, Lao PDR granted TLL a concession for the construction of a lignite-fired electricity generation plant in Hongsa and its exploitation for a period of thirty-one years, at the end of which ownership would be transferred to Laos. Art. 14.1 provided that all disputes arising from the contract would be referred to ad hoc arbitration in Kuala Lumpur in accordance with the UNCITRAL Rules. Art. 18.1 provided that Laotian law applied to the authorization for and the signing of the contract, to the various authorizations, the rules on foreign investments, the lease and the act conferring the mining rights; [it provided] for the application of the law of New York State to all other aspects and, in particular, to the interpretation of the contract.

[7] "Art. 19.11 of the PDA is an 'entirety clause', according to which:

> 'The present contract contains the entirety of the agreement between the parties as to its content, with the exception that the parties recognize the existence and continuing validity of the prior Contracts.'

Art. 19.12 ('Recognition') provides that the parties recognize and ratify the previous contracts. Art. 19.13 ('Incompatibility') provides that:

> 'The present Contract replaces and governs all prior arrangements between the parties, with the exception that the rights of [HLL] and/or TLL under the prior Contracts that are broader or more extensive than those under the present one shall remain in force and shall not be affected by the present Contract. The parties understand that neither the present

> Contract nor the prior Contracts have unfavorable effects between them but rather reflect two separate but linked projects.'

[8] "Notwithstanding their ambiguities, these contractual clauses show the common intention of the parties to keep the various contracts autonomous, confirming the preservation of the rights under the agreements prior to the PDA.
[9] "The award at issue was rendered by an ad hoc arbitral tribunal with seat in Kuala Lumpur, constituted on the basis of the arbitration clause in the PDA. In accordance with the PDA, this tribunal heard the case according to the provisions of the UNCITRAL Arbitration Rules and applied the law of the State of New York to the merits of the dispute.
[10] "The arbitrators, after holding that Lao PDR's termination of the PDA was improper for lack of compliance with the contractual guarantees in favor of the concession holder, and determining that the concession should be terminated as it could no longer be performed, examined the claim for damages of TLL and HLL in light of the provisions in Art. 15.1 of the PDA, which provides:

> 'In case of termination of the present Contract, TLL or the Government, as the case may be, will receive an indemnification whose amount shall be determined by an arbitral panel constituted in accordance with Art. 14 of this Contract, and which shall include the total investment cost borne by TLL, plus a bonus and a compensation for the Lenders and the Investors if the breach is made by the Government.'

[11] "Among the investments realized by TLL, the arbitral tribunal particularly took into account the construction of roads. In respect of the legal and research costs, it considered the sums indicated in TLL's claim, which include the entirety of the road works, although it appears from the file that most roads were built and became operative before mid-1994, while the PDA was signed only on 22 July 1994....
[12] "Contrary to TLL and HLL's contention, Lao PDR always claimed before the arbitrators that the 'total investment cost' which could entitle TLL to indemnification exclusively referred to costs incurred under the PDA, not [to costs incurred] in performing under prior contracts, to which different responsibility rules and manners to calculate indemnification applied....
[13] "By deciding on the indemnification of damages ensuing from contracts separate from the PDA, which [contracts] contained their own dispute settlement clauses and continued to exist after the conclusion of the PDA, the arbitrators partially decided without an arbitration agreement.

[14] "Since the award combines the indemnification awarded to TLL and HLL, the order must be annulled in its entirety.
[15] "TLL and HLL, which are the losing parties, cannot benefit from the provisions of Art. 700 CCP;[1] on this same basis, they shall pay € 50,000 to Lao PDR."
(….)

1. Art. 700 of the French Code of Civil Procedure reads:

"As provided for in Art. 75(1) of Law no. 91-647 of 10 July 1991, the court shall in all degrees direct the party which is to bear the costs [of the proceedings] or, lacking this, the losing party to pay to the other party a sum determined by the court for other expenditures not included in the costs. The court shall take into account equity or the economic situation of the party which has to pay. The court may, even on its own initiative and based on the above considerations, not so direct."

GERMANY

Ratification: 30 June 1961
No Reservations

146. Oberlandesgericht [Court of Appeal], Karlsruhe, 4 January 2012, 9 Sch 2/09
Bundesgerichtshof [Federal Supreme Court], 20 December 2012, III ZB 8/12

Parties:	Claimant: H (nationality not indicated) Defendant: F, in liquidation (nationality not indicated)
Published in:	*Court of Appeal*: available online at <www.dis-arb.de/de/47/datenbanken/rspr/olg-karlsruhe-az-9-sch-02-09-datum-2012-01-04-id1382>; *Federal Supreme Court*: available online at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=5ad73b90fdbf8d5047e784b10f852d27&nr=62934&pos=14&anz=35>
Articles:	III; V; V(2)(*b*); VII(1)
Subject matters:	– estoppel from raising public policy defense not raised in annulment action in country of origin – more-favorable-right provision – international public policy – public policy and place of arbitration v. place of hearing – public policy and time limit to render award – public policy and arbitrariness of assessment of costs (no)
Topics:	[3]-[14] = ¶ 303; [4] = ¶ 702; [18]-[26] = ¶ 524 (registration of insolvency claim); [19]-20] = ¶ 518;

[27]-[28] = ¶ 524 (failure to give advance notice of legal considerations deemed relevant); [30]-[31] = ¶ 524 (place of hearing); [32]-[34] = ¶ 524 (time limit to render award); [35]-[38] = ¶ 524 (arbitrator asleep at hearing); [39]-[41] = ¶ 524 (arbitrary award of costs); [42]-[49] = 301

Summary

Court of Appeal: an ICC award rendered in the United States was granted recognition. Defendant was estopped from raising public policy grounds for refusal, because it had not raised them in annulment proceedings in the United States. The public policy grounds also failed on the merits, as either they were not proved or they did not meet the narrow standard of international public policy. Also, contrary to defendant's opinion an insolvency claim established by a foreign award can be registered in the insolvency register. No oral hearing was necessary as defendant was estopped from raising grounds for refusal. Federal Supreme Court: the appeal on a point of law was denied: neither the question of defendant's estoppel nor the question of the registration of an insolvency claim established by a foreign award met the essential-relevance standard for such appeal, and the Court of Appeal's conclusion in respect of the latter issue could not be faulted. The refusal to hold an oral hearing did not violate due process and thus public policy, because the German Constitution only establishes a right to due process and does not concern itself with the manner in which this right is guaranteed. Here, defendant had been guaranteed due process in the recognition proceeding.

A dispute between H (Claimant) and F, in liquidation (Defendant) was referred to arbitration in the United States according to the rules of the International Chamber of Commerce (ICC). On 3 December 2008, a panel of three arbitrators rendered an award in favor of Claimant, directing Defendant to pay Claimant a total of US$ 4,083,168, as well as the costs of the arbitration in the amount of US$ 250,949, and interest on both sums at 8 percent per annum, to be paid out of Defendant's bankruptcy assets. Claimant sough a declaration of enforceability of the ICC award in Germany.

By the first reported decision, rendered on 4 January 2012, the Karlsruhe Court of Appeal granted recognition, finding that Defendant was estopped from raising the public policy grounds for refusal it relied on; at any event, these grounds would fail on the merits.

The court first reasoned that according to constant jurisprudence under the previous German arbitration law, preclusion from invoking grounds for refusal that have not been relied on timely in an annulment action in the country where the award was rendered also applies to grounds based on an alleged violation of

public policy. The court added that the continuing validity of this jurisprudence under the new law is disputed, because Sect. 1061 of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO) provides that recognition and enforcement are governed by the 1958 New York Convention, which does not provide for estoppel. However, the court remarked that the New York Convention does not prevent the German courts from applying the Convention's grounds for refusal restrictively, and the courts remain free as before to interpret national law restrictively. As a consequence, all grounds which justified estoppel under the earlier law continue to exist under the new law.

In the present case, Defendant could have filed an application to annul the award within three months of the award's notification in the courts of the United States, which had exclusive jurisdiction to set aside the award, relying on the same grounds which it now raised in the German court, but failed to do so.

The court distinguished a 2009 decision of the Federal Supreme Court relied on by Defendant, which answered in the affirmative the question whether the objection of lack of arbitration agreement can be raised for the first time in the German enforcement proceedings; by this decision, the Federal Supreme Court abandoned its earlier jurisprudence that this question should be answered in the negative. This holding, however, only concerns the objection that there is no arbitration agreement or the arbitration agreement is invalid. This was not the case here, since the existence of a valid arbitration agreement was not disputed.

The Court of Appeal then held that even if admissible, Defendant's arguments would fail on the merits. Defendant first argued that an insolvency claim cannot be registered in the insolvency register (*Insolvenztabelle*) on the basis of a foreign arbitral award. The court disagreed, reasoning that pursuant to Art. II(1) of the New York Convention, a Contracting State shall recognize an arbitration agreement if the subject matter of the dispute is capable of settlement by arbitration. Disputes on the rights of insolvency creditors are arbitrable; as a consequence, a foreign award may be relied on as a basis for the registration of an insolvency claim.

Defendant also raised six public policy arguments, which all failed. First, Defendant contended that the claim under the award was not registered in the insolvency register. The court noted that in fact the claim had been registered, disputed and finally entered in the register as a disputed claim. Registration of a non-final or insufficiently final claim in the insolvency register is not, under German bankruptcy law, a serious defect amounting to a violation of international public policy, which has a narrower meaning than domestic public policy and only justifies a refusal of recognition and enforcement when the defect affects "the basis principles of German social and economic life".

Second, the arbitral tribunal did not violate due process and public policy by failing to state its opinion of the factual and legal situation at the oral hearing and thereby ignoring its obligation to give advance notice of legal considerations deemed relevant (*Hinweispflicht*); Defendant alleged that this failure prevented it from making additional comments in respect of certain issues. The Court of Appeal held that it was doubtful whether there was such violation, because in principle the arbitral tribunal cannot be required to give a (provisional) assessment of all individual issues at the oral hearing, when the assessment becomes possible in part on the basis of the information gathered at the hearing. However, this question could remain open because at any event a failure to give indications is not a serious defect within the meaning of international public policy.

Third, the fact that the hearings were held in New York rather than at the seat of the arbitration, San Diego, was not a violation of public policy. Arbitrators may hold hearings and meetings at any place they consider appropriate, and Defendant did not argue that New York was an inappropriate venue or that this change explicitly or tacitly modified the arbitration agreement. Nor did the choice of New York for the hearings "bypass[]" the arbitration agreement. Defendant actually agreed to this choice of venue.

Fourth, Defendant argued that since the arbitral award was rendered after the six-month time limit provided for in the ICC Rules, when the arbitrators no longer had a personal impression of the witnesses and experts, the principle of fair hearing had been violated. The court held that while awards under German law must indicate the date of rendition, no time limit depends on that date. From the point of view of German law, the fact that the six-month time limit was exceeded was not a violation of public policy.

Fifth, Defendant claimed that the award violated public policy because one of the co-arbitrators was asleep most of the time during the eight days of hearings, in violation of the principles of due process and due composition of the judicatory body. According to jurisprudence, noted the Court of Appeal, a court is not regularly constituted if a judge sleeps during the oral hearing. However, jurisprudence also holds that there is a defective composition only when the party invoking this defect has drawn the attention of the president to the limited involvement of the co-arbitrator in the hearing. Defendant failed to do so. Its argument that this would lead to a confrontation with the arbitral tribunal was not plausible.

Sixth, Defendant argued that the arbitral tribunal violated the prohibition of arbitrariness because it directed Defendant to bear all the costs of the arbitration although it granted Claimant's claim only in part, denying a claim for US$ 16

million. The Court of Appeal reasoned that it is disputed that the rules on costs set out in the ZPO apply in arbitration, where arbitrators allocate costs at their discretion. At any event, this decision on costs was not so removed from the basic principles of the German law on costs as to constitute a violation of international public policy: the arbitral tribunal did deny a considerable part of Claimant's claims but also granted a not negligible part of those claims, while denying all the claims of Defendant.

The Court of Appeal finally held that an oral hearing was not necessary in the recognition proceedings because Defendant was estopped from raising grounds for refusing recognition. This is the first decision reported.

By the second reported decision, rendered on 20 December 2012, the Federal Supreme Court, before Schlick, Vice-president, Herrmann,Wöstmann, Hucke and Seiters, JJ, dismissed Defendant's appeal on a point of law (*Rechtsbeschwerde*), holding that the case did not have essential relevance nor did the development of the law or the safeguarding of a uniform jurisprudence demand a decision by the Court.

Neither the question whether Defendant was precluded from raising its public policy arguments because it did not raise them in US annulment proceedings, nor the question whether a foreign award establishing a claim not previously registered in the insolvency register violates international public policy met the essential-relevance standard for an appeal on a point of law. Also, under the specific circumstances of the present case the Court of Appeal correctly held that there was no violation of international public policy. Its conclusion that an insolvency claim that was previously registered but later entered in the register as disputed does not violate international public policy could not be faulted.

Nor was an appeal on a point of law admissible from the point of view of the protection of a uniform jurisprudence. Defendant alleged that the Court of Appeal violated the principle of due process enshrined in the German Constitution by not holding an oral hearing. However, the Constitution does not establish a right to an oral hearing, only to due process, and does not regulate how due process is concretely guaranteed. In this case, Defendant was sufficiently guaranteed due process in the proceeding before the Court of Appeal. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345042-n>.

Excerpt

[1] "The request is admissible (see Sect. 1062 et seq. ZPO [*Zivilprozessordnung* – Code of Civil Procedure]). The jurisdiction of the court seized follows from Sect. 1062(1) first option ZPO[1] together with Art. III second sentence of the [1958 New York Convention].
[2] "The request is also founded, because the arbitral award must be declared enforceable under Sect. 1061 ZPO together with the New York Convention. Grounds for refusing recognition can no longer be invoked nor are they present."

I. ESTOPPEL

[3] "The debtor is precluded [*präkludiert*] from invoking grounds for refusal of recognition, because it failed to rely on them timely in an annulment action in the United States. According to constant jurisprudence, also followed by this enforcement court (see, most recently, the decision of 27 March 2006, 9 Sch 2/5 and references therein),[2] also the grounds for refusal of recognition based on public policy can be taken into account in proceedings for a declaration of enforceability only when the time limit for an admissible and content-wise relevant claim for annulment in the country of origin of the arbitral award has not expired (BGH NJW-RR 2001, 1059 et seq.). It is true that the continuing validity of this jurisprudence is disputed since the new Sect. 1061 ZPO[3] [entered into force], because Art. V of the New York Convention does not provide for estoppel [*Rügeverlust*] (*against*, inter alia, OLG Schleswig, RIW 2000, 706, 708; BayObLG, NJW-RR 2001, 431, 432; Lachmann, *Handbuch für die Schiedsgerichtsbarkeit*, 3rd ed., 2008, No. 1323; Mallmann, SchiedsVZ 2004, 152,

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

   "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…."

2. Reported in Yearbook XXXII (2007) pp. 342-346 (Germany no. 101).
3. 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)."

157; Raeschke-Kessler, in Prütting/Gehrlein (eds.), *ZPO*, 2nd ed., 2010, Sect. 1061 No. 29 et seq.; Schwab/Walter, *Schiedsgerichtsbarkeit-Kommentar*, 7th ed., 2005, Chapter 30 No. 19; Schlosser, in Stein/Jonas, *ZPO*, 22nd ed., 2002, Annex Sect. 1061 No. 76; *in favor*: for instance OLG Stuttgart, decision of 14 October 2003 - 1 Sch 16/02, 1 Sch 6/03; OLG Karlsruhe, SchiedsVZ 2006, 281 et seq.; SchiedsVZ 2006, 335, 336; SchiedsVZ 2008, 47, 48; OLG Frankfurt a. M., decision of 18 October 2007 - 26 Sch 1/07; Münch, in *Münchener Kommentar zur ZPO*, 3rd ed., 2008, Sect. 1061 No. 12; v. Adolphsen, ibidem, Sect. 1061 Annex 1 New York Convention Art. V No. 11 et seq.; Voit, in Musielak (ed.), *ZPO*, 1st ed., 2009, Sect. 1061 No. 20; *unclear*: Geimer, in Zöller, *ZPO*, 29th ed., 2012, Sect. 1061 No. 22 on the one hand, No. 29 on the other hand; *left open* in OLG Rostock, IPRax 2002, 401, 405; KG, SchiedsVZ 2007, 108, 112).

[4] "However, the New York Convention – either as an international convention or as the law referred to by Sect. 1061 ZPO – does not prevent the German courts from applying the grounds for refusal of recognition restrictively. The New York Convention does not hinder recognition-friendly practice of the national law (Art. VII(1) New York Convention). Courts remain free as before to interpret national law restrictively [*teleologische Reduktion*], so that all the grounds which justified estoppel [*Präklusion*] under the former law continue to exist under the new provision (Münch, in *Münchener Kommentar zur ZPO*, 3rd ed., 2008, Sect. 1061 Annex 1 Art. V New York Convention No. 7, 13; Reichold, in Thomas/Putzo, *ZPO*, 32nd ed., 2011, Sect. 1061 No. 6; Voit, in Musielak, *ZPO*, 7th ed., 2009, Sect. 1061 No. 20).

[5] "In the case at issue, Defendant raised the grounds for refusing recognition for the first time in the proceeding for the declaration of enforceability before [this Court] in its statement of 27 October 2009.

[6] "The jurisdiction to annul an arbitral award belongs solely to the courts of the state of rendition (Art. V(1)(*e*) second case New York Convention; BGH, NJW-RR 2008, 1083). Since the arbitral award was rendered in the United States, US law applies. To the extent that Defendant argues that US law does not apply because the parties did not choose it as the procedural law, Defendant misunderstands the distinction between the procedural law of the arbitration and the procedural law that applies to the subsequent review of the arbitral award by the state courts of the state of origin. In principle, unless the parties otherwise provide, this law too is the procedural law of the seat of the arbitration (see Schwab/Walter, *Schiedsgerichtsbarkeit-Kommentar*, 7th ed., 2005, Chapter 25 No. 11), here thus US procedural law.

[7] "According to Sect. 12 of the United States [Federal] Arbitration Act [FAA], which is applicable to international arbitration of the kind at hand here

(see Sect. 208 FAA), a request to annul, modify or correct an arbitral award must be filed within three months of notification of the arbitral award. As correctly argued by Claimant, the grounds for refusing recognition raised by Defendant in the present proceeding could have been raised in the US annulment proceedings (see Sect. 10 FAA and relevant jurisprudence). In particular, an arbitral award can be annulled by the US courts if it is at odds with public policy (*Revere Copper and Brass Incorporated v. Overseas Private Investment Corporation*, 628 F.2d 81 (D.C. Cir.1980); *Weber Aircraft. Inc. v. General Warehousemen and Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001); *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155 (1st Cir. 1983)).[4] The arbitral award was undisputedly notified to Defendant at the latest on 7 January 2009. Defendant did not file a petition under Sect. 12 FAA before the competent US court within the three-month time limit that began on that day.

[8] "Contrary to Defendant's opinion, the decision of the Federal Supreme Court [*Bundesgerichtshof* – BGH] of 16 December 2010 (NJW 2011, 1290)[5] does not lead to a different conclusion. This decision concerned the question whether the objection that the foreign arbitral tribunal lacked jurisdiction because there was no arbitration agreement could be raised in the [German] proceedings for a declaration of enforceability, when the defendant in the arbitration failed to challenge the arbitral award abroad by means of appeal subject to a time limit.

[9] "Constant jurisprudence of the BGH initially answered this question in the negative (BGHZ 52, 184; 55, 162; BGH, WM 1984, 1014; 1998, 739); [the BGH] then left this question open after the arbitration law reform (BGH NJW-RR 2008, 1083; BGH, SchiedsVZ 2009, 126 No. 6). In its decision of 16 December 2010, [the BGH] abandoned this so-called 'preclusion jurisprudence' expressly, albeit only in respect of the objection that there is no arbitration agreement or the arbitration agreement is invalid.

[10] "The BGH pointed out in the reasons for its decision that the defendant in the underlying arbitration 'argued from the beginning that there was no arbitration agreement' (BGH, *id.*, No. 12 at the end). The BGH further noted that the Court of Appeal had determined in its evaluation of the facts that the claimant had no reason to assume, in good faith, that the defendant would not oppose a declaration of enforceability in Germany by rasing the objection of the lack of jurisdiction of the arbitral tribunal (BGH, *id.*, No. 16).

[11] "The present case differs from these facts in two crucial points. First, Defendant does not argue in the present case that there is no (valid) arbitration

4. Reported in Yearbook X (1985) pp. 519-532 (US no. 56).

5. Reported in Yearbook XXXVI (2011) pp. 273-276 (Germany no. 136).

agreement. Rather, it invokes procedural defects such as errors in the application of German law. The principle underlying the BGH's decision – that the party relying on the invalid arbitration agreement has the right to a court in the enforcement state, which must examine whether that party forwent the legal protection of the state courts on the basis of a valid arbitration agreement (BGH, *id.*, No. 16; further on this point, Schütze, RIW 2011, 417, 418) – is not affected in the present case. Rather, it is completely undisputed here that both parties validly referred to arbitration.

[12] "Second, in the present case Defendant at no time in the arbitration raised the objection which it now raises in the proceedings for a declaration of enforceability. [Defendant] gave as a reason that the procedural defects on which it [now] relies became discernible for the first time with [the issuance of] the arbitral award. However, Defendant also did not challenge the arbitral award subsequently, when it became aware of the alleged defects.

[13] "In respect of the violation of due process due to the co-arbitrator falling asleep, Defendant says that it refrained from a challenge because [parties] are dependant on the cooperation of the arbitral tribunal and [Defendant] wished to avoid a full conflict with the arbitral tribunal. However, the theoretical fear of a conflict concerns all objections that a party can raise to the conduct of the proceeding by a tribunal. In final analysis, Defendant's argumentation would mean that objections must not be raised in principle in the [arbitration] proceeding but rather after the award, in a subsequent appeal or enforcement proceeding. This is at odds with the German procedural law in force (see for instance Sect. 282 ZPO).

[14] "At any event, other than in the case decided by the BGH Claimant had no reason here, on the basis of Defendant's behavior, to assume that Defendant would oppose a declaration of enforceability in Germany on the basis of the objections it now raises."

II. GROUNDS FOR REFUSAL

[15] "Also on the merits there are no grounds for refusing recognition."

1. Insolvency Claim on the Basis of an Arbitral Award

[16] "Defendant objects that the registration of an insolvency claim in the insolvency register [*Insolvenztabelle*] on the basis of an international arbitral award is inadmissible, because pursuant to Sect. 180 of the Insolvency Act

[*Insolvenzordnung* – InsO] the court of first instance or magistrate's court in the district of the bankruptcy court have exclusive competence in this matter. [Defendant] misunderstands Sect. 180 InsO, which regulates only the territorial competence of state courts.

[17] "It is recognized that parties may refer disputes on the rights of the insolvency creditor to the decision of an arbitral tribunal (RGZ 137, 109, 111; BGHZ 24, 15, 18; Uhlenbruck, in Uhlenbruck (ed.), *Insolvenzordnung-Kommentar*, 13th ed., 2010, Sect. 180 No. 5; BGH, NZI 2009, 309; Schumacher, in *Münchener Kommentar zur InsO*, 2nd ed., 2008, Sect. 180 No. 9; Hess, in Hess (ed.), *Insolvenzrecht-Großkommentar*, 2007, Sect. 180 No. 2). It follows from this arbitrability that an international arbitral award can be relied on, because according to Art. II(1) of the New York Convention Contracting States recognize the agreement for an international arbitral tribunal if the subject matter of the dispute is capable of settlement by arbitration."

2. Public Policy

[18] "The objection that the arbitral award violates international public policy because the claims were not registered in the insolvency register equally fails to persuade. First, it is it is not true that the arbitral tribunal in its arbitral award determined that the claims were not registered. Rather, para. 219 of the arbitral award, cited by Defendant on this point, merely states (in the German translation): 'The tribunal was only informed in a very general manner that B [allegedly] disputed all the claims of H.' This information, which is given in the reported speech form [*indirekte Rede*], cannot be deemed a determination of non-registration by the arbitral tribunal.

[19] "To the extent that, here and later, it alleges a violation of public policy, Defendant misunderstands the distinction between domestic public policy (*ordre public interne*) and international public policy (*ordre public international*); the latter is the only standard of review for foreign arbitral awards (see Art. V(2)(*b*) of the New York Convention together with Sect. 1061 ZPO; Voit, in Musielak (ed.), *Zivilprozessordnung-Kommentar*, 8th ed. 2009, Sect. 1061 No. 23 et seq.). There is a violation of domestic public policy when the declaration of enforceability of a (domestic) arbitral award is clearly incompatible with the fundamental principles of German law, including, in particular, constitutional rights. Not any violation of mandatory law results in such incompatibility; rather, the content of the arbitral award must be in such strong contrast with the basic principles of German provisions and the notions of justice therein contained to be unacceptable according to [German] standards (see BGH NJW 1993, 3269,

3270; OLG Düsseldorf, NJW 1997, 572; Voit, in Musielak (ed.), *Zivilprozessordnung-Kommentar*, 8th ed. 2009, Sect. 1059 No. 25).

[20] "In contrast, in the case of recognition of an international arbitral award the standard is the less strict regime of international public policy. A declaration of enforceability shall be refused only when the arbitration proceeding suffers from a serious defect, which affects the basic principles of German social and economic life (see BGHZ 98, 70, 73 et seq.; BGHZ 110,104, 106 et seq.; BGH, NJW-RR 2001, 1059, 1060 et seq.; BGH NJW 2007, 772). This is not the case for the arbitral award at issue, which is an international arbitral award under German law, because the seat of the arbitration was San Diego in the United States.

[21] "Defendant relies on the decision of the BGH of 29 January 2009 (BGH, NZI 2009, 309) to allege a violation of international public policy; this argument fails. In that case there was a domestic arbitral award determining [the existence of] an insolvency claim which was partially unregistered in the insolvency register. The BGH stated that the requirement to register a claim pursued in court proceedings in the insolvency register has the procedural purpose of safeguarding the principle of the equal satisfaction of all insolvency creditors; this principle pertains to domestic public policy (BGH, *id.*, No. 23). Further, the BGH stated that, contrary to the opinion [expressed in] the appeal, the arbitral award [at issue] was not subject to international public policy, which tends to be more generous (BGH, *id.*, No. 27).

[22] "It follows directly from the above that an international arbitral award that determines a claim not registered in the insolvency register does not violate international public policy – provided only this [public policy] applies.

[23] "Further, in the present case – other than in the case decided by the BGH – on 14 August 2002 Claimant made a written registration in the insolvency register of two claims against Defendant for a total amount of about € 137 million, making use of the forms supplied. The copies of the spreadsheets supplied to [this Court] contain hand-written specifications as to the basis for and the amount of the claims. It can also be inferred without doubt from the spreadsheets that these claims were made as insolvency claims.

[24] "However, it is proved by the excerpt of the insolvency register of the magistrate's court in W that this registration was provisionally disputed by Defendant, for the first time on 15 February 2002 and finally on 26 June 2003, on the ground 'claim unproved by evidence'. According to Sect. 174(2) InsO, the basis for and the amount of the claim must be indicated at the moment of registration. It is unclear according to German insolvency law whether the liquidator has the right to pre-examine or must record an incoming registration automatically in the register.

(….)

[25] "In light of this discussion, registration of a non-final or insufficiently final claim in the insolvency register cannot be deemed, under German bankruptcy law, a serious defect affecting the principles of German social and economic life. Hence, an international arbitral award establishing an insolvency claim that was previously registered but later entered in the register as disputed because of non-finality, does not violate international public policy.

[26] "The violation of Sect. 103 InsO and Sect. 324 Civil Code alleged by Defendant, as well as the allegedly defective interpretation of certain documents … also do not constitute a violation of international public policy. Rather, this is an issue of the correct application of substantive and procedural law. Such examination is at odds with the prohibition of the review of the merits, which applies in respect of both domestic and international arbitral awards (BGH SchiedsVZ 2008, 40, 42; Geimer, in Zöller, *Zivilprozessordnung*, 29th ed., 2012, Sect. 1061 No. 40 and references therein).

[27] "In essence, Defendant claims that the arbitral tribunal violated its duty to give indications [*Hinweispflicht*] and thereby the principle of due process; this was the cause of the incorrect application of the law. However, Defendant does not allege at all that the arbitral tribunal prevented it from expressing its opinion in respect of the factual and legal issues. Rather, Defendant claims that the arbitral tribunal failed to state its opinion of the factual and legal situation at the oral hearing in so detailed a manner that [Defendant] could make additional comments in respect of certain specific issues.

[28] "It is doubtful that there was in fact a violation of the obligation to give indications in respect of the law here, because in principle the court can in no case be required to give a (provisional) assessment of all individual issues at the oral hearing. This would be amiss because such assessment becomes possible for the first time at the end of the hearing in light of all the knowledge that the arbitral tribunal has acquired at the hearing. However, this question can remain open here because at any event a failure to give indications cannot be deemed to be a serious defect within the meaning of international public policy, affecting the principles of German social and economic life. Even if one assumed that the failure to give indications was the cause of an incorrect application of Sect. 103 InsO or Sect. 324 CC, there would be no violation of international public policy. Incorrect application of the law is in and of itself not a ground for refusing the declaration of enforceability. Incorrect decisions on the merits are to be accepted in arbitral awards just like in decisions of state courts (Geimer, *op. cit.*).

[29] "Finally, also the further procedural violations alleged by Defendant cannot constitute a violation of international public policy by the arbitral award.

[30] "First, it does no harm that the arbitration hearings took place not only at the agreed seat of the arbitration, San Diego, but also in New York. This follows from Sect. 1043(2) ZPO, according to which, independent of the agreed seat of the arbitral proceedings, the arbitral tribunal may meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members. Defendant does not argue that New York was an inappropriate venue; rather, it claims that New York was chosen by mutual agreement as the venue for oral hearings and that this choice was made to accommodate the parties. Defendant does not argue, nor is it apparent, that the parties explicitly or tacitly modified the agreement in the arbitration clause for San Diego as the seat of arbitration by repeatedly choosing New York as the venue of the hearing. Contrary to Defendant's opinion, it cannot be deemed that the repeated choice for New York as the hearing venue breached the original arbitration clause – a breach to which Defendant agreed and to which therefore it could not object – because Sect. 1043(2) ZPO clarifies that the agreement for the seat of the arbitration in San Diego in the arbitration clause is not affected by the choice of a different place for one or more oral hearings.

[31] "Thus, the alleged danger due to uncertainty in respect of the complementary application of the law of the seat is excluded. Accordingly, also the fact that the arbitral tribunal did not state the change of seat of arbitration alleged by Defendant or the acceptance of New York as a further seat of arbitration in the arbitral award is not a violation of international public policy.

[32] "Defendant is equally unsuccessful with its objection that the six-month time limit provided for in Art. 24 of the [1998] ICC Rules of Arbitration to render the arbitral award was exceeded and that the arbitral award was rendered over one year after the last day of hearing, so that the [arbitrators'] no longer had a personal impression of the witnesses and experts and the principle of due process [fair proceedings – *faires Verfahren*] was violated.

[33] "We agree with Defendant that pursuant to Art. 24(1) [1998] ICC Rules the arbitral tribunal must rendered its final arbitral award within six months. This time limit starts on the day of the last signature by the arbitral tribunal or the parties of the Terms of Reference. The authors indicate that this time limit is very often exceeded (Lachmann, *Handbuch für die Schiedsgerichtspraxis*, 3rd ed., 2008, No. 1558; [Craig]/Park/Paulsson, *International Chamber of Commerce*, 3rd ed., 2000, 356). The usual time span between request for arbitration and rendition of the award is about twenty months (Schwab/Walter, *Schiedsgerichtsbarkeit-Kommentar*, 7th ed., 2005, Chapter 54 No. 5). According to Art. 24(2) of the ICC Rules, the Court may extend this time limit at the reasoned request of the arbitral tribunal or on its own initiative if it decides it is

necessary to do so. [The Court] makes use of this possibility in most cases, according to reported practice (Lachmann, op. cit., No. 1558; Clark/Park/Paulsson, op. cit., 356). It does not appear that in the present case a request for extension of the time limit was made and granted by the Court.

[34] "According to the ZPO, the arbitral award must indicate the day on which it is rendered (Sect. 1054(3) first sentence ZPO). However, no time limit of any kind starts on the date of rendition under [German] law (Schlosser, in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, 22nd ed., 2002, Sect. 1054 No. 14). Hence, from the point of view of German law there is no violation of international public policy because the six-month time limit was exceeded. The BGH agrees and holds that the time limit for the rendition of the arbitral award in the ICC Rules has only an administrative character. It stated in a 1998 decision that even a violation of this provision would not justify non-recognition of the arbitral award rendered in the meantime; the time limit provision only protects the parties to the arbitration from an unreasonable delay in [rendering] the decision; once the arbitral award has been rendered, this protection purpose is over and cannot justify non-recognition (BGH IPRrax 1989, 228, 230).

[35] "Nor can Defendant justify a violation of international public policy by its objection that on almost all eight days of hearing one of the co-arbitrators partially did not follow the hearings for a lengthy period of time because he was asleep, whereby the principle of due process and the requirement of the due composition of the arbitral tribunal were violated. According to constant jurisprudence, a court is not regularly constituted if a judge sleeps during the oral hearing and therefore does not follow important proceedings (BGH, NJW 1962, 2212; BVerwG NJW 1966, 467; BGH, NStZ 1982, 41; BFH, BeckRS 2009, 25015415; BeckRS 2011, 95025).

[36] "It can be left open whether this was the case in the arbitration between the parties, because it is also recognized in jurisprudence that it can be concluded that there is a defective composition only when the party invoking this defect has drawn the attention of the President to what it believes is the limited involvement of the co-arbitrator in the hearing (BGH MDR 1974, 725; BGH 6 March 2001, 4 StR 529/00; BVerwG, NJW 2001, 2898; BFH, BeckRS 2011, 95025; BFH/NV 2009, 1059; BFHE 89, 183).

[37] "Thus it was up to Defendant to draw the attention of the President of the arbitral tribunal timely – that is, during the arbitration proceeding – and in the appropriate manner to the repeated dozing off of the co-arbitrator. A confrontation of Defendant with the arbitral tribunal was in no manner inevitable. Defendant has not explained for what reason a hint given in an impersonal and discreet manner to the President, who was surely not personally

concerned, would have been 'unacceptable' or without 'a real chance' of a remedial action; the more so, as the arbitral tribunal itself must have had a concrete interest to remedy or avoid this defect.

[38] "Since according to German procedural law it cannot be concluded that there was a defect in the [tribunal's] composition, there is no violation of international public policy.

[39] "Finally, Defendant's objection that the arbitral tribunal violated the prohibition of arbitrariness because it directed Defendant to bear all the costs of the arbitration although it did not grant Claimant's claims for US$ 16 million also fails. In respect of arbitrations [in Germany], Sect. 1057(1) ZPO provides that the arbitral tribunal shall allocate the costs of the arbitration between the parties at its discretion and taking into consideration the circumstances of the case, in particular the outcome of the proceedings. In general, the arbitral tribunal is not bound by Sect. 91 et seq. for its decision on the reasons for and allocation of costs (Münch, in *Münchener Kommentar zur ZPO*, 3rd ed., 2008, Sect. 1057 No. 14). Further, the rule that the losing party bears all the costs is not a principle required by the nature of the case or by logic; rather, it is a German rule of law, though not always applicable. The arbitral tribunal can find otherwise (Schwab/Walter, *Schiedsgerichtsbarkeit-Kommentar*, 7th ed. 2005, Chapter 33, No. 1).

[40] "It is disputed whether it is at all appropriate, when exercising discretion, to follow the rigid provisions of Sect. 91 et seq. and the principles therein of complete reimbursement of costs and allocation (*in favor*: Geimer, in Zöller, *Zivilprozessordnung*, 29th ed., 2012, Sect. 1057 No. 2; *against*: Schlosser, in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, 22nd ed., 2002, Sect. 1057 No. 2). Further, it is argued that a violation of Sect. 91 et seq. ZPO in principle does not constitute a ground for annulment (Schwab/Walter, *Schiedsverfahrensrecht*, 7th ed., 2005, Chapter 33 No. 1 fn. 5).

[41] "In the present case, the amount of Defendant's claims is a multiple of Claimant's. In the end the arbitral tribunal denied all the claims of Defendant; it is true that it also denied a considerable part of the claims of Claimant, but it granted a not completely negligible part of them. In these circumstances a decision on costs by which Defendant bears the costs of the arbitration and its own legal costs and Claimant bears its own legal costs does not appear to be so removed from the basic principles of the German law on costs to constitute a violation of international public policy."

III. ORAL HEARING

[42] "Since Defendant was estopped [*präkludiert*] from raising grounds for refusing recognition, an oral hearing (Sect. 1063(2) ZPO)[6] was not indispensable (on this point, BGHZ 142, 204, 207)…."

Supreme Court, 20 December 2012

[43] "The appeal on a point of law [*Rechtsbeschwerde*] of Defendant against the decision of the Karlsruhe Court of Appeal – 9th Civil Chamber in Freiburg – of 4 January 2012 (9 Sch 2/09) is dismissed as inadmissible at [Defendant's] cost, because the case does not have essential relevance nor does the development of the law or the safeguarding of a uniform jurisprudence demand a decision of the [BGH] (Sect. 574(2) ZPO).
(….)
[44] "The appeal on a point of law is admissible by law (Sect. 574(1) first sentence no. 1 together with Sect. 1025(4), Sect. 1065(1) first sentence, Sect. 1062(1) no. 4 second case ZPO) [but] unfounded (Sect. 574(2) ZPO)).
[45] "The question whether Defendant is precluded from raising the argument that the [ICC] arbitral award [rendered] in San Diego on 3 December 2008 violates international public policy (Sect. 1061(1) first sentence ZPO, Art. V(2)(*b*) New York Convention), because it did not raise this argument in proceedings for the annulment of the arbitral award before a US court, is not [sufficiently] relevant for a decision [by the Court].
[46] "The same is true of the question whether a foreign arbitral award establishing a claim not previously registered in the insolvency register generally violates international public policy. At any event, under the specific circumstances of the present case the Court of Appeal correctly held that there was no violation of international public policy.
[47] "These are not relevant questions for the admissibility [of an appeal]. The Court of Appeal assumed, as its remarks [at [23] above] make clear, that the claims awarded to Claimant in the arbitral award were registered by Claimant on 14 August 2002. The Court of Appeal opined in this respect that a foreign arbitral award, 'establishing an insolvency claim that was previously registered

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6. 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."

but later entered in the register as disputed because of non-finality, does not violate international public policy'.

[48] "This cannot be objected to – at any event if we consider further that only Defendant in his capacity as liquidator, not the other insolvency creditors, contested the registration of 14 August 2002, and that Defendant expressly recognized in the course of the arbitration that the said insolvency claims were justified.

[49] "The appeal on a point of law is also not admissible from the point of view of the protection of a uniform jurisprudence. Defendant alleges that the attacked decision of the Court of Appeal violates Art. 103(1) GG[7] because no oral hearing was held. [However,] Art. 103(1) GG does not establish a right to an oral hearing, only to due process. The Constitution does not regulate how [due process] is guaranteed – in writing or orally (see, only, BVerfGE 60, 175, 210 et seq.; 89, 381, 391). Defendant was sufficiently guaranteed due process in the proceeding before the Court of Appeal."

7. Art. 103(1) of the German Constitution (*Grundgesetz* – GG) reads:

"Anyone has a right to a fair hearing before the court."

147. Kammergericht [Court of Appeal], Berlin, 4 June 2012, 20 Sch 10/11; Bundesgerichtshof [Federal Supreme Court], 30 January 2013, III ZB 40/12

Parties:	Claimant/Respondent: Werner Schneider as liquidator of Walter Bau A.G. (Germany) Defendant/Appellant: The Kingdom of Thailand
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Articles:	I(1); III; IV; V(1)(*a*); V(1)(*c*); V(1)(*e*); V(2)(*b*); VI; VII(1)
Subject matters:	– sovereign immunity from execution v. sovereign immunity from jurisdiction – Bilateral Investment Treaty Germany-Thailand – estoppel – European Convention of 1961 – existence of arbitration clause – nonsignatory benefitted third under contract is bound by arbitration clause – fraud as ground for violation of public policy – more-favorable-right provision
Topics:	[3] + [19] = ¶ 514; [8] = ¶ 301; [9]-[12] + [44]-[57] = ¶ 105; [13]-[17] = ¶ 226 + ¶ 507 (non-signatory); [16] = ¶ 216A; [18] = ¶ 401; [21]-[27] = ¶ 303 + ¶ 704; [28]-[38] = ¶ 524 (fraud); [39]-[42] = ¶ 601; [53]-[54] = ¶ 507 (no arbitration agreement)

Summary

Court of Appeal: an award rendered in Switzerland in arbitration under a 2002 BIT was declared enforceable. Defendant waived sovereign immunity from enforcement by agreeing to the 2002 BIT, which provided for arbitration of disputes, to the ensuing awards being binding and to their enforcement under the other state's domestic law. Defendant was estopped – under German estoppel provisions which apply under the more-favorable-right provision in the 1958 New York Convention – from arguing that as the dispute arose under an earlier BIT which did not provide for arbitration with investors there was no arbitration agreement between the parties or that the arbitrators exceeded their authority. Defendant initially contested the arbitral tribunal's jurisdiction but subsequently accepted it in respect of disputes under the 2002 BIT. A declaration of enforceability would not violate public policy: if as alleged the award had been obtained fraudulently by concealing information, then fraud could only constitute a violation of public policy if determined, inter alia, in a final criminal law decision. This was not the case here. Nor was this a case in which the creditor should renounce its right under the title because the title is substantively incorrect: if the award was incorrect because of the concealed evidence, it was so because of defendant's negligence in challenging it. Defendant's request for adjournment was denied. Federal Supreme Court: proceedings for a declaration of enforceability are not enforcement but sui generis adjudication proceedings to which the sovereign immunity principles of adjudication proceedings (sovereign immunity from jurisdiction) apply. Because the dispute concerned acts in its sovereign sphere, defendant was immune from jurisdiction, unless it consented to the jurisdiction of the German courts. Defendant had done so by entering into a BIT which provided not only for arbitration but also for awards to be binding and for enforcement under the domestic law of the other state, Germany. However, although defendant was not immune, the Court of Appeal should have decided first whether claimant's investment fell under the 2002 BIT rather than under the earlier BIT. Defendant's failure to challenge the award on jurisdiction was not an implied waiver of sovereign immunity.

By a Tollway Concession Agreement of 21 August 1989, the Kingdom of Thailand granted Don Muang Tollway Co. Ltd (DMT), a Thai company, a concession for the construction and the exploitation for twenty-five years of a tollway from Bangkok to Don Muang Airport (the Tollway Project). DMT's sole source of income was to be the toll charges over the tollway, which were to be raised regularly in consultation with and with the approval of Thailand.

On 4 June 2002, Germany and Thailand concluded a bilateral Treaty on the Promotion and Mutual Protection of Investment (the Bilateral Investment Treaty – BIT), which entered into force on 20 October 2004 and replaced an earlier BIT of 1961. The 1961 BIT contained a clause referring disputes between the two states to arbitration. The 2002 BIT provided in Art. 10 that also "disputes in respect of investments between one of the Contracting Parties and an investor of the other Contracting Party" would be referred to arbitration. Art. 8 provided

that the BIT applied to "approved investments made by investors of a Contracting Party in the territory of the other Contracting Party, in accordance with its laws and other rules, before the entry into force of this Treaty". Pursuant to Art. 2(3), the Contracting Parties undertook "to treat the investments of investors of the other Contracting Party and their proceeds in all cases justly and fairly and guarantee their full protection".

Walter Bau A.G. (WBAG) owned shares in DMT; between August 1989 and July 1991, it invested approximately TBH 750 million in the Tollway Project. In April 2005, WBAG was declared bankrupt. In September 2005, Werner Schneider, as liquidator of WBAG (Claimant) commenced arbitration against Thailand on the basis of the arbitration clause in the 2002 BIT (the BIT arbitration). Claimant alleged that Thailand violated Claimant's rights in DMT by charging low toll charges, building toll-free alternative routes to Don Muang Airport and temporarily closing the Airport. The BIT arbitration was held in Geneva. By a partial award of 5 October 2007, the arbitrators held that they had jurisdiction.

In the meantime, by a share purchase contract of 3 December 2006, Claimant sold its shares in DMT to Mr. S. P. and Mr. T. P. (collectively, the Intervenors), both partners in DMT and members of its board. The contract provided that the Intervenors would have the final decision as to whether to continue the BIT arbitration against Thailand; a confidential Side Letter stated, however, that Claimant was prepared to terminate the BIT arbitration at the Intervenors' request unless the parties could reach an agreement to continue the BIT arbitration after 31 March 2008. The 3 December 2006 contract was modified on 12 July 2007; the modification was backdated to 3 December 2006. The 3 December 2006/12 July 2007 Contract provided for the application of Swiss law; it also provided for ICC arbitration of disputes in Singapore.

Also on 12 July 2007, Thailand and DMT concluded a settlement under which the tollway concession was extended for a further twelve years and DMT was granted extensive rights to raise the toll charges.

On 13 August 2007, Claimant and the Intervenors executed a second confidential Side Letter, according to which the Intervenors were granted the right to request Claimant to terminate the BIT arbitration after 31 August 2008.

On 17 September 2008, the Intervenors requested Claimant to terminate the BIT arbitration against Thailand. Claimant did not comply with this request; it also did not inform the BIT tribunal of this request or the existence of the Side Letters.

On 15 October 2008, the Intervenors commenced ICC arbitration in Singapore against Claimant, seeking an order that Claimant must withdraw the

arbitration claim against Thailand in the BIT arbitration. On 23 April 2009, Thailand informed the BIT arbitral tribunal of the commencement of the ICC arbitration in Singapore.

On 1 July 2009, the BIT arbitral tribunal in Geneva rendered a final award in favor of Claimant, directing Thailand to pay Claimant € 29,210,000, € 1,806,560 for costs and interest on both sums. Claimant sought a declaration of enforceability of the BIT award by a declaration of enforceability in Germany. The reported decisions concern this application.

On 22 December 2009, Claimant submitted the BIT award in the pending ICC arbitration in Singapore. Since a final award had already been rendered in the BIT arbitration, the Intervenors renounced their right to request Claimant to perform under the contractual obligation in the 3 December 2006/12 July 2007 Contract by a letter of 23 April 2010. On 4 October 2010, the Intervenors modified their request in the ICC arbitration: they renounced their right to demand that Claimant withdraw its BIT arbitration request, and only sought reimbursement of part of the DMT share purchase price, which they claimed had been paid in consideration of the right to request the termination by Claimant of the BIT arbitration. By an award of 18 April 2011, the ICC tribunal in Singapore held that while the Intervenors did have the right to request Claimant to terminate the BIT arbitration, they were not entitled to reimbursement of part of the share purchase price, because it could not be determined that that sum had been paid in consideration of the Intervenors' right to request termination of the BIT arbitration.

By the first reported decision, rendered on 4 June 2012, the Berlin Court of Appeal granted Claimant's request for a declaration of enforceability of the BIT award, finding that Thailand waived its sovereign immunity from enforcement; that it was estopped from raising the objection that there was no valid arbitration agreement; and that a declaration of enforceability would not violate public policy.

The court reasoned that German courts can order enforcement measures against a foreign state's assets located in Germany, with the exception that assets earmarked for sovereign purposes are exempt from enforcement measures unless the foreign state consents thereto. Here, Thailand waived its immunity from enforcement by agreeing in the BIT to arbitration of disputes with investors, to the ensuing awards being binding and to their enforcement under German domestic law.

The Court of Appeal held that Claimant, as WBAG's liquidator, had standing. It then found that the 3 December 2006/12 July 2007 Contract between Claimant and the Intervenors was not a contract benefitting a third party under

the applicable Swiss law. Hence, Thailand did not have any rights as a third, non-signatory party under that Contract. In particular, Thailand could not rely on the right to demand that Claimant withdraw its arbitration claim, or its request for a declaration of enforceability of the ensuing award.

Moreover, even if the 3 December 2006/12 July 2007 Contract were a contract benefitting a third party – Thailand – then still Thailand could not rely on the right thereunder because the Intervenors renounced it in their 23 April 2010 letter. In any event the dispute should be heard in ICC arbitration, not by the enforcement court. The court added that if the contract were a contract benefitting a third party (which it was not), then Thailand could be bound to it under German law, which applies under the more-favorable-right provision, so that it would not be necessary to examine whether Thailand was bound under Swiss law.

Claimant complied with the formal conditions for requesting a declaration of enforceability under the 1958 New York Convention by supplying a certified copy of the arbitral award, whose existence and authenticity were moreover undisputed. The award was binding: the parties did not provide for an appellate arbitral instance, and though revision proceedings were pending before the Swiss courts, this did not hinder a declaration of enforceability as the award had not yet been set aside.

The Court of Appeal found that there were no grounds for refusing enforcement. First, Thailand was estopped from arguing that there was no (valid) arbitration agreement between the parties, or that the award concerned a dispute that did not fall under the arbitration clause in the BIT (Art. V(1)(*a*) and (*c*) New York Convention) because the dispute did not arise under the 2002 BIT but rather under the 1961 BIT. Although failing to raise these arguments in annulment proceedings in Switzerland is not a ground for estoppel under either German law or the New York Convention, other German estoppel (*Präklusion*) provisions, which are applicable under the more-favorable-right provision in Art. VII(1) of the Convention, can limit a defendant's right to raise objections in German recognition and enforcement proceedings. Referring to the 1961 European Convention – which provides that objections of lack of jurisdiction because there is no (valid) arbitration agreement must be filed at the latest when filing the statement on the merits of the arbitration – the Court of Appeal noted that although Thailand did argue at the beginning of the arbitration that there was no arbitration agreement, it subsequently accepted the tribunal's partial award on jurisdiction, recognizing that the tribunal had jurisdiction over disputes arising after the 2002 BIT came into force and only disputing jurisdiction in respect of disputes arising before that date. The court added that Thailand was also

estopped because of its contradictory behavior, the prohibition of contradictory behavior being inherent (also) in the New York Convention.

Second, declaring the BIT award enforceable would not violate public policy. Thailand argued that Claimant obtained the BIT award fraudulently, because it deliberately concealed the obligation it undertook in the 3 December 2006/12 July 2007 Contract to withdraw its request at the Intervenors' request. The Court of Appeal reasoned that there is a violation of public policy when there have been defects in the arbitration that constitute a ground for re-trial (*Restitution*). It agreed that if the award had been obtained by fraud, there would be a ground for a re-trial. However, the limitations established by the law in respect of a re-trial would also apply, in particular the requirement that an alleged fraud be determined in a final criminal law decision or that criminal proceedings to establish it could not be commenced or continued on other grounds than lack of evidence. This was not the case here.

In exceptionally serious cases a creditor may be ordered to refrain from relying on a title that is formally valid but substantively incorrect, that is, when execution under that title would be irreconcilable with the concepts of justice. Again, this was not the case here, since the award of damages was not substantively incorrect. Also, Thailand was aware of Claimant's obligation to the Intervenors well before the BIT award was rendered and failed to take any action; if the award was incorrect, it was so because of Thailand's negligence. Incorrect decisions cannot be corrected when the defect is due to negligent procedural conduct of the party concerned.

The Court of Appeal also held that since Thailand had no right to demand that the BIT arbitration claim be withdrawn – because it was not a third party benefitting under the 3 December 2006/12 July 2007 Contract – Claimant's breach of its contractual obligations toward the Intervenors did not justify a finding that declaring the BIT award enforceable would violate public policy in its narrow, international meaning. Finally, Claimant did not commit an abuse of law by continuing the arbitration. Thailand argued that the part of the sale price paid by the Intervenors for the DMT shares was a consideration for the Intervenors' right to demand the withdrawal of the BIT arbitration claim. The court noted, however, that the arbitral tribunal concluded that this allegation was not proved.

Thailand's request for adjournment under Art. VI of the New York Convention was also denied. The Court of Appeal held that the Swiss annulment action was not likely to succeed and that in any event a decision was not expected in the near future. This is the first decision reported.

By the second reported decision, rendered on 30 January 2013, the Federal Supreme Court, before Schlick, Vice-president, and Wöstmann, Seiters, Tombrink and Remmert, JJ, reversed and remanded the case to the Court of Appeal to determine whether Claimant's investment fell under the scope of the 2002 BIT.

The Court first found that the Court of Appeal's holding in respect of sovereign immunity was incorrect. It reasoned that the proceeding for a declaration of enforceability is not an enforcement proceeding, as held by the Court of Appeal, but rather a *sui generis* adjudication proceeding (*Erkenntnisverfahren*): hence, the principles on sovereign immunity applicable in adjudication, rather than enforcement proceedings apply. According to these principles, states are not subject to the jurisdiction of other states in adjudication proceedings in respect of their sovereign acts (*acta iure imperii*). The dispute decided in the BIT arbitration concerned the sovereign activity of Thailand. Its refusal to increase and the temporary reduction of the toll charges, the construction and expansion of alternative, toll-free routes and the temporary closing of the Don Muang Airport were omissions or activities to be ascribed to Thailand's sovereign sphere. Hence, Claimant's request for a declaration of enforceability of the Swiss arbitral award was admissible only if Thailand submitted to the jurisdiction of the German courts.

The Supreme Court found that Thailand did so submit. It premised that a waiver of immunity in adjudication proceedings does not imply a waiver of immunity in execution proceedings, and that sovereign immunity must be examined separately in both proceedings. It then held that it was unnecessary here to determine whether by simply signing the 2002 BIT Thailand waived its sovereign immunity in the adjudication proceedings for the declaration of enforceability of the award, since Thailand also agreed in the BIT to the award being enforced "according to domestic law". Thus, Thailand agreed to submit to the proceeding for a declaration of enforceability, which is a necessary condition for enforcement of an award in Germany.

The Court noted, however, that although Thailand could not invoke sovereign immunity the Court of Appeal should have decided first whether Claimant's investment fell under the 2002 BIT and not under the 1961 BIT, which did not contain an arbitration clause for disputes with investors.

It was irrelevant that the court found that Thailand was estopped from raising the objection of the lack of an arbitration agreement: first, the 1961 European Convention did not apply here as Thailand is not a Contracting State and, second, the question of immunity must be examined by the court at all stages on its own initiative. It was also irrelevant that Thailand did not challenge before the Swiss

courts the partial award on jurisdiction, which found that there was a valid arbitration agreement: a decision denying immunity is no obstacle to the examination in later proceedings of the question whether the German courts have jurisdiction, also when that decision has not been challenged. Nor was the failure to challenge the award on jurisdiction an implied waiver of sovereign immunity. A waiver requires in principle an express statement, or can be assumed when the party's behavior clearly shows its intention to submit to the courts' jurisdiction. In case of doubt, waiver can be assumed only in respect of the specific proceedings. In the case at issue, Thailand's behavior in the arbitration could not have the effect of waiving immunity in the proceeding for the declaration of enforceability of the award.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345043-n>.

Excerpt

Court of Appeal, 4 June 2012

[1] "The request for arbitration filed in September 2005 by [WBAG] against Defendant was based on the [2002 BIT], BGBl. II 2004, p. 48 et seq., announcing its entry into force and the simultaneous expiry of the earlier treaty of 13 December 1961, BGBl. II 2004, p. 1520.
(....)
[2] "By a partial award of 5 October 2007, the arbitral tribunal declared that it had jurisdiction to commence arbitration on the basis of the BIT of 24 June 2002.
[3] "On 1 July 2009, a final award [between the parties] was rendered in Geneva. According to the law of the place of arbitration – pursuant to the 'Terms of Reference' agreed in the arbitration, Geneva – the arbitral award is binding and enforceable upon notification pursuant to Art. 190(1) of the Swiss PILA.[1] The subsequent declaration of enforceability of the 'Court of First Instance'[English original] of Canton Geneva/Switzerland of 9 December 2009 pursuant to Art. 193(2) Swiss PILA[2] proves that the arbitral award is binding.
[4] "By a decision of 14 March 2011, the United States District Court for the Southern District of New York confirmed the arbitral award of 1 July 2009 in favor of the claimant in the arbitration. This decision was appealed by Defendant.[3]
[5] "By a decision of 11 July 2011, the Court of Appeal, at Claimant's request, ordered provisional security pursuant to Sect. 1063(3) ZPO,[4] after the Crown

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1. Art. 190(1) of the Swiss Private International Law Act – PILA reads:

   "1. The award is final from its notification."

2. Art. 193(2) Swiss PILA reads:

   "(2) On request of a party, the court shall certify the enforceability of the award."

3. *Note General Editor*. On 8 August 2012, subsequent to the present decision, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court granting enforcement. This decision is reported in Yearbook XXXVII (2012) pp. 417-419 (US no. 777).
4. Sect. 1063(3) of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO) reads:

   "(3) The presiding judge of the civil court senate (*Zivilsenat*) may issue, without prior hearing of the party opposing the application, an order to the effect that, until a decision on the request has been reached, the applicant may pursue enforcement of the award or enforce the interim measure of

Prince of [the Kingdom of Thailand] arrived in Munich for private purposes with a Boeing 747-4Z6 aircraft, which according to Claimant was the property of the [Royal Thai Air Force] and therefore the property of the [Kingdom of Thailand]. After Defendant, in order to avoid giving of security, gave Claimant a deed of suretyship … over € 38,000,000, the attachment of the aircraft ordered in the meantime was lifted and the aircraft left [Germany].

[6] "By an application of 14 September 2011, Defendant filed a request for revision [*Revision*] before the Swiss Federal Supreme Court, on the ground that it had become aware, after the arbitral award [had been rendered], of crucial facts and evidence: in particular, the right granted to the Intervenors to unilaterally demand that Claimant withdraw its request for arbitration against [Defendant] at first request, and the fact that this right was exercised before completion of the [BIT] arbitration proceedings."

(….)

I. DISCUSSION

[7] "The request for a declaration of enforceability is admissible and founded pursuant to Sect. 1061(1) and Sect. 1062(2) ZPO together with the [1958 New York Convention] and the [BIT]."

1. Territorial Competence

[8] "The Court of Appeal has competence to decide on the request for a declaration of enforceability, in accordance with the finding of the Court of Appeal of Munich that it lacked territorial competence; also, [this Court] has residual competence under Sect. 1062(2) last alternative ZPO[5] because the

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protection of the arbitration court pursuant to Sect. 1041. In the case of an award, enforcement of the award may not go beyond measures of protection. The party opposing the application may prevent enforcement by providing as security an amount corresponding to the amount that may be enforced by the applicant."

5. Art. 1062(2) 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."

aircraft, which remained at Munich airport for a short time, had no 'stable location'."

2. Sovereign Immunity

[9] "Defendant is not exempt from the jurisdiction of the German courts. Lacking specific legal provisions or international law agreements, the extent to which another state is subject to the jurisdiction of the German courts is determined according to the general rules of international law (Sect. 20(2) Judiciary Act [*Gerichtsverfassungsgesetz* – GVG]), which have the force of federal law pursuant to Art. 25 Constitution [*Grundgesetz* – GG]. Accordingly, as held by the Federal Constitutional Court, the forum state is not absolutely prevented under international law from carrying out measures of forced execution on the basis of a title against a foreign state on assets of that state that are located in the forum state (BVerfGE 46, 342, 388 et seq., 392; 64, 1, 23, 40).

[10] "There is only a general rule of international law that forced execution by the forum state on the basis of an executory title against a foreign state on assets of that state that fall under the sovereignty of the forum state or are located there is inadmissible, unless the foreign state consents, if [these assets] are earmarked for sovereign purposes of the foreign state at the time of the commencement of the measure of forced execution (BVerfGE 46, 342, 346, 364; 64, 1, 40).

[11] "Thus, Defendant does not have general immunity from execution. Also, the subject matter of this proceeding is not an encroachment on Defendant's sovereign rights, but rather an arbitral award ordering payment of a sum of money because of Claimant's claim for damages.

[12] "Further, Defendant agreed to an arbitration agreement under the BIT and to this extent waived its state immunity. It is expressly agreed in the Treaty that the decisions of the arbitral tribunal shall be binding on Defendant and shall be enforced pursuant to domestic law (Art. 9(5); Art. 10(2)). It would be at odds with the principles of international law, or rather in disregard of them, if the national courts of the other Contracting State could not make Defendant comply with this obligation into which it consciously entered."

3. Reliance on 3 December 2006/12 July 2007 Contract (No)

[13] The court held that Claimant, WBAG's liquidator, had standing. It then found that the 3 December 2006/12 July 2007 Contract between Claimant and

the Intervenors was not a contract for the benefit of a third party (*Vertrag zu Gunsten Dritter*) under the applicable Swiss law. Hence, Defendant as a non-signatory third party could not rely on that Contract to invoke the right to demand that Claimant withdraw its arbitration claim, or its request for a declaration of enforceability of the ensuing award.

[14] The court added that even if the 3 December 2006/12 July 2007 Contract were a contract for the benefit of a third party, Defendant could still not rely on this right because by letter of 23 April 2010 the Intervenors withdrew from the agreement and renounced their right to request Claimant to perform under this contractual obligation. The court continued:

[15] "Further, claims arising out of the 3 December 2006/12 July 2007 Contract are to be decided on the basis of the arbitration clause at No. 16, according to which all disputes under this contract are subject to [ICC arbitration] with seat in Singapore. Claimant rightly invoked the arbitration clause and argued that only the ICC arbitral tribunal can decide on these claims, which cannot be the subject matter of the proceeding for a declaration of enforceability. The right under the 3 December 2006/12 July 2007 Contract to demand that Claimant withdraw its [BIT] arbitration claim existed from the beginning with the 'limitation' that it could be relied on only before the arbitral tribunal, not the state courts. The arbitration clause also contained the prohibition to rely on [this] claim in proceedings before the state courts; it was the parties' intention that [this claim] be decided by an arbitral tribunal.

[16] "The arbitration clause is inherent in the content of the claim, so that also a third party is bound thereto under a contract for the benefit of a third party (Zöller/Geimer, *ZPO*, 29th ed., Sect. 1031 no. 19; see also BGH, decision of 2 October 1997 - III ZR 2/96 … on the informal transfer of the arbitration clause in the main agreement to the share purchaser). The fact that Defendant did not sign an arbitration agreement within the meaning of Art. II New York Convention is no obstacle to this [conclusion], because the more-favorable-right provision in Art. VII(1) of the New York Convention also applies in the context of the application and examination of Art. II of the New York Convention. Art. VII(1) of the New York Convention provides that the provisions of the Convention shall not deprive any party of the right to avail itself (in favor of validity) of an arbitral award in accordance with the law or the treaties of the country where the award is invoked. If, accordingly, the arbitration agreement is valid against third parties without formal requirements under the national procedural law of the enforcement state, then there is no need to examine, in the context of Art. V(1)(*a*) second case New York Convention, whether it is also

[valid] in accordance with the law of the country in which the arbitral award was rendered (see also BGH, decision of 30 September 2010 – III ZB 69/09).[6]
[17] "Hence, the state courts may not decide on the claims under the 3 December 2006/12 July 2007 Contract and Defendant cannot rely on them in proceedings for the declaration of enforceability.…"

4. Conditions for Requesting Enforcement

[18] "The further formal conditions for a request are complied with, in particular a certified copy of the arbitral award has been supplied in accordance with Sect. 1064(1) and (3) ZPO.[7] Moreover, the existence and authenticity of the arbitral award are undisputed."

5. Award Is Binding

[19] "The arbitral award is binding in the sense of Art. V(1)(*e*) New York Convention. The Court shares the opinion of the Federal Supreme Court that an arbitral award becomes binding on the parties when it cannot be challenged either in an appellate arbitral instance or through a means of recourse (BGH, decision of 14 April 1988 - III ZR 12/87).[8] This is the case of the arbitral award at issue. The parties did not agree on a review of the arbitral award by a higher arbitral instance. The revision proceedings commenced by Defendant before the Swiss Federal Supreme Court do not hinder the declaration of enforceability, because it can only set aside the arbitral award subsequently, and this does not prevent its being binding."

6. Grounds for Refusal

[20] "There are no grounds preventing recognition and enforcement of the arbitral award under Art. V New York Convention."

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6. Reported in Yearbook XXXVI (2011) pp. 282-283 (Germany no. 139).
7. 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."

8. Reported in Yearbook XV (1990) pp. 450-455 (Germany no. 33).

a. Valid arbitration agreement (estoppel)

[21] "Defendant is barred from arguing that there was no (valid) arbitration agreement between the parties, or that the arbitral award concerns a dispute that does not fall under the provisions of the arbitration clause in the BIT (Art. V(1)(*a*) and (*c*) New York Convention)….

[22] "In the proceeding for recognition and enforcement of a foreign arbitral award Defendant can argue, pursuant to Sect. 1061(1) first sentence [ZPO][9] and Art. V(1)(*a*) New York Convention (together with Art. II New York Convention) that the arbitral award is not based on a (valid) arbitration agreement. Neither Sect. 1061 ZPO nor Art. V New York Convention contains a reservation that foreign means of recourse must be commenced against the arbitral award. Hence, in the context of the [New York Convention], to which [German] law refers, this objection cannot be denied because of the failure to commence recourse proceedings abroad within the given time limit (BGH, decision of 16 December 2010 – III ZB 100/09 …).[10]

[23] "However, Sect. 1061(1) first sentence [ZPO] and Art. VII(1) New York Convention provide that the provisions of the Convention do not deprive any interested party of any right it may have to avail itself 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 (the so-called more-favorable-right provision). Thus, estoppel [*Präklusion*] provisions can limit a defendant's objections in [German] proceedings for recognition and a declaration of enforceability.

[24] "Art. V(1) first sentence of the [1961 European Convention] (BGBl. 1964 II p. 425) provides in this respect that if a party wishes to raise the objection of the lack of jurisdiction of the arbitral tribunal on the ground that there is no arbitration agreement or [the arbitration agreement] is invalid, it must do so at the latest at the same time as its statement on the main subject matter of the arbitration. Otherwise, pursuant to Art. V(2) European Convention, it is prevented from raising this claim also in the subsequent proceeding before a state court (BGH, id.). The European Convention complements to this extent Art.

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9. 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."

10. Reported in Yearbook XXXVI (2011) pp. 273-276 (Germany no. 136).

V(1) New York Convention (see also MünchKomm/Adolphsen, *ZPO*, 3rd ed. Book III, Sect. 1061 Annex 2 European Convention No. 10).

[25] "Although Defendant argued at the beginning of the arbitration that there was no arbitration agreement, according to the determinations in the main arbitral award … it accepted the arbitral tribunal's partial arbitral award on jurisdiction of 5 October 2007. According to the remarks in the arbitral award of 1 July 2009, at the hearing on the main subject matter [Defendant] argued that the arbitral tribunal did not have jurisdiction only from the point of view of time, in that the disputes arose before the BIT of 2002 came into force on 20 October 2004. Defendant expressly agreed that the arbitral tribunal had jurisdiction in respect of disputes which arose after that date. The arbitral tribunal agreed with Defendant's objection and expressed the opinion that 'Art. 10 of the Treaty established in 2002 does not provide for jurisdiction ratione temporis for the determination of disputes arising before the Treaty came into force'. Defendant itself stated that it no longer challenged the decision of the arbitral tribunal over its substantive jurisdiction in the further course of the arbitration; that it accepted it in the context of the arbitration; and that it had further raised only the question of the jurisdiction ratione temporis.

[26] "Defendant refers to the Terms of Reference, dated early 2008, according to which it reserved the right 'to dispute the reliance by claimant in the arbitration on the 1961 Treaty'. In fact, it did not reserve the right to rely on the lack of jurisdiction of the BIT arbitral tribunal, which based its jurisdiction on the BIT of 2002. The arbitral tribunal clearly thought the same, as it determined in the arbitral award that Defendant accepted its substantive jurisdiction. Rather, by accepting the ratione materiae and ratione temporis jurisdiction of the arbitral tribunal at the hearing on the main subject matter and by defending itself on the merits without further objections, Defendant validly waived the jurisdiction objection it initially raised and is precluded [from raising it] in the proceedings for the declaration of enforceability pursuant to Art. V(1) first sentence and (2) first sentence second part of the European Convention.

[27] "Defendant is also precluded from raising its jurisdiction objection because of contradictory behavior. The prohibition of contradictory behavior is a legal principle, inherent (also) in the New York Convention, which is to be taken into account in the context of Art. II and Art. V New York Convention (*Oberlandesgericht*, Schleswig-Holstein, decision of 30 March 2000 – 16 SCHH 5/99 …).[11] There is a contradiction of the requirement of fair proceedings [*redliche Prozessführung*] – which applies in the present proceedings before a

11. Reported in Yearbook XXXI (2006) pp. 652-662 (Germany no. 85).

German court as a manifestation of the principle of good faith in procedural law (Zöller/Vollkommer, *ZPO*, 29th ed., 'Introduction' No. 56) – if the defendant fully participates in the examination of [the issue of] jurisdiction in the arbitration, fails to have an unfavorable decision reviewed by the competent state court and further participates in the main action in the arbitration, affirming that the arbitral tribunal has jurisdiction, and then reverts to its objection of lack of an arbitration clause at the stage of the declaration of enforceability (see also [Berlin] Court of Appeal, decision of 18 August 2006 – 20 SCH 7/04; OLG Hamm, decision of 27 September 2005 – 29 Sch 1/05, SchiedsVZ 2006, 107)."[12]

b. Public policy

[28] "Nor is recognition and enforcement of the arbitral award to be denied because of a violation of public policy pursuant to Art. V(2)(*b*) New York Convention.

[29] "The annulment ground of violation of public policy is specified in Sect. 580 et seq. ZPO:[13] things have happened in the arbitration that constitute a ground for *Restitution* (Zöller/Geimer, *ZPO*, 29th ed., Sect. 1061 No. 32, Sect. 1059 No. 67). There is no such ground for annulment as described in Sect. 580 ZPO here.

[30] "Defendant claimed that Claimant obtained the arbitral award through procedural fraud and that it deliberately deceived the arbitral tribunal [by concealing] that it undertook in the share purchase contract with [the Intervenors] to withdraw the [BIT] arbitration claim. By backdating the share purchase contract and transferring the obligation therein to withdraw the [BIT] arbitration claim to an undisclosed 'Side Letter', Claimant concealed its obligation from the arbitral tribunal, since it should have supplied the share purchase contract in the arbitration. Claimant knew that revealing its obligation to withdraw the claim would have led to the dismissal of the arbitration claim. Claimant continued the arbitration knowing that its submission was incomplete

12. Reported in Yearbook XXXI (2006) pp. 685-697 (Germany no. 90).

13. Sect. 580 et seq. ZPO provide for the cases in which a request for re-trial (*Restitutionsklage*) can be filed. Sect. 580(4) ZPO reads:

> "There is a request for re-trial:
> ....
> 4. when the decision has been obtained by the representative of the party or by the defendant or its representative through an offense committed in respect of the legal dispute...."

and that damage was to be expected; [it did so] in order to maintain its claim for further payments than those received from Mr. S. P. and Mr. T. P.

[31] "If as alleged by Defendant the arbitral award had been obtained through a procedural fraud of Claimant, then there would be a ground for *Restitution* under Sect. 580(4) ZPO and thus in principle also a ground for refusal in the sense of Art. V(2)(*b*) New York Convention. However, the limitations of Sect. 581 et seq. ZPO apply to this ground, just as to the reliance on grounds for *Restitution* in state court proceedings. As a result of [these limitations], the public policy violation in the *Restitution* ground under Sect. 580(4) ZPO cannot be raised against this arbitral award. In respect of the alleged procedural fraud there is neither a final criminal law decision nor is it established that criminal proceedings could not be commenced or continued on other grounds than lack of evidence, Sect. 581(1) ZPO (see BGH, decision of 2 November 2000 – III ZB 55/99 …).

[32] "The request for a declaration of enforceability of the arbitral award also does not fail because Defendant successfully raises the objection of intentional illegal harm [*sittenwidrige vorsätzliche Schädigung*] (Sect. 826 BGB (*Bürgerliches Gesetzbuch* – Civil Code). This could happen only if obtaining a decision or relying on the final and binding decision of a state court were deemed to harm the defendant illegally in the sense of Sect. 826 BGB.

[33] "According to constant jurisprudence of the Federal Supreme Court (decision of 1 December 2011 – IX ZR 56/11 …) in particularly serious, narrowly limited exceptional cases a creditor can be obligated, pursuant to Sect. 826 BGB, to refrain from forced execution on the basis of a title which is final and binding but substantively incorrect, when it would be completely irreconcilable with the concepts of justice that the title creditor relies on his formal legal status against the debtor in disregard of the substantive legal situation; legal effectiveness takes a step back in that case. This presupposes the material incorrectness of the executory title, the creditor's knowledge thereof, and also special additional circumstances, under which obtaining or using an executory title is illegal, and it is imperative that the creditor renounces the legal position he has undeservedly obtained (BGH, id.).

[34] "These conditions, however, are clearly not present here. First, it does not appear that Defendant being ordered to pay damages in the arbitral award was substantively incorrect. Second, Defendant was aware of the withdrawal clause in the 3 December 2006/12 July 2007 Contract before completion of the BIT arbitration. According to its own statement, Defendant informed the arbitral tribunal by letter of 23 April 2009 of the existence of the ICC arbitration and argued that Claimant acted in bad faith because by continuing the arbitration

against [Defendant] it deliberately violated its obligations under the contract with Mr. S. P. and Mr. T. P. in respect of the withdrawal of the arbitration claim. [Defendant] informed the BIT arbitral tribunal that the Intervenors were willing to provide information to the arbitral tribunal, insofar as this would not have a detrimental effect on their position against Claimant in their own [ICC] arbitration.

[35] "In a 14 September 2011 statement in the *Revision* proceedings before the Swiss Federal Supreme Court, Defendant argued that it was aware of a Side Letter already in July 2008. It argues, without proving it, that it was not aware on the other hand of the precise content of the contracts and of the ICC arbitration; however, it should have made enquiries, as it did later on the occasion of the conversation with Mr. S. P. on 14 June 2011, and obtained the Side Letter. Defendant did not claim that this was not possible while the BIT arbitration was still pending. According to the jurisprudence of the Federal Supreme Court, a decision that is objectively incorrect cannot be corrected pursuant to Sect. 826 BGB when [the defect] is to be attributed to negligent procedural conduct of the party concerned (BGH, decision of 25 February 1988 – III ZR 272/85 …). This applies also to the failure to file possible means of recourse (Palandt/Sprau, *BGB*, 71th ed., Sect. 826 No. 52), such as in the present case Defendant's failure to commence annulment proceedings against the award under Art. 190(2) PILA.[14]

[36] "Further, it cannot be deemed that Claimant obtained the arbitral award by devious means because it concealed the content of the Side Letter, because it was bound to strict confidentiality under the 3 December 2006/12 July 2007 Contract. [Claimant] could also assume that Defendant had no rights regarding the BIT arbitration, as there was no agreement for the benefit of a third party, and that [Defendant] in any event should have relied on any rights under the

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14. Art. 190(2) Swiss PILA reads:

> "(2) The award may only be annulled:
>
> (a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
> (b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
> (c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
> (d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
> (e) if the award is incompatible with public policy."

arbitration clause in the 3 December 2006/12 July 2007 Contract before a separate ICC arbitral tribunal, and that these [rights] could not be considered in the BIT arbitration.

[37] "The violation of the obligation to withdraw the [BIT] arbitration claim does not constitute a violation of public policy because Defendant did not have its own right to demand the withdrawal of the arbitration claim, since it is not determined that there was a contract for the benefit of a third party. The arbitral award allegedly based on a mere breach of contract vis-à-vis a third party is not, in respect of Defendant, clearly irreconcilable with fundamental principles of German law; that is, it does not violate a norm regulating the principles of social or economic life nor is it in unacceptable contradiction to the German concepts of justice.

[38] "Nor did Claimant commit an abuse of law by continuing the arbitration notwithstanding the sale of its shares in DMT. Contrary to Defendant's opinion, the sale price paid did not pay also for the Intervenors' right to demand the withdrawal of the arbitration claim. According to the determinations of the ICC arbitral tribunal, there was no proof that the € 10,000,000 paid included proportionally a consideration for the right to demand the termination of the arbitration. Rather, it appears from the provision for the termination of the arbitration that Claimant (initially) was entitled to pursue in arbitration the claims for compensation of damages resulting from the violation of its company law rights. The sale of the shares of the company thus implied no waiver of the claims; the right to withdraw the arbitration claim was regulated in the contract distinctly and independently from the sale of the company shares. It does not appear that Defendant raised the objection of the lack of jurisdiction ratione materiae already in the arbitration, and that the arbitral tribunal failed to consider it."

II. ADJOURNMENT

[39] "Defendant's request for adjournment pursuant to Art. VI New York Convention must be denied.

[40] "Art. VI New York Convention gives the court a wide discretion and does not mention the criteria for the exercise of that discretion. The purpose of the New York Convention, facilitating the recognition of arbitral awards, must certainly be safeguarded. Thus the party opposing enforcement must show that the ground for annulment it relies on in is likely to succeed (*MünchKomm/Adolphsen*, op. cit., Sect. 1061 Annex 1 New York Convention No.

2). According to the legal opinion of the Swiss attorneys Prof. Dr. F. K. and Dr. B. B., of 18 November 2011, which Defendant has not opposed on this point, the Swiss Federal Supreme Court allows only the following grounds for revision, mentioned in the Law on the Federal Supreme Court (*Bundesgerichtsgesetz* – BGG), against an arbitral award:

> 'when criminal law proceedings establish that the decision has been influenced against the petitioner by a crime or an offense' (Art. 123(1) BGG)
>
> 'if the petitioner subsequently discovers relevant facts or crucial evidence that it could not invoke in the earlier proceeding, to the exclusion of facts and evidence predating the decision' (Art. 123(2)(a) BGG).

[41] "As explained above at [[27]], Defendant did not prove that it could not supply the Side Letters in the arbitration or state their content. Further, their content and the exercise of the withdrawal request by Mr. S. P. have not been relevant for the arbitral award, because as there was no proper contract to the benefit of a third party, Defendant had no right to demand the withdrawal of the arbitration claim. A decision on this issue was moreover reserved to a separate ICC arbitral tribunal.
[42] "Further, according to the uncontested statement of Claimant, a decision of the Swiss Federal Supreme Court is not to be expected in the near future. Also, if the Swiss Federal Supreme Court decides in its favor, Defendant can [seek] annulment of the declaration of enforceability pursuant to Sect. 1061(3) ZPO."[15]
(….)

Federal Supreme Court, 30 January 2013

(….)
[43] "The appeal on a point of law [*Rechtsbeschwerde*] is allowed (Sect. 574(1) first sentence no. 1, Sect. 1025(4), Sect. 1065(1) first sentence and Sect. 1062(1) no.

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15. Sect. 1061(3) ZPO reads:

> "(3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made."

4 second case ZPO) and admissible (Sect. 574(2) ZPO); it leads to the annulment of the impugned decision and to the case being remanded to the Court of Appeal.

[44] "The Court of Appeal held that the request for a declaration of enforceability was admissible and founded. In respect of admissibility, however, it reasoned inter alia:

> 'Defendant is not exempt from the jurisdiction of the German courts. Lacking specific legal provisions or international law agreements, the extent to which another state is subject to the jurisdiction of the German courts is determined according to the general rules of international law (Sect. 20(2) Judiciary Act [*Gerichtsverfassungsgesetz* – GVG]), which have the force of federal law pursuant to Art. 25 Constitution [*Grundgesetz* – GG]. Accordingly, as held by the Federal Constitutional Court, the forum state is not absolutely prevented under international law from carrying out measures of forced execution on the basis of a title against a foreign state on assets of that state that are located in the forum state (BVerfGE 46, 342, 388 et seq., 392; 64, 1, 23, 40).
>
> There is only a general rule of international law that forced execution by the forum state on the basis of an executory title against a foreign state on assets of that state that fall under the sovereignty of the forum state or are located there is inadmissible, unless the foreign state consents, if [these assets] are earmarked for sovereign purposes of the foreign state at the time of the commencement of the measure of forced execution (BVerfGE 46, 342, 346, 364; 64, 1, 40).
>
> Thus, Defendant does not have general immunity from execution. Also, the subject matter of this proceeding is not an encroachment on Defendant's sovereign rights, but rather an arbitral award ordering payment of a sum of money because of Claimant's claim for damages.
>
> Further, Defendant agreed to an arbitration agreement under the BIT and to this extent waived its state immunity. It is expressly agreed in the Treaty that the decisions of the arbitral tribunal shall be binding on Defendant and shall be enforced pursuant to [its] domestic law (Art. 9(5); Art. 10(2)). It would be at odds with the principles of international law, or rather in disregard of them, if the national courts of the other Contracting State could not make Defendant comply with this obligation into which it consciously entered.'

[45] "These remarks do not withstand a legal review.

[46] "The proceeding for a declaration of the enforceability of an arbitral award is not a proceeding for forced execution; rather, it is a *sui generis* adjudication proceeding [*Erkenntnisverfahren*] (see, only, the decision of this Chamber of 27 March 2002 – III ZB 43/00, NJW-RR 2002, 933; OLG Munich, SchiedsVZ 2007, 164, 165; Schwab/Walter, *Arbitral tribunalsbarkeit*, 7th ed., Chapter 26 no. 3, Chapter 27 no. 1; Zöller/Geimer, *ZPO*, 29th ed., Sect. 1060 no. 3). Hence, the principles on the immunity of foreign states in adjudication proceedings must be applied to this proceeding (see, only, Zöller/Geimer, *op. cit.*, Sect. 722 no. 63; Geimer, *Internationales Zivilprozessrecht*, 6th ed., no. 544).

[47] "According to the rules of general international law, which have force of federal law pursuant to Sect. 20(2) Law on the Judiciary [*Gerichtsverfassungsgesetz* – GVG], Art. 25 GG, states are not subject to the jurisdiction of other states in adjudication proceedings, to the extent that their sovereign acts (acta iure imperii) and not only their commercial activities (acta iure gestionis) are concerned (see, only, BVerfGE 16, 27, 33 et seq., 61 et seq.; 46, 343, 364; BVerfG NJW 2007, 2605 no. 34 et seq.; BGH, decision of 26 September 1978 - VI ZR 267/76, NJW 1979, 1101; *Bundesarbeitsgericht* [Federal Labor Court – BAG], decision of 1 July 2010 - 2 AZR 270/09, juris. no. 11; Stein/von Buttlar, *Völkerrecht*, 13th ed., Sect. 41 no. 717 et seq.). The distinction between sovereign and non-sovereign acts of a state – which as a rule is to be made according to the law of the deciding court – is not determined by their reason or purpose; determinative is rather the manner or nature of the state act to be assessed or of the legal relationship at issue (see, only, BVerfGE 16, 27, 61 et seq; BGH, decision of 26 September 1978, id.; BAG, id., no. 12) and thereby the question whether the foreign state acted in the exercise of the sovereignty to which it is entitled or as a private person.

[48] "The claim decided with the arbitral award of 1 July 2009 concerns the sovereign activity of Defendant. In the arbitral award the award of damages was based on a violation of Art. 2(3) of the 2002 BIT: the refusal to increase and the temporary reduction of the toll charges, the construction and expansion of alternative, toll-free routes and the temporary closing of the Don Muang Airport. These are omissions or activities of the Defendant in respect of which – as also not disputed by Claimant – [Defendant] did not act as a private person in a legal relation, but which are rather to be ascribed to the sovereign sphere. It is irrelevant that at present we are concerned with the enforceability of a monetary claim, because not this but rather the connection to sovereign or commercial activities is relevant for a decision on the issue of immunity.

[49] "The admissibility of the request for a declaration of enforceability of the arbitral award depends on whether Defendant submitted to the jurisdiction of the German courts.

[50] "Contrary to Defendant's opinion, it does not matter in this respect that the proceeding for recognition and enforcement of the arbitral award (Sect. 1061 ZPO together with [the 1958 New York Convention], BGBI. 1961 II p. 121) was not expressly mentioned in connection with the arbitration agreement in the 2002 BIT. According to Art. 10 of the 2002 BIT, Defendant subjected itself to arbitration concerning the settlement of disputes with an investor protected in accordance with the other provisions of the Treaty. The conclusion of an arbitration agreement does not imply a waiver of immunity in enforcement proceedings. Immunity in adjudication and enforcement proceedings must be examined separately; the mere submission to the jurisdiction of a state or a corresponding waiver of immunity in adjudication proceedings do not imply a waiver in forced execution proceedings (see, only, BVerfG NJW 2007, 2605 No. 37; BGH, decision of 4 October 2005 – VII ZB 8/05, NJW-RR 2006, 425 No. 22 and references therein).

[51] "We do not need to decide in principle whether at least a waiver of immunity in the proceedings for recognition and declaration of enforceability of an arbitral award (as a sui generis adjudication proceeding) can be deduced from the conclusion of an arbitration agreement (*affirmative*, for instance, Berger, RIW 1989, 956, 957; Lachmann, *Handbuch für die Schiedsgerichtspraxis*, 3rd ed., No. 2748; Schwab/Walter, op. cit., Chapter 4 No. 12; *negative*, for instance, Nagel/Gottwald, *Internationales Zivilprozessrecht*, 6th ed., Sect. 2 No. 23, Sect. 16 No. 34; Geimer, op. cit., No. 544, 3929) because in the 2002 BIT Defendant did not only subject itself in general to arbitration. Rather, Art. 10(2) third sentence of the 2002 BIT provides that 'the arbitral award shall be enforced according to domestic law'. Hence, Defendant also submitted to the proceeding that is necessary in Germany as the preliminary step for later forced enforcement.

[52] "Since a proceeding for the recognition and declaration of enforceability is necessary for the enforcement of a foreign arbitral award in Germany, it would contradict the meaning and purpose of the Convention if the contractual provisions were interpreted to the effect that Defendant could invoke its immunity in necessary preliminary proceedings and thereby pre-frustrate forced enforcement, while for instance forced enforcement against assets of a foreign state not earmarked for sovereign purposes is admissible in principle and thus does not require consent or waiver of immunity (see, only, BVerfG NJW 2007,2605 No. 39 and referenceys therein).

[53] "Contrary to the opinion of the Court of Appeal and Claimant this submission [to arbitration by Defendant] does not extend to matters falling outside the 2002 BIT. It is true that according to Art. 10(2) second sentence and Art. 9(5) second sentence of the 2002 BIT, the decisions of the arbitral tribunal are 'binding'. However, this applies only in the context of the contractually agreed arbitration clause. International law treaties must be interpreted in principle to the effect that the contractual parties on the one hand can reach their mutually pursued goal through the contract, and on the other hand are not deemed to be bound beyond their intention (see, only, BGH, decision of 4 October 2005 – VII ZB 8/05, NJW-RR 2006,425 No. 23 and references therein). If an arbitral tribunal misjudges the scope of application of the Treaty, this does not bind the contractual parties nor does it hinder the objection of immunity. The Treaty cannot be interpreted to mean that the contractual parties waive their immunity also where the Treaty is not applicable at all.

[54] "Against this background, the Court of Appeal should have decided first the question, disputed between the parties, whether the investment at issue fell under Art. 8 of the 2002 BIT. This examination is not made unnecessary by the fact that the Court of Appeal, in a different context relating to the merit of the application, expressed the opinion that Defendant was precluded from raising the objection of a lack of arbitration agreement (Art. V(1)(*a*) New York Convention). Apart from the fact that the [European Convention of 1961] (BGBl. 1964 11 425, 1965 11 107), which the Court of Appeal deemed relevant, is not applicable to Defendant, which is not a Contracting State, the Court of Appeal's considerations cannot in any event rule out the procedural precondition of the German jurisdiction, and thus the immunity of Defendant, which is to be examined at the court's initiative at all procedural stages.

[55] "The circumstance that Defendant did not challenge the partial arbitral award of the arbitral tribunal on its own jurisdiction of 5 October 2007 before the Swiss Federal Supreme Court pursuant to Art. 186(3) and Art. 190(3)(2b) of the Swiss PILA and Art. 77(1) and Art. 100(1) Swiss BGG is irrelevant in this context. According to the jurisprudence of this Court (see decision of 9 July 2009 – III ZR 46/08, BGHZ 182, 10 no. 17 et seq.) an interim decision denying the immunity of a party is no obstacle to the examination in later proceedings of the question whether the German courts have jurisdiction, also when [that decision] has not been challenged. An interim decision that incorrectly denies immunity does not have binding effect. This is all the more true in the present case, which concerns an interim decision in an earlier, different adjudication proceeding rather than an interim decision on jurisdiction within the same proceeding.

[56] "Nor can the fact that a party did not file a recourse against the interim decision and that it defended its case in the further proceedings be deemed a waiver of immunity (see decision of this Court of 9 July 2009, id., No. 37 et seq.). The requirements for a finding of waiver are strict. In case of doubt, such far-reaching renunciation by the foreign state must not be assumed (see BGH, decision of 26 September 1978, id., p. 1102). Thus, as a rule a waiver requires an express statement (see this Court, id., no. 38). An implied waiver of immunity comes into question only in case of behavior from which the intention to submit [to the courts' jurisdiction] appears clearly (see, only, Dahm/Delbrück/Wolfrum, *Völkerrecht*, 2nd ed., Book 1/1 p. 470; Geimer, op. cit., no. 506); in case of doubt, this refers only to the specific proceedings (Geimer, op. cit., No. 646).

[57] "Against this background, the behavior of Defendant in the arbitration discussed by the Court of Appeal cannot have the effect of excluding immunity for the proceeding for the declaration of enforceability of the arbitral award.

[58] "The appealed decision must therefore be annulled and the case must be remanded to the Court of Appeal…."

INDIA

Ratification: 13 July 1960
1st and 2nd Reservation

49. Supreme Court of India, 28 September 2012, Civil Appeal No. 7134 of 2012 with Civil Appeal Nos. 7135-7136 of 2012

Parties:	Appellant/Petitioner: Chloro Controls (I) P. Ltd. (India) Respondent/Defendant: Severn Trent Water Purification Inc. (US) et al.
Published in:	Available online at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=39605>
Articles:	II(1); II(3)
Subject matters:	– nonsignatory defendant may rely on arbitration clause – definition of "in writing" inclusive – court's decision on existence, validity of arbitration agreement binding on arbitrators – referral to arbitration is mandatory
Topics:	¶ 209 + ¶ 218 + ¶ 220 + ¶ 226

Summary

The Supreme Court held that the broad arbitration clause in the principal joint venture agreement extended to the parties to the ancillary agreements concluded to implement the same composite transaction; these were deemed to be parties claiming "through or under" a signatory within the meaning of Sect. 45 of the Indian Arbitration Act 1996, which broadens the scope of Art. II(3) of the 1958 New York Convention. The Court also applied the Group of Companies doctrine, according to which an arbitration agreement entered into by a company within a group can bind its non-signatory affiliates or sister or parent concerns. Further, incorporation by reference is possible under the New York Convention, as

the "in writing" requirement must be construed liberally. The court's finding as to the validity of the arbitration agreement is final and cannot be revisited by the arbitrators. If the agreement is valid, operative and capable of being performed, stay of proceedings and referral to arbitration is mandatory.

In 1988, two United States companies, Capital Control Co. Inc. (Capital) and Capital Control (Delaware) Co. Inc. (Capital Delaware), negotiated a joint venture in India with Chloro Controls (I) P. Ltd. (Chloro Controls) and its owner Mr. Madhusudan Kocha and his group, the Kocha Group. Capital Controls (I) Private Ltd (the Joint Venture Company) was eventually incorporated on 14 November 1995; its purpose was to design, manufacture, import, export and market certain gas- and electro-chlorination equipment. Chloro Controls and Mr. Kocha, on the one hand, and Capital and Capital Delaware, on the other hand, each owned 50 percent of the shares of the Joint Venture Company. Mr. Kocha was the Joint Venture Company's managing director.

On 16 November 1995, the parties concluded several agreements in respect of the joint venture: the Shareholders Agreement (the Principal or Mother Agreement); the Financial and Technical Know-how License Agreement; the International Distributor Agreement; the Exports Sales Agreement; the Trademark Registered User License Agreement and the Managing Directors Agreement (collectively, the Joint Venture Agreements). Not every party was a signatory to all the Joint Venture Agreements but each party signed one or more of them. The Shareholders Agreement and the Financial and Technical Know-How License Agreement contained a clause providing for International Chamber of Commerce (ICC) arbitration of disputes in London; the Export Sales Agreement provided for AAA arbitration in the US; the International Distributor Agreement provided for the jurisdiction of the state or federal courts in the Eastern District of Pennsylvania; the Managing Directors Agreement and the Trade Mark Registered User Agreement did not contain a dispute settlement clause. In August 1997, the parties also entered into a Supplementary Collaboration Agreement upon obtaining the required permission for the joint venture from the Indian Government.

The US parties to the joint venture changed subsequent to the original negotiations: between 1990 and 1994, Capital Control was fully acquired by Severn Trent Services PLC, UK – a United Kingdom water authority privatized in 1989. In 2002, Capital Control changed its name to Severn Trent Water Purification Inc. and, in 2003, it merged with Capital Delaware, which by then was fully by Severn Trent (Delaware) Inc. (Severn Delaware), a US company of the Severn Trent Group.

In 1998, Severn Delaware acquired Excel Technologies International Corporation (Excel Technologies). Excel Technologies later entered into a joint venture agreement with De Nora North America Inc.; in September 2001, the parties incorporated a joint venture company, Severn Trent De Nora LLC, which granted the distribution rights in respect of certain Excel Technologies products in India to Hi Point Services Pvt. Ltd, an Indian company.

Disputes arose between the parties to the Indian joint venture. On 23 January 2004, Capital Delaware and its parent Severn Delaware informed Chloro Controls, the Joint Venture Company and its managing director and part-owner Mr. Kocha that they would terminate the Joint Venture Agreements unless certain issues were remedied. On 21 July 2004, they notified the same parties that as the latter had failed to remedy these grievances, the Joint Venture Agreements were terminated as of the same day.

Chloro Controls commenced an action in the High Court of Bombay against Severn Trent Water Purification Inc., formerly Capital Control (Respondent No. 1); Capital Delaware (Respondent No. 2); Severn Trent De Nora LLC (Respondent No. 3); Hi Point Services Pvt. Ltd. (Respondent No. 4); the Joint Venture Company (Respondent No. 5); its managing director Mr. Kocha (Respondent No. 9) and the directors and chairman of the Joint Venture Company (Respondents Nos. 6-8 and 10-11).[1] Chloro Controls sought, inter alia, a declaration that the Joint Venture Agreements were valid and binding and an order to restrain Severn Delaware and Capital Delaware from acting upon their notice of termination. The respondents relied on the ICC arbitration clause in two of the Joint Venture Agreements, seeking a stay of court proceedings in favor of arbitration.

By two decisions of 8 April 2004 and 28 December 2004, two different judges of the Bombay High Court rejected the arbitration objection and granted the application of Chloro Controls, respectively. Both orders were set aside by two distinct Division Benches of the High Court, on 4 March 2010 and 28 July 2011. Chloro Controls appealed against both decisions.

The Supreme Court of India, before S.H. Kapadia, CJ, and A.K. Patnaik and S. Kumar, JJ, in an opinion by Swatanter Kumar, dismissed the appeals from the appellate decisions.

The Court examined the ambit and scope of Sect. 45 of the Indian Arbitration Act 1996, which reflects Art. II(3) of the 1958 New York Convention and further provides that either a party to an arbitration agreement or "any person

1. All these parties, with the exception of Respondents Nos. 3 and 4, had signed one or more Joint Venture Agreements.

claiming through or under him" may request the court to refer the dispute to arbitration. Sect. 45 of the 1996 Act thus intentionally broadens the scope of Art. II(3) of the Convention. The Court noted that in a case such as this, when the Indian legislature is "of wider connotation", the relevant provision must normally be construed liberally. Hence, considering "the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers".

In light of the above considerations, the Supreme Court held on the specific issue at hand that arbitration is possible between a signatory and a nonsignatory to the arbitration agreement, although the burden to prove that a party is claiming "through" or "under" the signatory party is a heavy one. In making this determination, the facts and circumstances are determinative. In the present case, the Joint Venture Agreements were closely interrelated and were meant to implement "the composite transaction" in the Shareholders Agreement – the Principal or Mother Agreement – which contained a broadly-worded ICC arbitration clause. Hence, the parties to the court action that were not signatories of one of the agreements containing the ICC arbitration clause but rather to the other related agreements were parties "claiming through or under" a signatory and could be included among the parties seeking a stay and referral to arbitration. The Court also applied the Group of Companies doctrine, whereby an arbitration agreement entered into by a company within a group can bind its non-signatory affiliates or sister or parent concerns. As to the respondents who had not signed any of the Joint Venture Agreements, the Court noted that they had already consented to arbitration.

The Supreme Court further reasoned that the requirement that the arbitration agreement be in writing is worded liberally in both the 1996 Act and the New York Convention; the relevant expression is "incapable of strict construction and requires to be construed liberally". In particular, incorporation by reference is commonly allowed, though the New York Convention is silent in this respect.

Once the court has determined that the agreement is valid, operative and capable of being performed, stay of proceedings and referral to arbitration is mandatory under both Indian law and the New York Convention. The Supreme Court noted that a court's decision on the validity of the arbitration agreement, where it is argued that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed, is final and is not open to question by the arbitral tribunal.

The Court finally found that it was irrelevant that the International Distributor Agreement provided for litigation to be brought in federal or state court in Pennsylvania. This was an alternative remedy restricted to the disputes arising from that agreement; also, none of the parties invoked the jurisdiction of the Pennsylvania courts.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345044-n>.

Excerpt

[1] "The expanding need for international arbitration and divergent schools of thought have provided new dimensions to the arbitration jurisprudence in the international field. The present case is an ideal example of invocation of arbitral reference in multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. The distinguished learned counsel appearing for the parties have raised critical questions of law relatable to the facts of the present case which in the opinion of the Court are as follows:

(1) What is the ambit and scope of Sect. 45 of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act')?[2]
(2) Whether the principles enunciated in the case of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* [(2003) 5 SCC 531] is the correct exposition of law?
(3) Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others don't and further the parties are not identically common in proceedings before the Court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part can be made to the arbitral tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement?
(4) Whether bifurcation or splitting of parties or causes of action would be permissible, in absence of any specific provision for the same, in the 1996 Act?"

I. THE DECISIONS BELOW

[2] "Chloro Controls (India) Private Ltd., the appellant herein, filed a suit on the original side of the High Court of Bombay being Suit No. 233 of 2004, for declaration that the joint venture agreements and supplementary collaboration

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2. Sect. 45 of the Indian Arbitration and Conciliation Act, 1996 (No. 26 of 1996) reads:

> "45. *Power of judicial authority to refer parties to arbitration*
> Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

agreement entered into between some of the parties are valid, subsisting and binding. It also sought a direction that the scope of business of the joint venture company, Respondent No. 5, set up under the said agreements includes the manufacture, sale, distribution and service of the entire range of chlorination equipments including the electro-chlorination equipment and claimed certain other reliefs as well, against the defendants in that suit.

[3] "The said parties took out two notices of motion, being Notice of Motion No. 553 of 2004 prior to and Notice of Motion No. 2382 of 2004 subsequent to the amendment of the plaint. In these notices of motion, the principal question that fell for consideration of the learned Single Judge of the High Court was whether the joint venture agreements between the parties related only to gas chlorination equipment or whether they included electro-chlorination equipment as well. The applicant had prayed for an order of restraint, preventing Respondent Nos. 1 and 2, the foreign collaborators, from acting upon their notice dated 23 January 2004, indicating termination of the joint venture agreements and the supplementary collaboration agreement. A further prayer was made for grant of injunction against committing breach of contract by directly or indirectly dealing with any person other than the Respondent No. 5, in any manner whatsoever, for the manufacture, sale, distribution or services of the chlorination equipment, machinery parts, accessories and related equipments including electro-chlorination equipment, in India and other countries covered by the agreement.

[4] "The defendants in that suit had taken out another Notice of Motion No. 778 of 2004, under Sect. 8[3] read with Sect. 5 of the 1996 Act claiming that arbitration clauses in some of the agreements governed all the joint venture agreements and, therefore, the suit should be referred to an appropriate arbitral tribunal for final disposal and until a final award was made by an arbitral tribunal, the proceedings in the suit should be stayed.

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3. Sect. 8 of the 1996 Act reads:

> "8. *Power to refer parties to arbitration where there is an arbitration agreement*
> (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

[5] "The learned Single Judge, vide order dated 28 December 2004, allowed Notice of Motion No. 553 of 2004 and consequently disposed of Notice of Motion No. 2382 of 2004 as not surviving. Against this order, an appeal was preferred, which came to be registered as Appeal No. 24 of 2005 and vide a detailed judgment dated 28 July 2011, a Division Bench of the High Court of Bombay set aside the order of the learned Single Judge and dismissed both the notices of motion taken out by the plaintiff in the suit.

[6] "Notice of Motion No. 778 of 2004 was dismissed by another learned Single Judge of the High Court of Bombay, declining the reference of the suit to an arbitral tribunal vide order dated 8 April 2004. This order was again assailed in appeal by the defendants in the suit and another Division Bench of the Bombay High Court, vide its judgment dated 4 March 2010, allowed the Notice of Motion No. 778 of 2004 and made reference to arbitration under Sect. 45 of the 1996 Act.

[7] "The judgments of the Division Benches, dated 4 March 2010 and 28 July 2011, respectively, have been assailed by the respective parties before this Court in the present Special Leave Petitions, being SLP(C) No. 8950/2010 and SLP(C) No. 26514-15/2011, respectively. Thus, both these appeals shall be disposed of by this common judgment."

II. THE AGREEMENTS BETWEEN THE PARTIES

(....)

[8] "The parties to the proceedings, except Respondents Nos. 3 and 4, were parties to one or more of the seven agreements entered into between the parties. This includes the Principal Agreement, i.e., the Shareholders Agreement, the Financial and Technical Know-how License Agreement, the International Distributor Agreement, the Exports Sales Agreement, the Trademark Registered User License Agreement and the Managing Directors Agreement, all dated 16 November 1995. Lastly, the parties also entered into and executed a Supplementary Collaboration Agreement in August 1997. [E]xcept Respondents Nos. 3 and 4 who were not signatory to any agreement, all other parties were not parties to all the agreements but had signed one or more agreement(s) keeping in mind the content and purpose of that agreement. Now we shall proceed to discuss each of these agreements."

1. The Shareholders Agreement

[9] "The Shareholders Agreement dated 16 November 1995 was entered into and executed between the Capital Control (Delaware) Co. Inc., Respondent No. 2, on the one hand and Chloro Controls (India) Private Ltd., the appellant company run by the Kocha/Capital Controls group and Mr. M.B. Kocha, Respondent No. 9, on the other. As is apparent from the pleadings on record, these two groups had negotiated for starting a joint venture company in India and for this purpose they had entered into the Shareholders Agreement. The main object of this agreement was to float a joint venture company which would be responsible for manufacture, sale and services of the products as defined in the Financial and Technical Know-how License Agreement, in terms of clause 1 of the Agreement. The Agreement was subject to obtaining all necessary approvals, licenses and authorization from the Government of India, as the joint venture company under the name and style of Capital Control India Pvt. Ltd. was to be registered as a company with its office located in India at Bombay and to carry on its business in India. The plant was to be taken on lease. [T]he authorized capital of the company was Rs.5 million, consisting of equity shares of Rs.10 each. In terms of clause 7, Capital Controls, which was the short form for Capital Control (Delaware) Co. Inc., appointed the joint venture company as a distributor in India of the products manufactured by it, subject to the terms and conditions of the International Distributor Agreement attached to that Agreement as Appendix II. Directors to the joint venture company were to be nominated for a period of three years in accordance with clause 8 of the Agreement. Clause 14 made it obligatory for the parties to ensure that the joint venture company entered into the Financial and Technical Know-how License Agreement with Capital Controls, subject to which, as mentioned above, the joint venture company was to have the right and license to manufacture the specified products in India. The Financial and Technical Know-how License Agreement, which was annexed to the Principal Agreement as Appendix IV, was to be executed relating to sale and purchase of chlorination equipment assets. This Agreement had to be construed and interpreted in accordance with the laws of the Union of India in terms of clause 29. Further clause 21 related to termination of this Principal Agreement. In terms of this clause, it was agreed that the Agreement was to continue in force and effect for so long as each party held not less than twenty-six per cent (26 percent) of the total paid- up equity shares of the company or in the event that the company failed to achieve a cumulative sales volume of Rs.120 million over three years and cumulative profit of fifteen per cent (15 percent) over three years from signing of the Agreement. Either party had the option to terminate the agreement and dispose of the shares as provided in the terms thereof. Material breach of the Agreement or a deadlock regarding the management of the

Company were, inter alia, the contemplated grounds for termination of the Agreement, whereby the party not in default could terminate the Agreement by giving notice in writing to the other party. The period of notice in the event of a material breach was 90 days from the date of such notice. Clause 21.3 provided that in the event of the termination of the Agreement, the joint venture company would be wound up and all obligations undertaken by Chloro Controls under different agreements would cease with immediate effect. In such an eventuality, even the name of the joint venture company was required to be changed and the word 'Capital', either individually or in combination with other words, was to be removed.

[10] "Two other very material clauses of this Agreement, which require the attention of this Court, are clauses 4 and 30. In terms of clause 4.5, the Kocha Group and their company Chloro Controls were bound not to engage themselves, directly or indirectly, or even have financial interest in the manufacture, sale or distribution of chlorination equipment which were similar to those manufactured by the joint venture company during the term of the Agreement. In terms of clause 30, all or any disputes or differences arising under or in connection with the Agreement between the parties were liable to be settled by arbitration, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (for short, the 'ICC'), by three arbitrators designated in conformity with those Rules. The arbitration proceedings were to be held in London, England and were to be governed by and subject to English laws.

[11] "As is clear from the above terms and conditions of this Agreement, it was treated as a principal agreement executed between the parties and other agreements, like the Financial and Technical Know-how License Agreement, the Trademark Registered User License Agreement, the International Distributor Agreement, the Managing Directors' Agreement and the Export Sales Agreements were not the only anticipated agreements to be executed between the parties, but their drafts and necessary details had been annexed as Appendix I to VII of the Shareholder Agreement. The other Agreements were only required to be signed by the parties who, as per the Shareholders Agreement, were required to sign such agreement.

[12] "The Arbitration Clause of the Shareholders Agreement reads as under:

> 'Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties, shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and

Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The arbitration proceedings shall be held in London, England and shall be governed by and subject to English law. Judgment upon the award rendered may be entered in any court of competent jurisdiction.'"

2. The International Distributor Agreement

[13] "The International Distributor Agreement has been mentioned as Appendix II to the Shareholders Agreement. The International Distributor Agreement was executed on the same day and entered into between Capital Controls Company Inc., Respondent No. 1, and the joint venture company Capital Controls India Pvt. Ltd., Respondent No. 5. Under this Agreement, the joint venture company was appointed as the exclusive distributor of products in the 'territory' and for the term provided under clause 10 of that Agreement. The specified territory was India, Afghanistan, Nepal and Bhutan but the agreement also stated that exports to other countries were not permissible except with the specific authorization by Respondent No. 1. Besides providing the rights and duties of the Distributors, this Agreement also stated the schedule for delivery of products/orders, the prices payable, commissions and inspection. It also provided for the terms of payment. Distributor's orders of products were subject to acceptance by the seller at its offices and the seller reserved his right, at any time, to cease manufacture as well as offering for sale any product and to change the design of product.

[14] "This distributorship right was non-assignable and was exclusively between the distributor and the seller. The relationship between the parties was agreed to be that of a seller and purchaser. Clause 11 of the Agreement then clearly postulated that the distributor was an independent contractor and not joint venture or partner with an agent or employee of the seller. Clause 13 provided that the Agreement contained the entire understanding between the parties with respect to that subject matter and superseded all negotiations, discussions, promises or agreements, prior to or contemporaneous with this Agreement.

[15] "Further, this Agreement contained the confidentiality clause as well as the non-competition clause being clauses 16 and 18, respectively. The latter specified that the distributor shall not, directly or indirectly, sell, manufacture or supply products similar to any of the products or engage, directly or indirectly, in any business the same as or similar to that of seller, except subject to the conditions of the Agreement.

[16] "In terms of clause 20, the agreement between the parties was to remain confidential and not to be discussed, shown to or filed with any Government agencies without the prior consent of the seller in writing.
[17] "This Agreement did not contain any arbitration clause, but it did provide a jurisdiction clause i.e. clause 21, which read as under:

> 'The construction, interpretation and performance of this Agreement and all transactions under it shall be governed by and interpreted under the laws of the State of Pennsylvania, USA, and the parties hereto agree that each shall be subject to the jurisdiction of, and any litigation hereunder shall be brought in, any federal or state court located in the Eastern District of the Commonwealth of Pennsylvania, and that the resolution of such litigation by such court shall be binding upon the parties.'

[18] "We may notice here that the International Distributor Agreement was not only executed in furtherance to clause 7 of the Shareholders Agreement but in that clause itself it was also stated to be annexed thereto as Appendix II. The Distributor Agreement was liable to be renewed as long as the Distributor, i.e. Capital Controls, held at least twenty-six per cent (26 percent) of the shares in the joint venture company."

3. The Managing Directors Agreement

[19] "Clause 8.6 of the Shareholders Agreement had provided for appointment or reappointment of the Managing Director or whole time Director by mutual consent. Subject to the provisions of the Companies Act, it was agreed that Mr. Kocha would be appointed as the first Managing Director of the Company for an initial period of three years and on such terms and conditions as were specified in Appendix III, i.e., the Managing Directors Agreement of the same date. In other words, the Managing Directors Agreement had been executed between joint venture company, Capital Control India Pvt. Ltd., and Mr. M.B. Kocha, on terms already agreed to between the parties to the Shareholders' Agreement.
[20] "The joint venture company, which is stated to have been incorporated on 14 November 1995, held Board Meeting on 16 November 1995 and as contemplated under clause 8.6 of the Shareholders Agreement, appointed Mr. Kocha as the Managing Director of the Company for three years commencing from 1 April 1996. This Managing Directors Agreement spelt out the powers which the Managing Director could exercise and more specifically, under clause 3, the powers which the Managing Director could exercise only with the prior

approval of the Board of Directors of the joint venture company. For instance, under clause 3 (k), the Managing Director was not entitled to undertake any new business or substantially expand the business contemplated thereunder except with the approval of the Board of Directors. Further, clause 6 contained a non-compete clause requiring Mr. Kocha not to run any similar business for two years after the date of termination of the Agreement.

[21] "This Agreement also did not contain any arbitration agreement and provided no terms which were not within the contemplation of clause 8.7 of the Shareholders Agreement."

4. The Export Sales Agreement

[22] "The Export Sales Agreement was again signed between the Chloro Control India Pvt. Ltd. and Capital Control Co. Inc., the foreign partner to the joint venture. This Agreement, on its bare reading, presupposes the existence and working of the joint venture company. The products required to be manufactured by the joint venture company under the Shareholders Agreement as well as those stated in Exhibit 1 of this Agreement were to be exported to different countries by Capital Control Company Inc. which was required to export those goods and execute such orders as per the terms and conditions of this Agreement, except in countries specified in Exhibit 2 to the Agreement. It is noteworthy that the export could be effected to all countries covered under the 'Territory' excluding the countries specified in Exhibit 2 of the agreement which was completely in consonance with the execution and performance of Shareholder Agreement and the International Distributor Agreement executed between the parties. This Agreement stipulated distinct terms and conditions which had to be adhered to by the parties while the Capital Control Company Inc. was to act as sole and exclusive agent for sale of the products. The products under the Agreement meant design, supply, installation commissioning and after-sale services of chlorination systems and equipment related products manufactured by the Joint Venture Company. The services under the Agreement could be performed by Capital Control Co. Inc. itself or through its affiliated corporation or duly appointed sales agents and distributors. In terms of clause 17 of the Agreement, it was to be construed and interpreted in accordance with the laws in the State of Pennsylvania, USA.

[23] "It specifically contained an arbitration clause (clause 18) that read as under:

'Any dispute of difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of American Arbitration Association. The arbitration proceedings shall be held in Pennsylvania, USA. Judgment upon the award rendered may be rendered may be entered in any court of competent jurisdiction.'"

5. *The Financial and Technical Know-how License Agreement and the Trademark Registered User Agreement*

[24] "Now, we shall deal with both these agreements together as both these agreements are inter-dependent and one finds elaborate reference to one in the other. Furthermore, both these agreements have been entered into and executed between Capital Control Co. Inc. on the one hand and the joint venture company on the other.

[25] "Under clause 14 of the Shareholders Agreement, it was required of the parties to cause the joint venture company to enter into the Financial and Technical Know-how License Agreement with Capital Controls under which the latter was to grant the joint venture company the right and license to manufacture the products in India in accordance with the technical know-how and other technical information possessed by Capital Controls. Clause 18 of the Principal Agreement also referred to this agreement and postulated that if the Government of India did not grant permission for the terms of foreign collaboration contained in this agreement, even the Principal Agreement, i.e. the Shareholder's Agreement would be liable to be terminated without giving rise to any claim for damages. Both these clauses provided that this Agreement was attached to the Principal Agreement itself and had been referred to as the 'License Agreement', for short.

[26] "We may refer to certain terms of this agreement which would indicate that the terms and conditions of the Principal Agreement were to be implemented through this Agreement. Besides providing the obligations of Capital Controls (Respondent No. 5), it also stipulated that the licensee, i.e. the joint venture company, would be free to manufacture the products under the said patent even after the expiry of the Agreement. Under clauses 9 and 10 of the Agreement, obligations of the licensee were stated and it required the licensee to maintain quality comparable to corresponding products made by Capital Controls in USA and to allow free access and information to Capital Controls. The products manufactured by the licensee whose quality was approved by

Capital Controls could be marked with the legend, 'Manufactured in India under license from Capitals Control Company Inc. Colmar, Pennsylvania, USA'. However, if the agreement was terminated, the licensee was not to use the trademark and legend.

[27] "As stated, the purpose of this Agreement was that the licensee desired to obtain the right and license to manufacture the products in accordance with the technical know-how owned or acquired by Capital Controls and for which that company was willing to grant license on the terms and conditions stated in that Agreement. The first and foremost restriction was that the rights under the agreement were non-transferable and the right was restricted to sell the products exclusively in India and the countries listed in the Appendix to the Agreement. The Agreement also contained a non-competing clause providing that the licensee must not manufacture or have manufactured for it, sell or offer for sale or be financially interested in similar products without prior written permission of Capital Controls. Respondent No. 1 had also agreed that its affiliated companies would sell the product in India only through the licensee. The Agreement provided for payment of royalties under clause 11.

[28] "Another very significant clause of this Agreement was the Term and Termination clause. The agreement was to continue in force for ten years from the date it was filed with the Reserve Bank of India, subject to earlier termination in terms of clause 15.2. Clause 14.2 provided practically for the conditions of termination of this Agreement similar to those contemplated for the Share Holders Agreement. Neither any modification/amendment of this Agreement nor any waiver of its terms and conditions was to be binding upon the parties unless made in writing and duly executed by both the parties. Appendix I to this agreement recorded the products which the joint venture company was to manufacture.

[29] "In the event of dispute, the parties were expected to settle it by friendly negotiations, failing which it was to be referred to the ICC, by three Arbitrators designated in conformity with the relevant Rules. Clause 26, the Arbitration clause, read as under:

> 'Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The Arbitration proceedings shall be held in London, England and shall be governed by and subject to

English Law. Judgment upon the award rendered may be entered in any court of competent jurisdiction.'

[30] "Clauses 15.1 and 15.2 of the Principal Agreement referred to the Trademark Registered User License Agreement. Firstly, it is provided that Respondent No. 9, Mr. Kocha, and Chloro Controls acknowledged that Capital Controls was the sole owner of certain trademarks and trade-names used by Capital Controls in connection with the sale of the products. Besides agreeing that they would not adopt, use or register as a trademark or trade-name any word or symbol, which in the opinion of Capital Controls is confusingly similar to their trademarks, there the joint venture company was required to enter into a Trademark Registered User License Agreement for obtaining the right to use certain trademarks and trade-names and it was further specifically provided that the said agreement formed part of the Financial and Technical Know-how License Agreement.

[31] "The Trademark Registered User Agreement, as already noticed, was executed between the Respondent No. 1 and Respondent No. 5, the joint venture company. The relationship between the parties under this agreement was contractual and Respondent No. 1 had agreed to grant user permission to use the trademarks, subject to the terms and conditions specified in the agreement. The agreement was executed with the clear intention that the license owner (Respondent No. 1) would provide its secret drawings, plans, specifications, test data, formulae and other manufacturing procedures and as well as technical know-how for assembly, manufacture, quality control and testing of goods to the licensee, the joint venture company. The agreement dealt with various aspects including grant of non-exclusive right to use the trademarks in relation to the goods in the territory as the registered user of the trademarks. In terms of clause 10 of the agreement, the joint venture company was not to acquire any ownership interest in the trademarks or registrations thereof by virtue of use of trademark and it was specifically agreed that every permitted use of trademarks by the user would enure to the benefit of the licensor company. This Agreement was to terminate automatically in the event the License Agreement i.e. the Financial and Technical Know-how License Agreement, was terminated for any reason. Clause 13 also provided that the permitted use of the trademarks did not involve the payment of any royalty or other consideration, other than the royalties payable under the Financial and Technical Know-how License Agreement by joint venture company to the licensor company. This agreement was terminable on the conditions stipulated in clause 16, which again were similar to the termination clause provided in other agreements.

[32] "This Agreement did not contain an arbitration clause."

6. The Supplementary Collaboration Agreement

[33] "The last of the documents in this series which requires to be mentioned by the Court is the Supplementary Collaboration Agreement. Any joint venture agreement in India which is in collaboration with a foreign partner can be commenced only after obtaining the permission of the Government of India. The parties herein had already executed a joint venture agreement dated 16 November 1995. The company obtained the permission of the Government of India vide its letter No. FC-II 830(96)245(96) dated 11 October 1996 amended on 21 April 1997. The company then commenced the operation and business of the joint venture company with effect from 1 April 1997.

[34] "In the letter by the Government of India dated 11 October 1996, besides noticing the items of manufacture activity covered by the foreign collaboration agreement, foreign equity participation being 50 percent and other conditions which had been specifically postulated, under clause 7 of the letter it was specified that the approval letter was made a part of the foreign collaboration agreement executed between the parties and only those provisions of the agreement which were covered by the said letter or which were not at variance with the said letter would be binding on the Government of India or the Reserve Bank of India. Thus, the parties were directed to proceed to finalize the agreement.

[35] "Vide its letter dated 21 December 1996, the joint venture company had written to the Ministry of Industry, Department of Industrial Policy and Promotion, Government of India, requesting to amend point No. 2 of the above-mentioned approval letter. The request was to widen the scope of the manufacture activities covered by the foreign collaboration agreement. The company wished to add the manufacture of gas and electro-chlorination equipments, amongst other stated items. The other amendment that was sought for was increase in the authorized share capital from 25 lakhs to paid-up capital of 50 lakhs in the joint venture company. Both these requests of the joint venture company were accepted by the Government of India vide their letter dated 21 April 1997 and clauses (2), (3) and (4) of the earlier approval letter dated 11 October 1996 were modified. All other terms and conditions of the approval letter remained the same. The Government of India had asked for acknowledgement of the said letter.

[36] "In furtherance to this letter of the Government of India, the joint venture company and Respondent No. 2 executed this Supplementary Collaboration

Agreement. The important part of this one-page agreement is 'we hereby confirm that we shall adhere to the terms and conditions as stipulated by the Government of India. Letter No. FC.II: 830(96) 295(96) dated 11 October 1996, amended 21 April 1997'. It also stated that the companies had entered into the joint venture agreement dated 16 November 1995 and had commenced their operation with effect from 1 April 1997. In other words, the Supplementary Collaboration Agreement was a mere confirmation of the previous joint venture agreement. By this time i.e., somewhere in August 1997, all other agreements had been executed, the joint venture company had come into existence and, in furtherance to those agreements, it had commenced its business.

[37] "[T]he name of Respondent No. 1, Capital Control Co. Inc., was changed to Severn Trent Water Purification Inc. with effect from 1 April 2002. Later on, Respondent No. 2, Capital Control (Delaware) Co. Inc., was merged with Respondent No. 1 on 31 March 2003. Thus, for all purposes and intents, in fact and in law, interest of Respondents Nos. 1 and 2 was controlled and given effect to by Severn Trent.

[38] "On this issue, version of the Respondents had been disputed in the earlier round of litigation between the parties where Respondent No. 1, Severn Trent Water Purification Co. Inc., USA, had filed a petition for winding up Respondent No. 5 – Chloro Controls India Pvt. Ltd., the joint venture company – on just and equitable ground under Sect. 433(j) of the Companies Act. In this petition, specific issue was raised that merger of Capital Controls (Delaware) Co. with Severn Trent was not intimated to the Respondent No. 5 company prior to the filing of the arbitration petition by Severn Trent under Sect. 9 of the 1996 Act[4] as well as that Severn Trent was not a shareholder of the joint venture

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4. Sect. 9 of the 1996 Act reads:

> "9. *Interim measures by court*
> A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court,
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
> (ii) for an interim measure of protection in respect of any of the following matters, namely:
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
> (b) securing the amount in dispute in the arbitration;
> (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or

company and thus had no locus standi to file the petition. This Court vide its judgment dated 18 February 2008 in Civil Appeal No. 1351 of 2008 titled *Severn Trent Water Purification Inc. v. Chloro Control (India) Pvt. Ltd. and Anr.* held that the winding up petition by Severn Trent Water Purification Inc. was not maintainable as it was not a contributory. But the question whether that company was a creditor of the joint venture company was left open.

[39] "At this very stage, we may make it clear that we do not propose to deal with any of the contentions raised in that petition whether decided or left open, as the judgment has already attained finality. In terms of the settled position of law, the said judgment cannot be brought in challenge in the present proceedings, collaterally or otherwise.

[40] "Certain disputes had already arisen between the parties that resulted in termination of the joint venture agreements. Vide letter dated 21 July 2004, Severn Trent Services informed Respondent No. 9, Respondent No. 5 and Chloro Controls India Pvt. Ltd., the present appellant, that they had failed to remedy the issues and grievances communicated to them in their previous correspondences and meetings and also failed to engage in any productive negotiation in this connection and therefore, they were terminating from that very day, the joint venture agreements executed between them and the appellant company, which included agreements stated in that letter i.e. the Shareholders Agreement, the International Distributor Agreement, the Financial and Technical Know-how License Agreement, the Export Sales Agreement and the Trademark Registered User Agreement, all dated 16 November 1995 and requested them to commence the winding up proceedings of the joint venture company, Respondent No. 5. They were also called upon to act in accordance with the terms of the agreement in the event of such termination. It may be noticed here itself that prior to the serving of the notice of termination, a suit had been instituted by the appellant in which application under Sect. 8/45 of the 1996 Act was filed."

III. THE PARTIES' POSITIONS

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evidence;
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

[41] "The appellant had filed a derivative suit being Suit No. 233 of 2004 praying, inter alia, for a decree of declaration that the joint venture agreements and the Supplementary Collaboration Agreement are valid, subsisting and binding and that the scope of business of the joint venture company included the manufacture, sale, distribution and service of entire range of chlorination equipments including electro-chlorination equipment. An order of injunction was also obtained restraining Respondents Nos. 1 and 2 from interfering in any way and/or preventing Respondent No. 5 from conducting its business of sale of chlorination equipments including electro-chlorination equipment and that they be not permitted to sell their products in India save and except through the joint venture company, in compliance of clause 2.5 of the Financial and Technical Know-how License Agreement read with the Supplementary Collaboration Agreement. Besides this, certain other reliefs have also been prayed for.

[42] "After the institution of the suit, as already noticed, Respondent Nos. 1 and 2 had terminated the joint venture agreements vide notices dated 23 January 2004 and 21 July 2004. Resultantly, in the amended plaint, specific prayer was made that both these notices were wrong, illegal and invalid; in breach of the joint venture agreements and of no effect; and the joint venture agreements were binding and subsisting. To be precise, the appellant had claimed damages, declaration and injunction in the suit primarily relying upon the agreements entered into between the parties. In this suit, earlier interim injunction had been granted in favour of the appellant, which was subsequently vacated at the appellate stage.

[43] "Respondents Nos. 1 and 2 filed an application under Sect. 8 of the Act, praying for reference of the suit to the arbitral tribunal in accordance with the agreement between the parties. This application was contested and finally decided by the High Court in favour of Respondents Nos. 1 and 2, vide order dated 4 March 2010 making a reference of the suit to arbitration.

[44] "It is this Order of the Division Bench of the High Court of Bombay that has given rise to the present appeals before this Court."

1. Appellant's Position

[45] "While raising a challenge, both on facts and in law, to the judgment of the Division Bench of the Bombay High Court making a reference of the entire suit to arbitration, Mr. Fali S. Nariman, learned senior counsel appearing for the appellant, has raised the following contentions:

(1) There is inherent right conferred on every person by Sect. 9 of the Code of Civil Procedure, 1908, (for short 'CPC') to bring a suit of a civil nature unless it is barred by a statute or there was no agreement restricting the exercise of such right. Even if such clause was there (is invoked), the same would be hit by Sect. 27 of the Indian Contract Act, 1872 and under Indian law, arbitration is only an exception to a suit and not an alternative to it. The appellant, in exercise of such right, had instituted a suit before the Court of competent jurisdiction, at Bombay and there being no bar under any statute to such suit. The Court could not have sent the suit for arbitration under the provisions of the 1996 Act.
(2) The appellant, being dominus litis to the suit, had included Respondents Nos. 3 and 4, who were necessary parties. The appellant had claimed different and distinct reliefs. These Respondents had not been added as parties to the suit merely to avoid the arbitration clause but there were substantive reliefs prayed for against these Respondents. Unless the Court, in exercise of its power under Order I, Rule 10(2) of the CPC, struck out the name of these parties as being improperly joined, the decision of the High Court would be vitiated in law as these parties admittedly were not parties to the arbitration agreement.
(3) On its plain terms, Sect. 45 of the 1996 Act provides that a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Sect. 44,[5] shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration. The expression 'party' refers to parties to the action or suit. The request for arbitration, thus, has to come from one of the parties to the suit or action or any person claiming through or under him. The Court then can refer those parties to arbitration. The expression 'parties' used under Sect. 45 would necessarily mean all the parties and not some or any one of them. If the expression 'parties' is not construed to mean all parties to the action and the agreement, it will result in

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5. Sect. 44 of the 1996 Act reads:

> "44. *Definition*
> In this Chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 –
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

multiplicity of proceedings, frustration of the intended one-stop remedy and may cause further mischief. Judgment of the High Court in referring the entire suit, including the parties who were not parties to the arbitration agreement as well as against whom the cause of action did not arise from arbitration agreement, suffers from error of law.

(4) The 1996 Act is an amending and consolidating Act being an enactment setting out in one statute the law relating to arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Further, the 1996 Act has no provision like Sect. 34 of the Arbitration Act, 1940 (for short '1940 Act').[6] In Sect. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short '1961 Act'),[7] there existed a mandate only to stay the proceedings and not to actually refer the parties to arbitration. Thus, the position before 1996 in India, as in England, permitted a partial stay of the suit, both as regards matters and parties. But after coming into force of the 1996 Act, it is no longer possible

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6. Sect. 34 of the Indian Arbitration Act, 1940 (No. 10 of 1940) read:

   "34. *Power to stay legal proceedings where there is an arbitration agreement*
   Where any party to arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and 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, such authority may make an order staying the proceedings."

   This Act is no longer in force.

7. Sect. 3 of the Indian Foreign Awards (Recognition And Enforcement) Act, 1961 (No. 45 of 1961) read:

   "3. Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies or any persons claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

   This Act is no longer in force.

to contend that some parties and/or some matters in a suit can be referred to arbitration leaving the rest to be decided by another forum.
(5) Bifurcation of matters/cause of action and parties is not permissible under the provisions of the 1996 Act. Such procedure is unknown to the law of arbitration in India. The judgment of this Court in the case of *Sukanya Holdings Pvt. Ltd.* (supra) is a judgment in support of this contention. This judgment of the Court is holding the field even now. In the alternative, it is submitted that bifurcation, if permitted, would lead to conflicting decisions by two different forums and under two different systems of law. In such situations, reference would not be permissible.
(6) In the alternative, reference to arbitral tribunal is not possible in the facts and circumstances of the present case. Where three major agreements, i.e., Managing Director Agreement, Trademark Registered User Agreement and Supplementary Collaboration Agreement do not have any arbitration clause, there the International Distributor Agreement exclusively provides the jurisdiction for resolution of dispute to the federal or state courts in the Eastern District of the Commonwealth of Pennsylvania, USA. This latter agreement, thus, provided for resolution of disputes under a specific law and by a specific forum. Thus, for uncertainty and indefiniteness, the alleged arbitration clause is unenforceable.

[46] "Thus, in the present case, out of all the agreements signed between different parties, four agreements, i.e., Managing Director Agreement, International Distributor Agreement, Trademark Registered User Agreement and the Supplementary Collaboration Agreement, have no arbitration clause. Furthermore, different agreements have been signed by different parties and Respondent No. 9 is not a party to some of the agreements containing/not containing an arbitration clause. In any case, Respondents Nos. 3 and 4 are not party to any of the Agreements and the cause of action of the appellant against them is limited to the scope of the International Distributor Agreement vis-à-vis the products covered under the joint venture agreement.
[47] "On these contentions, it is submitted that the judgment of the High Court is liable to be set aside and no reference to arbitral tribunal is possible. Also, the submission is that, within the ambit and scope of Sect. 45 of the 1996 Act, multiple agreements, where some contain an arbitration clause and others don't, a composite reference to arbitration is not permissible. There has to be clear intention of the parties to refer the dispute to arbitration."

2. Respondents' Position

[48] "Mr. Harish Salve, learned senior counsel, while supporting the judgment of the High Court for the reasons stated therein, argued in addition that the submissions made by Mr. F.S. Nariman, learned senior counsel, cannot be accepted in law and on the facts of the case. He contended that:

(i) Under the provisions of the 1996 Act, particularly in Part II, the Right of Reference to Arbitration is indefeasible and therefore, an interpretation in favour of such reference should be given primacy over any other interpretation.
(ii) In substance, the suit and the reliefs claimed therein relate to the dispute with regard to the agreed scope of business of the joint venture company as regards gas-based chlorination or electro-based chlorination. This major dispute in the present suit being relatable to joint venture agreement therefore, execution of multiple agreements would not make any difference. The reference of the suit to arbitral tribunal by the High Court is correct on facts and in law.
(iii) The filing of the suit as a derivative action and even the joinder of Respondents Nos. 3 and 4 to the suit were primarily attempts to escape the impact of the arbitration clause in the joint venture agreements. Respondents Nos. 3 and 4 were neither necessary nor appropriate parties to the suit. In the facts of the case the party should be held to the bargain of arbitration and even the plaint should yield in favour of the arbitration clause.
(iv) All agreements executed between the parties are in furtherance to the Shareholders Agreement and were intended to achieve only one object, i.e., constitution and carrying on of business of chlorination products by the joint venture company in India and the specified countries. The parties having signed the various agreements, some containing an arbitration clause and others not, performance of the latter being dependent upon the Principal Agreement and in face of clause 21.3 of the Principal Agreement, no relief could be granted on the bare reading of the plaint and reference to arbitration of the complete stated cause of action was inevitable.
(v) The judgment of this Court in the case of *Sukanya* (supra) does not enunciate the correct law. Severability of cause of action and parties is permissible in law, particularly, when the legislative intent is that arbitration has to receive primacy over the other remedies. *Sukanya* being a judgment relatable to Part 1 (Sect. 8) of the 1996 Act, would not be applicable to the facts of the present case which exclusively is covered under Part II of the 1996 Act.
(vi) The 1996 Act does not contain any restriction or limitation on reference to arbitration as contained under Sect. 34 of the 1940 Act and therefore, the Court would be competent to pass any orders as it may deem fit and proper, in the circumstances of a given case particularly with the aid of Sect. 151 of the CPC.

(vii) A bare reading of the provisions of Sect. 3 of the 1961 Act on the one hand and Sect. 45 of the 1996 Act on the other clearly suggests that change has been brought in the structure and not in the substance of the provisions. Sect. 3 of the 1961 Act, of course, primarily relates to stay of proceedings but demonstrates that the plaintiff claiming through or under any other person who is a party to the arbitration agreement would be subject to the applications under the arbitration agreement. Thus, the absence of equivalent words in Sect. 45 of 1996 Act would not make much difference. Under Sect. 45, the applicant seeking reference can either be a party to the arbitration agreement or a person claiming through or under such party. It is also the contention that a defendant who is neither of these, if cannot be referred to arbitration, then such person equally cannot seek reference of others to arbitration. Such an approach would be consistent with the development of arbitration law."

IV. ANALYSIS

[49] "The contention raised before us is that Part I and Part II of the 1996 Act operate in different fields and no interchange or interplay is permissible. To the contra, the submission is that provisions of Part I have to be construed with Part II.

[50] "On behalf of the appellant, reliance has been placed upon the judgment of this Court in the case *Bhatia International v. Bulk Trading S.A. and Anr.* [(2002) 4 SCC 105].[8] The propositions stated in the case of *Bhatia International* (supra) do not directly arise for consideration of this Court in the facts of the present case. Thus, we are not dealing with the dictum of the Court in *Bhatia International*'s case and application of its principles in this judgment.

[51] "It is appropriate for us to deal with the interpretation, scope and ambit of Sect. 45 of the 1996 Act particularly relating to an international arbitration covered under the [1958 New York Convention].

[52] "Now, we shall proceed to discuss the width of Sect. 45 of the 1996 Act."

1. Interpretation of Sect. 45 of the Indian Arbitration Act 1996

[53] "In order to invoke jurisdiction of the Court under Sect. 45, the applicant should satisfy the pre-requisites stated in Sect. 44 of the 1996 Act.

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8. Reported in Yearbook XXVII (2002) pp. 234-248.

[54] "Chapter I, Part II deals with enforcement of certain foreign awards in accordance with the New York Convention, annexed as Schedule I to the 1996 Act. As per Sect. 44, there has to be an arbitration agreement in writing. To such arbitration agreement the conditions stated in Schedule I would apply. In other words, it must satisfy the requirements of Art. II of Schedule I. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration their disputes in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The arbitration agreement shall include an arbitration clause in a contract or an arbitration agreement signed by the parties or entered in any of the specified modes. Subject to the exceptions stated therein, the reference shall be made.

[55] "The language of Sect. 45 read with Schedule I of the 1996 Act is worded in favour of making a reference to arbitration when a party or any person claiming through or under him approaches the Court and the Court is satisfied that the agreement is valid, enforceable and operative. Because of the legislative intent, the mandate and purpose of the provisions of Sect. 45 being in favour of arbitration, the relevant provisions would have to be construed liberally to achieve that object. The question that immediately follows is as to what are the aspects which the Court should consider while dealing with an application for reference to arbitration under this provision.

[56] "The 1996 Act makes it abundantly clear that Part I of the Act has been amended to bring these provisions completely in line with the UNCITRAL Model Law on International Commercial Arbitration (for short, the 'UNCITRAL Model Law'), while Chapter I of Part II is meant to encourage international commercial arbitration by incorporating in India, the provisions of the New York Convention. Further, the protocol on Arbitration Clauses (for short 'Geneva Convention') was also incorporated as part of Chapter II of Part II.

[57] "For proper interpretation and application of Chapter I of Part II, it is necessary that those provisions are read in conjunction with Schedule I of the Act. To examine the provisions of Sect. 45 without the aid of Schedule I would not be appropriate as that is the very foundation of Sect. 45 of the Act.

[58] "The International Council for Commercial Arbitration prepared a *Guide to the Interpretation of 1958 New York Convention*, which lays/contains the Road Map to Art. II. Sect. 45 is enacted materially on the lines of Art. II of this Convention. When the Court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects:

'1. Does the arbitration agreement fall under the scope of the Convention?

2. Is the arbitration agreement evidenced in writing?
3. Does the arbitration agreement exist and is it substantively valid?
4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration?
5. Is the arbitration agreement binding on the parties to the dispute that is before the Court?
6. Is this dispute arbitrable?'

[59] "According to this *Guide*, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the Court will have to adjudicate any plea, if taken by a non-applicant that the arbitration agreement is null and void, inoperative or incapable of being performed. In these three situations, if the Court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest.
[60] "If the parties are referred to arbitration and award is made under these provisions of the Convention, then it shall be binding and enforceable in accordance with the provisions of Sects. 46 to 49 of the 1996 Act. The procedure prescribed under Chapter I of Part II is to take precedence and would not be affected by the provisions contained under Part I and/or Chapter II of Part II in terms of Sect. 52.[9] This is the extent of priority that the Legislature had intended to accord to this Chapter 1 of Part II.
[61] "Amongst the initial steps, the Court is required to enquire whether the dispute at issue is covered by the arbitration agreement. Stress has normally been placed upon three characteristics of arbitrations which are as follows –

(1) arbitration is consensual. It is based on the parties' agreement;
(2) arbitration leads to a final and binding resolution of the dispute; and
(3) arbitration is regarded as substitute for the court litigation and results in the passing of an binding award."

a. Whether nonsignatories are bound by the arbitration clause

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9. Sect. 52 of the 1996 Act reads:

"52. *Chapter II not to apply*
Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies."

[62] "Mr. Nariman, learned senior counsel appearing on behalf of the appellant, contended that in terms of Sect. 45 of the 1996 Act, parties to the agreement shall essentially be the parties to the suit. A stranger or a third party cannot ask for arbitration. They have to be essentially the same. Further, the parties should have a clear intention, at the time of the contract, to submit any disputes or differences as may arise, to arbitration and then alone the reference contemplated under Sect. 45 can be enforced.

[63] "To the contra, Mr. Salve, the learned senior counsel appearing for Respondent No. 1, submitted that the phrase 'at the request of one of the parties or any person claiming through or under him' is capable of liberal construction primarily for the reason that under the 1996 Act, there is a greater obligation to refer the matters to arbitration. In fact, the 1996 Act is the recognition of an indefeasible Right to Arbitration. Even a party which is not a signatory to the arbitration agreement can claim through the main party. Particularly, in cases of composite transactions, the approach of the Courts should be to hold the parties to the bargain of arbitration rather than permitting them to escape the reference on such pleas.

[64] "At this stage itself, we would make it clear that we are primarily discussing these submissions purely on a legal basis and not with regard to the merits of the case, which we shall shortly revert to.

[65] "We have already noticed that the language of Sect. 45 is at a substantial variance to the language of Sect. 8 in this regard. In Sect. 45, the expression 'any person' clearly refers to the legislative intent of enlarging the scope of the words beyond 'the parties' who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. The use of the word 'shall' would have to be given its proper meaning and cannot be equated with the word 'may', as liberally understood in its common parlance. The expression 'shall' in the language of the Sect. 45 is intended to require the Court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act.

[66] "However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the pre-requisites stated under Sects. 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

[67] "Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under Sect. 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in *Law and Practice of Commercial Arbitration in England* (2d ed.) by Sir Michael J. Mustill:

> '1. The claimant was in reality always a party to the contract, although not named in it.
> 2. The claimant has succeeded by operation of law to the rights of the named party.
> 3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.
> 4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence.'

[68] "Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the 'Group of Companies Doctrine'. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. (*Russell on Arbitration* (23d ed.)).

[69] "This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, 'intention of the parties' is a very

significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

[70] "A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

[71] "In a case like the present one, where origin and end of all is with the Mother or the Principal Agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfillment of the Principal or the Mother Agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the Court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically inter-linked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the arbitral tribunal is one of the determinative factors.

[72] "We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognize the doctrine, while others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in *Ruhrgas AG v. Marathon Oil Co.* [526 US 574 (1999)][10] discussed this doctrine at some length and relied on more traditional principles, such as, the

10. Reported in Yearbook XXV (2000) pp. 934-946 (US no. 312).

non-signatory being an alter ego, estoppel, agency and third party beneficiaries to find jurisdiction over the non-signatories.

[73] "The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically inter-mingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of 'composite performance' would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

[74] "As already noticed, an arbitration agreement, under Sect. 45 of the 1996 Act, should be evidenced in writing and in terms of Art. II of Schedule 1, an 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. Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally, as the words of this Article provide.

[75] "Even in a given circumstance, it may be possible and permissible to construe the arbitration agreement with the aid and principle of 'incorporation by reference'. Though the New York Convention is silent on this matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference.

[76] "The solution to such issue should be case-specific. The relevant considerations to determine incorporation would be the status of parties, usages within the specific industry, etc. Cases where the main documents explicitly refer to arbitration clause included in standard terms and conditions would be more easily found in compliance with the formal requirements set out in the Art. II of the New York Convention than those cases in which the main contract simply refers to the application of standard forms without any express reference to the arbitration clause.

[77] "For instance, under the American Law, where standard terms and conditions referred to in a purchase order provided that the standard terms would have been attached to or form part of the purchase order, this was considered to be an incorporation of the arbitration agreement by reference. Even in other countries, the recommended criterion for incorporation is whether the parties were or should have been aware of the arbitration agreement. If the Bill of Lading, for example, specifically mentions the arbitration clause in the Charter Party Agreement, it is generally considered sufficient for incorporation. Two different approaches in its interpretation have been adopted, namely, (a) interpretation of documents approach; and (b) conflict of laws approach. Under the latter, the Court could apply either its own national law or the law governing the arbitration.

[78] "In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of *Owners and Parties Interested in the Vessel M.V. BALTIC CONFIDENCE & Anr. v. State Trading Corporation of India Ltd. & Anr.* [(2001) 7 SCC 473],[11] the Court was considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading and what the intention of the parties to the Bill of Lading was. The primary document was the Bill of Lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the Charter Party Agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading. This Court, after considering the judgments of the courts in various other countries, held as under:

> '19. From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading, the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. While ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If

11. Reported in Yearbook XXVII (2002) pp. 478-481 (India no. 37).

> on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bill of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the disputes arising on the Bill of Lading should be resolved by an arbitrator.'

[79] "Reference can also be made to the judgment of this Court in the case of *Olympus Superstructure Pvt. Ltd. v. Meena Vijay Khetan & Ors.* [(1999) 5 SCC 651], where the parties had entered into a purchase agreement for the purchase of flats. The main agreement contained the arbitration clause (clause 39). The parties also entered into three different Interior Design Agreements, which also contained arbitration clauses. The main agreement was terminated due to disputes about payment and non-grant of possession. These disputes were referred to arbitration. A sole arbitrator was appointed to make awards in this respect. Inter alia, the question was raised as to whether the disputes under the Interior Design Agreements were subject to their independent arbitration clauses or whether one and the same reference was permissible under the main agreement. It was argued that the reference under clause 39 of the main agreement could not permit the arbitrator to deal with the disputes relating to Interior Design Agreements and the award was void. The Court, however, took the view that parties had entered into multiple agreements for a common object and the expression 'other matters … connected with' appearing in clause 39 would permit such a reference. The Court held as under:

> '30. If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters" "connected" with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same

arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute), it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in *Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co*. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the

above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.'

[80] "The Court also took the view that a dispute relating to specific performance of a contract in relation to immoveable property could be referred to arbitration and Sect. 34(2)(b)(i) of the 1996 Act[12] was not attracted. This finding of the Court clearly supports the view that where the law does not prohibit the exercise of a particular power, either the Arbitral Tribunal or the Court could exercise such power. The Court, while taking this view, has obviously rejected the contention that a contract for specific performance was not capable of settlement by arbitration under the Indian law in view of the statutory provisions. Such contention having been rejected, supports the view that we have taken."

b. Referral is mandatory

[81] "Where the Court which, on its judicial side, is seized of an action in a matter in respect of which the parties have made an arbitration agreement, once the required ingredients are satisfied, it would refer the parties to arbitration but for the situation where it comes to the conclusion that the agreement is null and void, inoperative or incapable of being performed. These expressions have to be construed somewhat strictly so as to ensure that the Court returns a finding with certainty and on the correct premise of law and fact as it has the effect of depriving the party of its right of reference to arbitration. But once the Court finds that the agreement is valid then it must make the reference, without any

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12. Sect. 34(2)(b) of the 1996 Act reads:

"34. *Application for setting aside arbitral award*
(2) An arbitral award may be set aside by the Court only if –
(….)
(b) the Court finds that –
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(ii) the arbitral award is in conflict with the public policy of India.

Explanation. Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

further exercise of discretion. (Refer *General Electric Co. v. Renusagar Power Co.* [(1987) 4 SCC 137]).[13]

[82] "These are the issues which go to the root of the matter and their determination at the threshold would prevent multiplicity of litigation and would even prevent futile exercise of proceedings before the arbitral tribunal."

c. Whether the court may review the existence and validity of the arbitration agreement

[83] "The issue of whether the courts are empowered to review the existence and validity of the arbitration agreement prior to reference is more controversial. A majority of the countries admit to the positive effect of Kompetenz-Kompetenz principle, which requires that the arbitral tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Thus, challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. If it retains jurisdiction, making of an award on the substance of the dispute would be permissible without waiting for the outcome of any court action aimed at deciding the issue of the jurisdiction. The negative effect of the Kompetenz-Kompetenz principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed.

[84] "This is the position of law in France and in some other countries, but as far as the Indian Law is concerned, Sect. 45 is a legislative mandate and does not admit of any ambiguity. We must take note of the aspect of Indian law that Chapter I of Part II of the 1996 Act does not contain any provision analogous to Sect. 8(3) under Part I of the Act. In other words, under the Indian Law, greater obligation is cast upon the Courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration. (*State of Orissa v. Klockner and Company & Ors.* (AIR 1996 SC 2140)).

[85] "Alan Redfern and Martin Hunter in *Law and Practice of International Commercial Arbitration* (4th ed.) have opined that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than in a series of separate proceedings. In

13. Reported in Yearbook XIV (1989) pp. 663-672 (India no. 17).

general terms, this saves time, money, multiplicity of litigation and more importantly, avoids the possibility of conflicting decisions on the same issues of fact and law since all issues are determined by the same arbitral tribunal at the same time. In proceedings before national courts, it is generally possible to join additional parties or to consolidate separate sets of proceedings. In arbitration, however, this is difficult, sometimes impossible, to achieve this because the arbitral process is based upon the agreement of the parties.

[86] "Where there is multi-party arbitration, it may be because there are several parties to one contract or it may be because there are several contracts with different parties that have a bearing on the matter in dispute. It is helpful to distinguish between the two. Where there are several parties to one contract, like a joint venture or some other legal relationship of similar kind and the contract contains an arbitration clause, when a dispute arises, the members of the consortium or the joint venture may decide that they would each like to appoint an arbitrator. In distinction thereto, in cases involving several contracts with different parties, a different problem arises. They may have different issues in dispute. Each one of them will be operating under different contracts often with different choice of law and arbitration clauses and yet, any dispute between say the employer and the main contractor is likely to involve or affect one or more of the suppliers or sub-contractors, even under other contracts. What happens when the dispute between an employer and the main contractor is referred to arbitration, and the main contractor wishes to join the sub-contractor in the proceedings, on the basis that if there is any liability established, the main contractor is entitled to pass on such liability to the sub- contractor?

[87] "This was the issue raised in the *Adgas* case (*Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.* [1982] 2 Lloyd's Rep. 425, CA).[14] Adgas was the owner of a plant that produced liquefied natural gas in the Arabian Gulf. The company started arbitration in England against the main contractors under an international construction contract, alleging that one of the huge tanks that had been constructed to store the gas was defective. The main contractor denied liability but added that, if the tank was defective, it was the fault of the Japanese sub-contractor. Adgas brought ad hoc arbitration proceedings against the main contractor before a sole arbitrator in London. The main contractor then brought separate arbitration proceedings, also in London, against the Japanese sub-contractor.

[88] "There is little doubt that if the matter had been litigated in an English court, the Japanese company would have been joined as a party to the action.

14. Reported in Yearbook IX (1984) pp. 448-451 (UK no. 13).

However, Adgas did not agree that the Japanese sub-contractor should be brought into its arbitration with the main contractor, since this would have lengthened and complicated the proceedings. The Japanese sub-contractor also did not agree to be joined. It preferred to await the outcome of the main arbitration, to see whether or not there was a case to answer.

[89] "Lord Denning, giving judgment in the English Court of Appeal, plainly wished that an order could be made consolidating the two sets of arbitral proceedings so as to save time and money and to avoid the risk of inconsistent awards:

> 'As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases … it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance.' (*Abu Dhabi Gas*, at 427)

[90] "We have already referred to the contention of Mr. Fali S. Nariman, the learned senior counsel appearing for the appellant, that the provisions of Sect. 45 of the 1996 Act are somewhat similar to Art. II(3) of the New York Convention and the expression 'parties' in that Section would mean that 'all parties to the action' before the Court have to be the parties to the arbitration agreement. If some of them are parties to the agreement, while the others are not, Sect. 45 does not contemplate the applicable procedure and the status of the non-signatories. The consequences of all parties not being common to the action and arbitration proceedings are, as illustrated above, multiplicity of proceedings and frustration of the intended 'one stop action'. The Rule of Mischief would support such interpretation. Even if some unnecessary parties are added to the action, the Court can always strike out such parties and even the cause of action in terms of the provisions of the CPC. However, where such parties cannot be struck off, there the proceedings must continue only before the Court.

[91] "Thus, the provisions of Sect. 45 cannot be effectively applied or even invoked. Unlike Sect. 24 of the 1940 Act,[15] under the 1996 Act the Court has

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15. Sect. 24 of the 1940 Act read:

> "24. *Reference to arbitration by some of the parties*
> Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court

not been given the power to refer to arbitration some of the parties from amongst the parties to the suit. Sect. 24 of 1940 Act vested the Court with the discretion that where the Court thought fit, it could refer such matters and parties to arbitration provided the same could be separated from the rest of the subject matter of the suit. Absence of such provision in the 1996 Act clearly suggests that the Legislature intended not to permit bifurcated or partial references of dispute or parties to arbitration. Without prejudice to this contention, it was also the argument that it would not be appropriate and even permissible to make reference to arbitration when the issues and parties in action are not covered by the arbitration agreement.
[92] "Referring to the consequences of all parties not being common to the action before the Court and arbitration, the disadvantages are:

(a) There would be multiplicity of litigation;
(b) Application of principle of one stop action would not be possible; and
(c) It will frustrate the application of the Rule of Mischief. The Court can prevent the mischief by striking out unnecessary parties or causes of action.

[93] "It would, thus, imply that a stranger or a third party cannot ask for arbitration. The expression 'claiming through or under' will have to be construed strictly and restricted to the parties to the arbitration agreement.
[94] "Another issue raised before the Court is that there is possibility of the arbitration proceedings going on simultaneously with the suit, which would result in rendering passing of conflicting orders possible. This would be contrary to the public policy of India that Indian courts can give effect to the foreign awards which are in conflict with judgment of the Indian courts.
[95] "To the contra, Mr. Salve, learned senior counsel appearing for Respondent No. 1, contended that the expressions 'parties to arbitration', 'any person claiming through or under him' and 'at the request of one of the party' appearing in Sect. 45 are wide enough to include some or all the parties and even non-signatory parties for the purposes of making a reference to arbitration. It is

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may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application."

This Act is no longer in force.

also the contention that on the true construction of Sects. 44, 45 and 46 of the 1996 Act, it is not possible to accept the contention of the appellant that all the parties to an action have to be parties to the arbitration agreement as well as the Court proceedings. This would be opposed to the principle that parties should be held to their bargain of arbitration. The Court always has the choice to make appropriate orders in exercise of inherent powers to bifurcate the reference or even stay the proceedings in a suit pending before it till the conclusion of the arbitration proceedings or otherwise. According to Mr. Salve, if the interpretation advanced by Mr. Nariman is accepted, then mischief will be encouraged which would frustrate the arbitration agreement because a party not desirous of going to arbitration would initiate civil proceedings and add non-signatory as well as unnecessary parties to the suit with a view to avoid arbitration. This would completely frustrate the legislative object underlining the 1996 Act. Non-signatory parties can even be deemed to be parties to the arbitration agreement and may successfully pray for referral to arbitration.

[96] "As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the Legislature and available for its consideration when it enacted the 1996 Act. Art. II of the Convention provides that each contracting State shall recognise an agreement and 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. Once the agreement is there and the Court is seized of an action in relation to such subject matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

[97] "Still, the legislature opted to word Sect. 45 somewhat dissimilarly. Sect. 8 of the 1996 Act also uses the expression 'parties' simpliciter without any extension. In significant contra- distinction, Sect. 45 uses the expression 'one of the parties or any person claiming through or under him' and 'refer the parties to arbitration', whereas the rest of the language of Sect. 45 is similar to that of Art. II(3) of the New York Contention. The Court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the Legislature in a provision should be given its due meaning. To us, it appears that the Legislature intended to give a liberal meaning to this expression.

[98] "The language of Sect. 45 has wider import. It refers to the request of a party and then refers to an arbitral tribunal, while under Sect. 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Sect. 8 and Sect. 45 read with Art. II(3). The language and expressions used in Sect. 45, 'any person claiming through or under him' including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the Legislature are of wider connotation or the very language of the Section is structured with liberal protection then such provision should normally be construed liberally.
[99] "Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers."

d. "Legal Relationship" in Art. II(1) New York Convention and Sect. 45 1996 Act

[100] "Now, we should examine the scope of concept of 'legal relationship' as incorporated in Art. II(1) of the New York Convention vis-à-vis the expression 'any person claiming through or under him' appearing in Sect. 45 of the 1996 Act. Art. II(1) and (3) have to be read in conjunction with Sect. 45 of the Act.
[101] "Both these expressions have to be read in harmony with each other. Once they are so read, it will be evident that the expression 'legal relationship' connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties. It is also stated in the *Law and Practice of International Commercial Arbitration*, Alan Redfern and Martin Hunter (supra), that for the purposes of both the New York Convention and the UNCITRAL Model Law, it is sufficient that there should be a defined 'legal relationship' between the parties, whether contractual or not. Plainly there has to be some contractual relationship between the parties, since there must be some arbitration agreement to form the basis of the arbitral proceedings. Given the existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract.
[102] "In the case of *Roussel-Uclaf v. G.D. Searle & Co. Ltd. and G.D. Searle & Co.* [1978 Vol. 1 LLR 225],[16] the Court held:

16. Reported in Yearbook IV (1979) pp. 317-320 (UK no. 4).

> 'The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is "claiming through or under" the parent to do what it is in fact doing whether ultimately held to be wrongful or not.'

[103] "However, the view expressed by the Court in the above case does not find approval in the decision of the Court of Appeal in the case of *City of London v. Sancheti* [(2009) 1 Lloyds Law Reports 116]. In paragraph 34, it was held that the view in the case of *Roussel-Uclaf* need not be followed and stay could not be obtained against a party to an arbitration agreement or a person claiming through or under such a party, as mere local or commercial connection is not sufficient. But the Court of Appeal hastened to add that, in cases such as the one of Mr. Sancheti, the Corporation of London was not party to the arbitration agreement, but the relevant party is the United Kingdom Government. The fact that in certain circumstances, the State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of the local authorities, does not make the local authority a party to the arbitration agreement.

[104] "Having examined both the above-stated views, we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope of the provisions of the Section and it may not be possible for the Court to permit reference to arbitration at the behest of or against such party.

[105] "We have already referred to the judgments of various courts, that state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it

is claiming under or through a signatory party, as contemplated under Sect. 45 of the 1996 Act.
[106] "Michael J. Mustill and Stewart C. Boyd in *The Law and Practice of Commercial Arbitration in England* have observed that the applicant must show that the person whose claim he seeks to stay is either a party to the arbitration agreement or a person claiming through or under such a party. It is further noticed that it occasionally happens that the plaintiff is not himself a party to the arbitration agreement on which the application is founded. This may arise in the following situations :

(i) The plaintiff has acquired the rights, which the action is brought to enforce, from someone who is a party to an arbitration agreement with the defendant;
(ii) The plaintiff is bringing the action on behalf of someone else, who is a party to an arbitration agreement with the defendant.
(iii) When the expression used in the provision, the words 'claiming under plaintiff' relate to substantive right which is being asserted.

[107] "The requirements can scarcely be interpreted in their literal sense, this would mean that a person could claim a stay even though not a party to the arbitration agreement. However, the applicant must be party to the agreement against whom legal proceedings have been initiated rather than a party as intervenor.
[108] "Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the *ICCA's Guide to the Interpretation of the 1958 New York Convention* also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Art. I of the Convention, the most compelling answer is 'no' and the same is supported by a number of reasons.
[109] "Various legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called the 'alter ego'), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

[110] "We may also notice the Canadian case of *The City of Prince George v. A.L. Sims & Sons Ltd.* [Yearbook Commercial Arbitration XXIII (1998) p. 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

[111] "We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

[112] "The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

[113] "If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

[114] "In the present case, the corporate structure of the respondent companies as well as that of the appellant companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the lis or persons claiming under them. They have contractual relationship which arises out of the various contracts that spell out the terms,

obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependant on any single agreement but was capable of being achieved only upon fulfillment of all these agreements. If one floats a joint venture company, one must essentially know how to manage it and what shall be the methodology adopted for its management. If one manages it well, one must know what goods the said company is to produce and with what technical know-how. Even if these requisites are satisfied, then also one is required to know, how to create market, distribute and export such goods. It is nothing but one single chain consisting of different components. The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main party to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful, by execution of various agreements, like in the present case.
[115] "The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen concerning the subject matter capable of settlement of arbitration. We have referred to a number of judgments of the various courts to emphasize that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible."

e. Partial referral to arbitration

[116] "Next, we are to examine the issue whether the cause of action in a suit can be bifurcated and a partial reference may be made by the Court. Whatever be the answer to this question, a necessary corollary is as to whether the Court should or should not stay the proceedings in the suit? Further, this may give rise to three different situations. Firstly, while making reference of the subject matter to arbitration, whether the suit may still survive, partially or otherwise; secondly, whether the suit, still pending before the Court, should be stayed completely; and lastly, whether both the arbitration and the suit proceedings could be permitted to proceed simultaneously in accordance with law.

[117] "Mr. Nariman, the learned senior counsel, while relying upon the judgments in the cases of *Turnock v. Sartoris* [1888 (43) Chancery Division, 1955 SCR 862], *Taunton-Collins v. Cromie & Anr.* [1964 Vol. 1 Weekly Law Reports 633] and *Sumitomo Corporation v. CDS Financial Services (Mauritius) Ltd. and Others* [(2008) 4 SCC 91] again emphasized that the parties to the agreement have to be parties to the suit and also that the cause of action cannot be bifurcated unless there was a specific provision in the 1996 Act itself permitting such bifurcation or splitting of cause of action. He also contended that there is no provision like Sects. 21[17] and 24 of the 1940 Act in the 1996 Act and thus, it supports the view that bifurcation of cause of action is impermissible and such reference to arbitration is not permissible.

[118] "In the case of *Turnock* (supra), the Court had stated that it was not right to cut up that litigation into two actions, one to be tried before the arbitrator and the other to be tried elsewhere, as in that case matters in respect of which the damages were claimed by the plaintiff could not be referred to arbitration because questions arising as to the construction of the agreement and provisions in the lease deed were involved and they did not fall within the power of the arbitrator in face of the arbitration agreement. In the case of *Taunton-Collins* (supra), the Court again expressed the view that it was undesirable that there should be two proceedings before two different tribunals, i.e., the official referee and an Arbitrator, as they may reach inconsistent findings.

[119] "This Court dealt with the provisions of the 1940 Act, in the case of *Anderson Wright Ltd. v. Moran & Company* [1955 SCR 862], and described the conditions to be satisfied before a stay can be granted in terms of Sect. 34 of the 1940 Act. The Court also held that it was within the jurisdiction of the Court to determine a question whether the plaintiff was a party to the contract containing the arbitration clause or not. Still in the case of *Sumitomo Corporation* (supra), this Court primarily declined the reference to arbitration for the reason that the disputes stated in the petition did not fall within the ambit of the arbitration clause contained in the agreement between the parties and also that the Joint Venture Agreement did not itself contain a specific arbitration clause. An

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17. Sect. 21 of the 1940 Act read:

> "21. *Parties to suit may apply for order of reference*
> Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

This Act is no longer in force.

observation was also made in paragraph 20 of the judgment that the 'party' would mean 'the party to the judicial proceeding should be a party to the arbitration agreement'.

[120] "It will be appropriate to refer to the contentions of Mr. Salve, the learned senior counsel. According to him, reference, even of the non-signatory party, could be made to arbitration and upon such reference the proceedings in an action before the Court should be stayed. The principle of bifurcation of cause of action, as contemplated under the CPC, cannot stricto sensu apply to Sect. 45 of the 1996 Act in view of the non-obstante language of the Section. He also contended that parties or issues, even if outside the scope of the arbitration agreement, would not per se render the arbitration clause inoperative. Even if there is no specific provision for staying the proceedings in the suit under the 1996 Act, still in exercise of its inherent powers, the Court can direct stay of the suit proceedings or pass such other appropriate orders as the court may deem fit.

[121] "We would prefer to first deal with the precedents of this Court cited before us. As far as *Sumitomo Corporation* (supra) is concerned, it was a case dealing with the matter where the proceedings under Sects. 397-398 of the Companies Act had been initiated and the Company Law Board had passed an order. Whether the appeal against such order would lie to the High Court was the principal question involved in that case. The denial of arbitration reference, as already noticed, was based upon the reasoning that disputes related to the joint venture agreement to which the parties were not signatory and the said agreement did not even contain the arbitration clause. On the other hand, it was the other agreement entered into by different parties which contained the arbitration clause. As already noticed, in paragraph 20, the Court had observed that a party to an arbitration agreement has to be a party to the judicial proceedings and then alone it will fall within the ambit of Sect. 2(h) of the 1996 Act.[18]

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18. Sect. 2(h) of the 1996 Act reads:

> "2. *Definitions*
> (1) In this Part, unless the context otherwise requires,
> ....
> (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

[122] "As far as the first issue is concerned, we shall shortly proceed to discuss it when we discuss the merits of this case, in light of the principles stated in this judgment. However, the observations made by the learned Bench in the case of *Sumitomo Corporation* (supra) do not appear to be correct. Sect. 2(h) only says that 'party' means a party to an arbitration agreement. This expression falls in the Chapter dealing with definitions and would have to be construed along with the other relevant provisions of the Act. When we read Sect. 45 in light of Sect. 2(h), the interpretation given by the Court in the case of *Sumitomo Corporation* (supra) does not stand to the test of reasoning. Sect. 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the provision of Sect. 45 of the 1996 Act.

[123] "We have already discussed above that the language of Sect. 45 is incapable of being construed narrowly and must be given expanded meaning to achieve the twin objects of arbitration, i.e., firstly, the parties should be held to their bargain of arbitration and secondly, the legislative intent behind incorporating the New York Convention as part of Sect. 44 of the Act must be protected. Moreover, paragraph 20 of the judgment of *Sumitomo Corporation* (supra) does not state any principle of law and in any event it records no reasons for arriving at such a conclusion. In fact, that was not even directly the issue before the Court so as to operate as a binding precedent. For these reasons, respectfully but without hesitation, we are constrained to hold that the conclusion or the statement made in paragraph 20 of this judgment does not enunciate the correct law."

f. Finality of court decision on existence/validity of arbitration agreement

[124] "An application for appointment of arbitral tribunal under Sect. 45 of the 1996 Act would also be governed by the provisions of Sect. 11(6) of the Act.[19]

(iv) the Government of a foreign country;...."

19. Sect. 11(6) of the 1996 Act reads:

> 11. *Appointment of arbitrators*
> (....)
> (6) Where, under an appointment procedure agreed upon by the parties,
> (a) a party fails to act as required under that procedure; or
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

This question is no more res integra and has been settled by decision of a Constitution Bench of seven Judges of this Court in the case of *SBP and Co. v. Patel Engineering Ltd. and Anr.* [(2005) 8 SCC 618], wherein this Court held that power exercised by the Chief Justice is not an administrative power. It is a judicial power.

[125] "It is a settled principle that the Chief Justice or his designate Judge will decide preliminary aspects which would attain finality unless otherwise directed to be decided by the arbitral tribunal. In para. 39 of the judgment, the Court held as under:

> '39. It is necessary to define what exactly the Chief Justice, approached with an application under Sect. 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Sect. 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.'

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a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

[126] "This aspect of the arbitration law was explained by a two Judge Bench of this Court in the case of *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* [(2007) 4 SCC 599] wherein, while referring to the judgment in *SBP & Co.* (supra) particularly the above paragraph, this Court held that the scope of order under Sect. 11 of the 1996 Act would take in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. It held as under:

> '27. .... Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only *has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a*

finding that the respective claims of the parties have not become barred by limitation.' (Emphasis supplied.)

[127] "Thus, the Bench while explaining the judgment of this Court in *SBP & Co.* (supra) has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the arbitral tribunal to decide.
[128] "In *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [(2009) 1 SCC 267], another equi-bench of this Court after discussing various judgments of this Court, explained *SBP & Co.* (supra) in relation to scope of powers of the Chief Justice and/or his designate while exercising jurisdiction under Sect. 11(6), held as follows:

'22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Sect. 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* This Court identified and segregated the preliminary issues that may arise for consideration in an application under Sect. 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.
(b) Whether there is an arbitration agreement and whether the party who has applied under Sect. 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.
(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
(ii) Merits or any claim involved in the arbitration.'

[129] "We may notice that at first blush, the judgment in the case of *Shree Ram Mills* (supra) is at some variance with the judgment in the case of *National Insurance Co. Ltd.* (supra) but when examined in depth, keeping in view the judgment in the case of *SBP & Co.* (supra) and provisions of Sect. 11(6) of the 1996 Act, both these judgments are found to be free from contradiction and capable of being read in harmony in order to bring them in line with the statutory law declared by the larger Bench in *SBP & Co.* (supra). The expressions 'Chief Justice does not in strict sense decide the issue' or 'is prima facie satisfied', will have to be construed in the facts and circumstances of a given case. Where the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law. On such an issue, the Arbitral Tribunal will have no jurisdiction to re-determine the issue. In the case of *Shree Ram Mills* (supra), the Court held that the Chief Justice could record a finding where the issue between the parties was still alive or was dead by lapse of time. Where it prima facie found the issue to be alive, the Court could leave the question of limitation and also open to be decided by the arbitral tribunal.
[130] "The above expressions are mere observations of the Court and do not fit into the contours of the principle of ratio decidendi of the judgment. The issues in regard to validity or existence of the arbitration agreement, the application not satisfying the ingredients of Sect. 11(6) of the 1996 Act and claims being barred by time etc. are the matters which can be adjudicated by the Chief Justice or his designate. Once the parties are heard on such issues and the matter is determined in accordance with law, then such a finding can only be disturbed by the Court of competent jurisdiction and cannot be reopened before the arbitral tribunal. In *SBP & Co.* (supra), the Seven Judge Bench clearly stated, 'the finality given to the order of the Chief Justice on the matters within his competence under Sect. 11 of the Act are incapable of being reopened before the arbitral tribunal'.
[131] "Certainly the Bench dealing with the case of *Shree Ram Mills* (supra) did not intend to lay down any law in direct conflict with the Seven Judge Bench judgment in *SBP & Co.* (supra). In the reasoning given in *Shree Ram Mills*' case, the Court has clearly stated that matters of existence and binding nature of

arbitration agreement and other matters mentioned therein are to be decided by the Chief Justice or his designate and the same is in line with the judgment of this Court in the case of *SBP & Co.* (supra). It will neither be permissible nor in consonance with the doctrine of precedent that passing observations by the Bench should be construed as the law while completely ignoring the ratio decidendi of that very judgment. We may also notice that the judgment in *Shree Ram Mills* (supra) was not brought to the notice of the Bench which pronounced the judgment in the case of *National Insurance Co. Ltd.* (supra).

[132] "As far as the classification carved out by the Court in the case of *National Insurance Co. Ltd.* (supra) are concerned, it draws its origin from paragraph 39 of the judgment in the case of *SBP & Co.* (supra) wherein the Constitution Bench of the Court had observed that

> 'it may not be possible at that stage to decide whether a live claim made is one which comes within the purview of the arbitration clause. It will be more appropriate to leave the seriously disputed questions to be decided by the Arbitral Tribunal on taking evidence along with the merits of the claim, subject matter of the arbitration.'

[133] "The foundation for category (2) in para. 22 of *National Insurance Company Ltd.* (supra) is directly relatable to para. 39 of the judgment of this court in *SBP & Co.* (supra) and matters falling in that category are those which, depending on the facts and circumstances of a given case, could be decided by the Chief Justice or his designate or even may be left for the decision of the arbitrator, provided there exists a binding arbitration agreement between the parties. Similar is the approach of the Bench in the case of *Shree Ram Mills* (supra) and that is why in paragraph 27 thereof, the Court has recorded that it would be appropriate sometimes to leave the question regarding the claim being alive to be decided by the arbitral tribunal and the Chief Justice may record his satisfaction that parties have not closed their rights and the matter has not been barred by limitation.

[134] "As already noticed, the observations made by the Court have to be construed and read to support the ratio decidendi of the judgment. Observations in a judgment which are stared upon by the judgment of a larger bench would not constitute valid precedent as it will be hit by the doctrine of stare decisis. In the case of *Shree Ram Mills* (supra) surely the Bench did not intend to lay down the law or state a proposition which is directly in conflict with the judgment of the Constitution Bench of this Court in the case of *SBP & Co.* (supra).

[135] "We have no reason to differ with the classification carved out in the case of *National Insurance Co.* (supra) as it is very much in conformity with the

judgment of the Constitution Bench in the case of *SBP* (supra). The question that follows from the above discussion is as to whether the views recorded by the judicial forum at the threshold would be final and binding on the parties or would they constitute the prima facie view.

[136] "This again has been a matter of some debate before this Court. A three Judge Bench of this Court in the case of *Shin-Etsu Chemical Co. Ltd. v. M/s. Aksh Optifibre Ltd. & Anr.* [(2005) 7 SCC 234][20] was dealing with an application for reference under Sect. 45 of the 1996 Act and consequently, determination of validity of arbitration agreement which contained the arbitration clause governed by the ICC Rules in Tokyo, Japan. The appellant before this Court had terminated the agreement in that case. The respondent filed a suit claiming a decree of declaration and injunction against the appellant for cancellation of the agreement which contained the arbitration clause. In that very suit, the appellant also prayed that this long term sale and purchase agreement, which included the arbitration clause be declared void ab initio, inoperative and incapable of being performed on the ground that the said agreement contained unconscionable, unfair and unreasonable terms; was against public policy and was entered into under undue influence. The appellant had also filed an application under Sect. 8 of the 1996 Act for reference to arbitration. Some controversy arose before the Trial Court as well as before the High Court as to whether the application was one under Sect. 8 or Sect. 45 but when the matter came up before this Court, the counsel appearing for both the parties rightly took the stand that only Sect. 45 was applicable and Sect. 8 had no application. In this case, the Court was primarily concerned and dwelled upon the question whether an order refusing reference to arbitration was appealable under Sect. 50 of the 1996 Act[21] and what would be its effect.

[137] "We are not really concerned with the merits of that case but certainly are required to deal with the limited question whether the findings recorded by the referring Court are of final nature, or are merely prima facie and thus, capable

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20. Reported in Yearbook XXXI (2006) pp. 747-785 (India no. 41).

21. Sect. 50 of the 1996 Act reads:

> "50. *Appealable orders*
> (1) An appeal shall lie from the order refusing to –
> (a) refer the parties to arbitration under section 45;
> (b) enforce a foreign award under section 48,
> to the Court authorised by law to hear appeals from such order.
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

of being re-adjudicated by the arbitral tribunal. Where the Court records a finding that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed on merits of the case, it would decline the reference. Then the channel of legal remedy available to the party against whom the reference has been declined would be to take recourse to an appeal under Sect. 50(1)(a) of the 1996 Act. The Arbitral Tribunal in such situations does not deliver any determination on the issues in the case. However, in the event that the referring Court deals with such an issue and returns a finding that objections to reference were not tenable, thus rejecting, the plea on merits, then the issue arises as to whether the arbitral tribunal can re-examine the question of the agreement being null and void, inoperative or incapable of performance, all over again.

[138] "Sabharwal, J., after deliberating upon the approaches of different courts under the English and the American legal systems, stated that both the approaches have their own advantages and disadvantages. The approach whereby the courts finally decide on merits in relation to the issue of existence and validity of the arbitration agreement would result to a large extent in avoiding delay and increased cost. It would not be for the parties to wait for months or years before knowing the final outcome of the disputes regarding jurisdiction alone. Then, he held as follows:

> '56. I am of the view that the Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration.
> 57. In view of the aforesaid discussion, I am of the view that under Sect. 45 of the Act, the determination has to be on merits, final and binding and not prima facie.'

[139] "However, Srikrishna, J. took a somewhat different view and noticing the truth that there is nothing in Sect. 45 to suggest that a finding as to the nature of the arbitration agreement has to be ex facie or prima facie, observed that if it were to be held that the finding of the court under Sect. 45 should be a final, determinative conclusion, then it is obvious that until such a pronouncement is made, the arbitral proceedings would have to be in limbo. So, he held as follows:

> '105. I fully agree with my learned Brother's view that the object of dispute resolution through arbitration, including international commercial arbitration, is expedition and that the object of the Act would be defeated if proceedings remain pending in the court even after commencing of the

> arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by Sect. 45, the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage.'

[140] "Dharmadhikari, J., the third member of the Bench, while agreeing with the view of Srikrishna, J. and noticing,

> 'Where a judicial authority or the court refuses to make a reference on the grounds available under Sect. 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Sect. 50(1)(a) of the Act and further appeal to this Court under Sub-sect. (2) of the said Section.'

expressed no view on the issue of prima facie or finality of the finding recorded on the pre-reference stage, he left the question open in the following paragraph:

> '112. Whether such a decision of the judicial authority or the court, of refusal to make a reference on grounds permissible under Sect. 45 of the Act would be subjected to further re-examination before the Arbitral Tribunal or the court in which eventually the award comes up for enforcement in accordance with Sect. 48(1)(a) of the Act, is a legal question of sufficient complexity and in my considered opinion since that question does not directly arise on the facts of the present case, it should be left open for consideration in an appropriate case where such a question is directly raised and decided by the court.'

[141] "The judgment of this Court in *Shin-Etsu Chemical Co. Ltd.* (supra) preceded the judgment of this Court in the case of *SBP & Co.* (supra). Though the Constitution Bench in the latter case referred to this judgment in paragraph 89 of the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Sect. 11 relatable to Sect. 8 are final and not open to be questioned by the arbitral tribunal.

[142] "Sects. 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has

to pray for a reference before the Chief Justice or his designate in terms of Sect. 11 of the 1996 Act. We may refer to the exact terminology used by the larger Bench in *SBP & Co.* (supra) in relation to the finality of such matters, as reflected in para 12 of the judgment which reads as under:

> '12. Sect. 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-sect. (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-sect. (2) of Sect. 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-sect. (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Sect. 34 of the Act. The question, in the context of Sub-sect. (7) of Sect. 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Sect. 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by

> Sub-sect. (7) of Sect. 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. *It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Sect. 16 has full play only when an Arbitral Tribunal is constituted without intervention under Sect. 11(6) of the Act, is one way of reconciling that provision with Sect. 11 of the Act, especially in the context of Sub-sect. (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him*.' (Emphasis supplied.)

[143] "We are conscious of the fact that the above dictum of the Court is in relation to the scope and application of Sect. 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in the case of *SBP* (supra) which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Sect. 8 or Sect. 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Sect. 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course, would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent.

[144] "We are not oblivious of the principle 'Kompetenz-Kompetenz'. It requires the arbitral tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the Courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The Kompetenz-Kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. (Refer *Fouchard Gaillard Goldman on International Commercial Arbitration*.)

[145] "This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Sect. 16[22] appearing in Part I of the same Act. Sect. 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II, Chapter I is suggestive of the requirement for the Court to determine the ingredients of Sect. 45, at the threshold itself. It is expected of the Court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the Court in accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and re-agitating of same issues over and over again. The underlining principle of finality in Sect. 11(7) would be applicable with equal force while dealing with the interpretation of Sects. 8 and 45.

[146] "Further, it may be noted that even the judgment of this Court in *SBP & Co.* (supra) takes a view in favour of finality of determination by the Court despite the language of Sect. 16 in Part I of the 1996 Act. Thus, there could hardly be

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22. Sect. 16 of the 1996 Act reads:

> "16. *Competence of arbitral tribunal to rule on its jurisdiction*
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that [sic] he has appointed, or participated in the appointment of, an arbitrator.
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
> (4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

any possibility for the Court to take any other view in relation to an application under Sect. 45 of the 1996 Act. Since the categorization referred to by this Court in the case of *National Insurance Company Ltd.* (supra) is founded on the decision by the larger Bench of the Court in the case of *SBP & Co.* (supra), we see no reason to express any different view. The categorization falling under para. 22.1 of the *National Insurance Company* case (supra) would certainly be answered by the Court before it makes a reference while under para. 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the arbitral tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the arbitral tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable by the arbitral tribunal. [147] "Another very significant aspect of adjudicating the matters initiated with reference to Sect. 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Sect. 45 would further the cause of justice and interest of the parties as well. To illustratively demonstrate it, we may give an example. Where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality. [148] "Even when the arbitration law in India contained the provision like Sect. 34 of the 1940 Act which was somewhat similar to Sect. 4 of the English Arbitration Act, 1889, this Court in the case of *Anderson Wright Ltd.* (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated under Sect. 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not. Applying the analogy thereof will fortify

the view that determination of fundamental issues as contemplated under Sect. 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Sect. 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration."

g. Sukanya Holdings

[149] "Though rival contentions have been raised before us on the correctness of the judgment of this Court in *Sukanya Holdings Pvt. Ltd.* (supra), Mr. Salve vehemently tried to persuade us to hold that this judgment does not state the correct exposition of law and to that effect it needs to be clarified by this Court in the present case. On the contrary, Mr. Nariman argued that this judgment states the correct law and, in fact, the principles stated should be applied to the present case.

[150] "The ambit and scope of Sect. 45 of the 1996 Act, we shall be discussing shortly but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of *Sukanya* (supra). This we say for varied reasons. Firstly, *Sukanya* was a judgment of this Court in a case arising under Sect. 8 Part I of the 1996 Act while the present case relates to Sect. 45 Part II of the Act. As such that case may have no application to the present case. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Sect. 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Sect. 45 of the Act. Thus, the dictum stated in para. 13 of the judgment of *Sukanya* would not apply to the present case. Thirdly, on facts, the judgment in *Sukanya*'s case, has no application to the case in hand.

[151] "Thus, we decline to examine the merit or otherwise of this contention."

2. Nonsignatories in the Present Case

(….)

[152] "[T]he Kocha group had floated a company and incorporated the same under the Indian laws, which was carrying on the business of manufacture of chlorination equipment under the name and style 'Chloro Control India Private Limited'. They were negotiating with Severn Trent Water Purification Inc. for an international joint venture agreement to deal with the manufacture, distribution and sale of gas chlorination equipment and electro-chlorination equipment, 'Hypogen Series 3300' etc. On this basis, they had entered into a joint venture agreement which was signed between them. The joint venture agreement contemplated that the business shall be carried on under the name and style of Capital Controls India Ltd. Private Limited. The agreements gave 50 percent shareholding to the foreign collaborators which were to be equally divided between Capital Control (Del) Company Inc. and Capital Control Company Inc. These joint venture agreements were executed between the parties on 16 November 1995 but the joint venture company had been incorporated on 14 November 1995 itself. Severn Trent Services (Del) Inc. is the holding company of the companies which have entered into the joint venture agreement for floating both Capital Control India Ltd. as well as Severn Trent De Nora LLC.

[153] "The disputes had arisen actually between the Kocha Group on the one hand and Severn Trent Water Purification Inc. on the other, and the disputes were mainly with regard to Capital Control (India) Pvt. Ltd. Inc. Now, we must note, even at the cost of repetition, the parties signatory to each of these agreements and we must also note which of these agreements did not contain arbitration clause. Shareholders Agreement dated 16 November 1995 was executed between the Capital Control (Delaware) Company Inc. and Chloro Control India Private Ltd. Capital Control Delaware Company Inc. was a subsidiary of Severn Trent Services (Delaware) Inc. and was formed on 21 September 1994. Capital Control Company Inc. came to be merged with Capital Control (Delaware) Company Inc. in March 1994. As a result the Capital Control Delaware Company was no more in existence. Thus, the reference to Capital Control Company Inc. includes reference to Capital Control Company Inc. as well as Capital Control (Delaware) Company Inc.

[154] "The corporate structure of the Companies involved in the present litigation clearly shows that name of Capital Control Company Inc., incorporated in the year 1994, was changed to Severn Trent Water Purification Inc. with effect from April 2002. Thus, both these companies together were subsidiaries of the holding company Severn Trent Services (Delaware) Inc. The joint venture agreement was executed between Chloro Control (India) Pvt. Ltd. and the erstwhile Capital Control Company Inc. resulting into creation of the joint

venture company, Capital Control (India) Pvt. Ltd. This is the basic structure which one has to make clear before examining the agreements and their impact. The negotiations between the appellant and Respondents Nos. 1 and 2 or their holding companies were going on since 1990 and ultimately culminated into execution of the joint venture agreement.

[155] "In terms of the Shareholders Agreement, the authorized share capital of the company was five million rupees consisting of equity shares of Rs.10 each. Initially the parties had decided to issue equity capital of 1,50,000 equity shares of Rs.10 each with 50 percent of the initial equity to Capital Controls and the remaining 50 percent to Chloro Controls. It is necessary to refer in some detail the relevant clauses of this Agreement as this agreement is the 'Principal or the Mother Agreement'. All other agreements were executed in furtherance to and for achieving the purpose of this Agreement. This agreement notices that Capital Control was engaged in the design, manufacture, import, marketing, export etc. of gas and electro-chlorination equipments. The company was to be registered and as is evident, in furtherance to the negotiations, steps for registration of the said company had been taken and finally it came to be incorporated on 14 November 1995. The main object of the joint venture company was the manufacture, service and sale of the products. In terms of the Principal Agreement, establishment of a plant, management of the company, appointment of Directors, implementation of decisions of the Board of Directors, appointment or re-appointment of the Managing Director, dividend policy, loans, financial information, trademarks, transfer of shares, sale-purchase of chlorination equipment, assets, government approvals, performance of Chloro Controls, trademark, service of notices, modifications, severability and arbitration, settlement of disputes by arbitration etc. were the matters specifically provided for under this agreement. A very significant feature of this contract was that the Kocha Group was put under an injunction to not engage directly or indirectly or be financially interested in the manufacture, sale or distribution of chlorination equipment and related products, which is similar to those manufactured or sold by the company during the term of the agreement. Similarly, a restriction was also placed upon Capital Controls and even its holding companies to not directly or indirectly engage in or to be financially interested in the manufacture, sale or distribution in India of products manufactured or sold by the company, during the term of the agreement.

[156] "The Principal Agreement specifically referred to various agreements or even terms and conditions thereof. Clause 7 of the agreement provided for execution of the International Distributor Agreement which was Appendix II to this Agreement. The Financial and Technical Know-how Licence Agreement was

executed in furtherance to clause 14 thereof. Similarly, the Trademark Registered User License Agreement was required to be executed between the parties in terms of clause 15 of this Agreement. Other terms and conditions of the Principal Agreement referred to management of the company by appointment or reappointment of Directors or Managing Directors inasmuch as clause 8.6 contemplated execution of the agreement which was appended as Appendix III. Still, certain other clauses of the Principal Agreement specifically dealt with the sale of goods manufactured by the joint venture company, nationally and internationally. This resulted in signing of the International Distribution and Export Sales Agreement between the parties.

[157] "All the five agreements signed by the parties were primarily to fulfill their obligations and ensure performance of this Principal Agreement. The Supplementary Collaboration Agreement executed in August 1997 was only to comply with the conditions of the Government Approval which were granted vide letter dated 11 October 1996, as amended by letter dated 21 April 1997. The companies which executed the various agreements were the companies signatory to the Principal Agreement or their holding companies or the companies belonging to the respondent group in which they had got merged for the purposes of attaining effective designing, manufacturing, import, export and marketing of the agreed chlorinated products.

[158] "All the subsequent agreements were, therefore, ancillary or incidental agreements to the Principal Agreement. Thus, the joint venture entered between the parties had different facets. Its foundation was provided under the Principal Agreement but all the agreed terms could only be fulfilled by performance of the ancillary agreements. If one segregates the Principal Agreement from the rest, the subsequent agreements would be rendered ineffective. If the agreed goods were not manufactured in India with the technical know-how of Respondent No. 1 and the joint venture company was not incorporated, the question of the Distribution Agreement, Managing Director Agreement, Financial and Technical Know-how License Agreement or the Export Sales Agreement would not have even arisen, in any event. Conversely, if the ancillary agreements were not performed in a collective manner, the Principal Agreement would be of no consequence. In other words, it was one composite transaction for attaining the purpose of business of the joint venture company. All these agreements are so intrinsically connected to each other that it is neither possible nor probable to imagine the execution and implementation of one without the collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction. It can safely be covered under the principle of 'agreements within

an agreement'. For instance, the Financial and Technical Know-how License Agreement not only finds a specific mention in the Principal Agreement but its contents also are referable to the clauses of the Principal Agreement. The Financial and Technical Know- how License Agreement was Appendix III to the Principal Agreement and the details of the goods which were contemplated to be manufactured, distributed and sold under the Principal Agreement had been specified in Appendix I of the Financial and Technical Know-how Agreement. If the latter agreement was not there, the Principal Agreement between the parties would have remained incomplete and the parties would have been at a disadvantage to know as to what goods were to be manufactured and what goods could not have been manufactured. The Principal Agreement referred either specifically or by necessary implication to all other agreements. They were inter-dependent for their performance and one could not be read and understood completely without the aid of the other.

[159] "Having held that all these other agreements as well as the mother/principal agreement were part of a composite transaction to facilitate implementation of the principal agreement and that was in reality the intention of the parties, now, we will deal with the question of parties to the principal agreement. When the mother agreement dated 16 November 1995 was executed between the parties, presumably the Certificate of Incorporation of Capital Control India Private Ltd. had not been issued to the parties though it had been incorporated on 14 November 1995. If the company had been duly incorporated and the Certificate of Incorporation was available to the parties, then there could be no reason for the parties to propose in the Principal Agreement that the joint venture company would be in the name of Capital Controls India Private Ltd. or any other name which would be mutually agreed between the parties. The reference to joint venture company, thus, was not by a specific name. Both the parties have signed this agreement with the clear intention that the company, Capital Control India Pvt. Ltd., will be the joint venture company. Thus, non-mentioning of the name of the joint venture company in the principal agreement, though it had been incorporated on 14 November 1995, is immaterial and inconsequential in face of intention of the parties appearing from the written documents on record.

[160] "Once the Principal Agreement was signed, all other agreements had to be executed by or in favour of the joint venture company. That is how to all these other agreements the joint venture company i.e. Capital Control India Pvt. Ltd. is a party. It further completely supports the view that non-mentioning of the name of Capital Control India Pvt. Ltd. can hardly affect the findings of the Court. With regard to the management of the joint venture company and

implementation of the Principal Agreement, the parties had entered into the Managing Director Agreement dated 16 November 1995. This agreement was signed by each of the concerned partners i.e. by Capital Control India Pvt. Ltd., Respondent No. 5, and the Kocha Group, Respondent No. 9. This agreement provided as to how the Managing Directors were to be appointed or reappointed and how the meeting of the Board of Directors of the company were to be conducted in accordance with law and the terms of the Mother Agreement. This agreement came to be signed between the joint venture company and the Kocha Group.

[161] "Other aspect of performance of the Principal Agreement was the Financial and Technical Know-how License Agreement. This agreement had been signed between the Capital Control Company Inc., subsequently known as Severn Trent Water Purification, Respondent No. 1, one the one hand and the joint venture company, Respondent No. 5. Severn Trent Water Purification Inc. is the holding company of the joint venture to the extent of its share holding and is the company into which Capital Control (Del.) Co. Inc. had merged. Severn Trent Water Purification Inc. is thus, the resultant product of Capital Control (Del.) Company Inc. being merged into Capital Control Company Inc. and its name was changed with effect from 1 April 2002. All these three companies had at the relevant time been or when came into existence were and are subsidiaries of Severn Trent (Del.) Inc. The requisite technical know-how was possessed by these companies and was agreed to be imparted in favour of the joint venture company, in furtherance to and as per the terms and conditions contained in the Principal Agreement.

[162] "Similarly, Severn Trent Water Purification Inc. had entered into an International Distributor Agreement and an Export Sales Agreement with the joint venture to facilitate the sale, marketing and export of goods, under these two different agreements. Thus, it is crystal clear that all the six material agreements had been signed by some parties or their holding companies or the companies into which the signatory company had merged. None of these companies is either stranger to the transaction or not an appropriate party. The parties who have signed the agreements could alone give rights or benefits to the joint venture company and they, in turn, were the companies descendants in interest or the subsidiaries of Severn Trent Services Del. Inc.

[163] "May be all the parties to the lis are not signatory to all the agreements in question, but still they would be covered under the expression 'claiming through or under' the parties to the agreement. The interests of these companies are not adverse to the interest of the principal company and/or the joint venture company. On the contrary, they derive their basic interest and enforceability

from the Mother Agreement and performance of all the other agreements by respective parties had to fall in line with the contents of the Principal Agreement.
[164] "In view of the settled position of law that we have indicated above, we will have no hesitation in holding that these companies claim their interest and invoke the terms of the agreement or defend the action in the capacity of a 'party claiming through or under' the parties to the agreement."

3. Referral to Arbitration in the Present Case

[165] "When we refer to all the six relevant agreements in relation to the arbitration clause, the Shareholders Agreement, the Financial and Technical Know-how License Agreement and the Export Sales Agreement contained the arbitration clause while the other three agreements, i.e., the International Distributor Agreement, the Managing Directors Agreement and the Trademark Registered User License Agreement, did not contain any such arbitration clause.
[166] "The arbitration clause contained in the Principal Agreement in clause 30 has been reproduced above. It requires that any dispute or difference arising under or in connection with that agreement which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with the Rules of ICC. This clause is widely worded. It is comprehensive enough to include the disputes arising 'under and in connection with' the agreement. The word 'connection' has been added by the parties to expand the scope of the disputes under the agreements. The intention to make it more comprehensive is writ large from the language of the agreement and particularly clause 30 of the Mother Agreement. It is useful to notice that the agreement has to be construed and interpreted in accordance with laws of the Union of India, as consented by the parties.
[167] "The expression 'connection' means a link or relationship between people or things or the people with whom one has contact (Concise Oxford Dictionary (Indian Edition). 'Connection' means act of uniting; state of being united; a relative; relation between things one of which is bound up with (Law Lexicon 2nd ed. 1997).
[168] "Thus, even the dictionary meaning of this expression is liberally worded. It implies expansion in its operation and effect both. Connection can be direct or remote but it should not be fanciful or marginal. In other words, there should be relevant connection between the dispute and the agreement by specific words or by necessary implication like reference to all other agreements in one (principal) agreement. The expression appearing in clause 30 has to be given a meaningful interpretation particularly when the Principal Agreement itself, by specific words

or by necessary implication, refers to all other agreements. This would imply that the other agreements originate from the Principal Agreement and hence, its terms and conditions would be applicable to those agreements.

[169] "There are three agreements, as already noticed, which do not contain any specific arbitration clause. Both the Managing Director Agreement and the International Distributor Agreement directly relate to the Principal Agreement stating the manner in which the affairs would be managed and the Managing Directors be appointed. At the same time, the International Distributor Agreement is executed between the Severn Trent Water Purification Inc. the erstwhile Capital Control Company Inc., and Capital Control India Private Ltd., the joint venture company. Firstly, the chances of dispute between the same group of companies were remote and secondly these were the companies which were held by the same management. The parties had also agreed to have relationship as that of seller and distributor to make the joint venture company a success. The interest of Capital Controls Company Inc. and that of the Capital Control India Private Ltd., to the extent of the former's share, were common. Furthermore, this being an integral part of the Principal Agreement would, in our opinion, be squarely covered by the arbitration clause contained in the Mother/Shareholders Agreement. This agreement has been specifically referred in clause 7 of the Mother/Shareholders Agreement. Not only that there is incorporation by reference of International Distribution Agreement in the Mother/Shareholders Agreement but, in fact, it is an integral part thereof.

[170] "Another aspect of the case is that all these agreements were executed simultaneously on 16 November 1995 which fact fully supports the view that the parties intended to have all these agreements as a composite transaction. Furthermore, when the parties signed the Supplementary Collaboration Agreement in August 1997, by that time all these agreements had not only been signed and understood by the parties but, in fact, had also been acted upon.

[171] "In the Supplementary Collaboration Agreement, the parties re-confirmed the existence of the joint venture agreement dated 16 November 1995 and made a specific stipulation that both the parties confirmed to adhere by the terms and conditions stipulated by the Government of India in its letters dated 11 October 1996, amended on 21 April 1997. This was signed by Madhusudan B. Kocha, member of the Kocha group on behalf of the joint venture company and Capital Controls (Delaware) Inc. The necessity for executing this agreement was in face of the condition of Government approval as well as the subsequent amendment of clauses 2, 3 and 4 of the approval letter dated 11 October 1996 i.e. items of manufacture, proposed location and foreign equity.

[172] "The conduct of the parties and even the subsequent events leave no doubt in the mind of the Court that the parties had executed, intended and actually implemented the composite transaction contained in the Principal Agreement. The Courts have also applied the Group of Companies Doctrine in such cases. As already noticed, this Court in the case of *Olympus Superstructure Pvt. Ltd.* (supra) permitted reference to arbitration where there were multiple contracts between the parties, interpreting the words 'in connection with' and 'disputes relating to connected matters'.

[173] "Besides making the reference, the Court also held that making of two awards which may be conflicting in relation to the items which are likely to overlap in two agreements could not be permitted. The courts have also accepted and more so in group company cases that the fact that a party being non-signatory to one or other agreement may not be of much significance, the performance of one may be quite irrelevant with the performance and fulfillment of the principal or the mother agreement. That, in fact, is the situation in the present case.

[174] "One of the arguments advanced was that the International Distributor Agreement had specifically provided for construction, interpretation and performance of the agreement and for the transaction under that agreement to be governed by and interpreted by the laws of State of Pennsylvania, USA and parties thereto agreed that any litigation thereunder shall be brought in any federal or state court in the Eastern District of the Commonwealth of Pennsylvania which fact would oust the possibility of reference to arbitration in terms of clause 30 of the Principal Agreement, as the parties had chosen a specific forum of the court system. Discussion on this argument may not be greatly relevant in view of the above discussion in this judgment. This being a composite transaction, the parties could opt for any remedy.

[175] "In the present case, we have already noticed, that some agreements contain the arbitration clause, while others don't. The Shareholders Agreement, Financial and Technical Know-How Licence Agreement and Export Sales Agreement contain the arbitration clause, while the International Distributor Agreement, Managing Directors Agreement and Trade Mark Registered User Agreement do not contain the arbitration clause. The arbitration clause contained under clause 30 of the Shareholders Agreement and that under clause 26 of the Financial and Technical Know-How Licence Agreement are identical. They both require the disputes to be referred to arbitration in London as per the ICC Rules. However, the arbitration clause contained in clause 18 of the Export Sales Agreement provides for reference of the disputes to arbitration at Pennsylvania, USA, in accordance with rules of American Arbitration Association. It also provides that the judgment upon the Award rendered could be entered in any

court of competent jurisdiction. Still, clause 21 of the International Distributor Agreement required the construction, interpretation and performance of the agreement to be governed by and interpreted under the laws of the State of Pennsylvania, USA. Any litigation thereunder was to be brought in any federal or State Court located in the Eastern District of the Commonwealth of Pennsylvania, which was to be binding upon the parties.

[176] "As already noticed, two of the agreements did not contain any arbitration clause, but they also did not subject the parties even for litigative jurisdiction. They are the Managing Directors Agreement and the Trademark Registered User Agreement. These two agreements had been executed in furtherance to and for compliance of the terms and conditions of the mother agreement which contained the arbitration clause. They were, thus, intrinsically inter-connected with the mother agreement.

[177] "All these agreements were signed on the same day and in furtherance to the mother agreement. None of the parties have invoked the jurisdiction of the Court at Pennsylvania, USA. Thus, it was an alternative remedy that too restricted to the disputes, if any arising from that agreement. Where different agreements between the parties provide for alternative remedies, it does not necessarily mean that the other remedy or jurisdiction stands ousted. Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law. It was for the parties to chose either to institute a suit qua the International Distributor Agreement at Pennsylvania or to invoke the arbitration agreement in terms of clause 30 of the mother agreement. They have chosen the latter remedy. The question, therefore, does not arise as to which law would apply since the only litigation taken out by the parties is the suit instituted by the appellant before the original side of the Bombay High Court and the subsequent application for reference to arbitration filed by Respondent No. 1 under Sect. 45 of the 1996 Act.

[178] "The effect of execution of multiple agreements has been discussed by us in some elaboration above. The real intention of the parties was not only to refer all their disputes arising under the agreement which could not be settled despite friendly negotiations to arbitration, but even the disputes which arose in connection with the shareholder/mother agreement to arbitration.

[179] "Thus, a composite reference was well within the comprehension of the parties to various agreements which were executed on the same day and for the same purpose. There cannot be any doubt to the contention that in terms of Sect. 9 of the CPC, the courts in India shall have jurisdiction to try all suits of civil

nature. Further, this Section gives a right to a person to institute a suit before the court of competent jurisdiction. However, the language of Sect. 9 itself makes it clear that the civil courts have jurisdiction to try all suits of civil nature except the suits of which taking cognizance is either expressly or impliedly barred. In other words, the jurisdiction of the court and the right to a party emerging from Sect. 9 of the CPC is not an absolute right, but contains inbuilt restrictions. It is an accepted principle that jurisdiction of the court can be excluded. In the case of *Dhulabhai v. State of M.P. and Anr.* [AIR 1969 SC 78], this Court has settled the principle that jurisdiction of the Civil Court is all embracing, except to the extent it is excluded by law or by clear intendment arising from such law. In *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation* [(2009) 8 SCC 646], this Court has even stated the conditions for exclusion of jurisdiction. They are, (a) whether the legislative intent to exclude is expressed explicitly or by necessary implication, and (b) whether the statute in question provides for an adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.

[180] "The provisions of Sect. 45 of the 1996 Act are to prevail over the provisions of the CPC and when the Court is satisfied that an agreement is enforceable, operative and is not null and void, it is obligatory upon the court to make a reference to arbitration and pass appropriate orders in relation to the legal proceedings before the court, in exercise of its inherent powers.

[181] "In the present case, the court can safely gather definite intention on behalf of the parties to have their disputes collectively resolved by the process of arbitration. Even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over a refusal of reference to arbitration. There appears to be no uncertainty in the minds of the parties in that regard, rather the intention of the parties is fortified and clearly referable to the mother agreement.

[182] "It is not the case of any of the parties before us that any of the parties to the present litigation had taken steps before that Court or had invoked the jurisdiction of that court under that system. There is no apparent conflict of interest as of now. The arbitration clause would stand incorporated into the International Distributor Agreement as this agreement itself was Appendix II to the Principal Agreement. This Court in the case of *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd.* [(2009) 7 SCC 696] has stated that firstly the subject of reference be enacted by mutual intention, secondly a mere reference to a document may not be sufficient and the reference should be sufficient to bring out the terms and conditions of the referred document and also that the arbitration clause should be capable of application in respect of a dispute under

the contract and not repugnant to any term thereof. All these three conditions are satisfied in the present case.

[183] "The terms and conditions of the International Distribution Agreement were an integral part of the Principal Agreement as Appendix II and the Principal Agreement had an arbitration clause which was wide enough to cover disputes in all the ancillary agreements. It is not necessary for us to examine the choice of forum or legal enforceability of legal system in the present case, as we find no repugnancy even where the main contract is governed by law of some other country and the arbitration clause by Indian law. They both could be invoked, neither party having invoked the former will be no bar for invocation of the latter in view of arbitration clause 30 of the mother agreement.

[184] "Reliance was also placed on the judgment of this Court in the case of *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar* [AIR 2011 SC 1899] where the Court had declined reference of multiple and multi party agreement. That case is of no help to the appellant before us. In that case, there were four parties, the seller of the land, the builder, purchaser of the flat and the bank. The bank had signed an agreement with the purchaser of the flat to finance the flat, but it referred to other agreement stating that it would provide funds directly to the builder. There was an agreement between the builder and the owner of the land and the purchaser of the land to sell the undivided share and that contained an arbitration clause. The question before the Court was whether while referring the disputes to the arbitration, the disputes between the bank on the one hand, and the purchaser of the flat on the other could be referred to arbitration. The Court, in reference to Sect. 8 of the 1996 Act, held that the bank was a non-party to the arbitration agreement, therefore, neither the reference was permissible nor they could be impleaded at a subsequent stage. This judgment on facts has no application. The distinction between Sect. 8 and Sect. 45 has elaborately been dealt with by us above and in view of that, we have no hesitation in holding that this judgment, on facts and law, is not applicable to the present case.

[185] "Thus, in view of the above, we hold that the disputes referred to and arising from the multi-party agreements are capable of being referred to arbitral tribunal in accordance with the agreement between the parties.

[186] "Another argument advanced with some vehemence on behalf of the appellant was that Respondents Nos. 3 and 4 were not party to any of the agreements entered into between the parties and their cause of action is totally different and distinct, and their rights were controlled by the agreement of distribution executed by Respondents Nos. 1 and 2 in their favour for distribution of products of gas and electro-chlorination. It was contended that

there cannot be splitting of parties, splitting of cause of action and remedy by the Court.

[187] "On the other hand, it was contended on behalf of Respondent No. 1 that it is permissible to split cause of action, parties and disputes. The matter referable to arbitration could be segregated from the civil action. The court could pass appropriate orders referring the disputes covered under the arbitration agreement between the signatory party to arbitration and proceed with the claim of Respondents Nos. 3 and 4 in accordance with law.

[188] "As far as this question of law is concerned, we have already answered the same. On facts, there is no occasion for us to deliberate on this issue, because Respondents Nos. 3 and 4 had already consented for arbitration. In light of that fact, we do not wish to decide this question on the facts of the present case."

V. CONCLUSION

[189] "Having dealt with all the relevant issues in law, now we would provide answer to the questions framed by us in the beginning of the judgment as follows.

[190] "Sect. 45 is a provision falling under Chapter I of Part II of the 1996 Act which is a self-contained Code. The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sects. 44 and 45 read with Schedule I. Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible.

[191] "In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

[192] "Having answered these questions, we do not see any reason to interfere with the judgment of the Division Bench of the Bombay High Court under appeal. We direct all the disputes arise in the suit and from the agreement

between the parties to be referred to arbitral tribunal and be decided in accordance with the Rules of ICC.

[193] "The appeals are dismissed. However, in the facts and circumstances of the present case, we do not award costs."

(….)

50. Supreme Court of India, 3 July 2013, Civil Appeal No. 5085 of 2013

Parties:	Appellant: Shri Lal Mahal Ltd. (India) Respondent: Progetto Grano SpA (Italy)
Published in:	(3) Arbitration Law Reporter 1 (SC)
Articles:	V; V(2)(*b*)
Subject matters:	– narrow concept of public policy – review of merits of award (no)
Topics:	¶ 502 + ¶ 518

Summary

The expansive reading of the term "public policy of India" given by the Supreme Court in Saw Pipes in 2003 in the context of an action for setting aside – which reading includes the case in which the award is contrary to the contract between the parties and/or is patently illegal – does not apply to the public policy objection to enforcement of a foreign award. As held in Renusagar in 1994, public policy in the latter context covers only the violation of fundamental policy of Indian law, the interests of India or justice or morality. The Renusagar holding, though rendered in respect of the Foreign Awards Act 1961 then in force, equally applies in respect of the Indian Arbitration Act 1996 presently in force. Although the same expression "public policy of India" is used both in Sect. 34 (on setting aside) and Sect. 48 (on enforcement) of the 1996 Act and this concept is the same in both sections, its application for the purposes of Sect. 48 is more limited. In the case at issue, the result reached by the GAFTA tribunal in respect of certain evidence did not fall under one of the three Renusagar categories. Also, the enforcement court may not review the merits of the award to be enforced. The two GAFTA appeal awards could be enforced in India.

On 12 May 1994, Shiv Nath Rai Harnarain, an Indian company, and Italgrani SpA, an Italian company, entered into a contract under which Shiv Nath Rai Harnarain sold Italgrani SpA 20,000 metric tons of Indian durum wheat. The parties were later succeeded by Shri Lal Mahal Limited (Seller) and Progetto Grano SpA (Buyer), respectively. The sale contract specified the quality and conditions of the wheat and provided that those quality and conditions were to be ascertained by a certificate issued by an SGS office nominated by Buyer. For all remaining conditions the sale contract referred to the terms and conditions of

the Rules of the Grain and Feed Trade Association (GAFTA), which contain an arbitration clause.

The goods left India on the nominated vessel on 13 August 1994. On 16 August 1994, Seller faxed Buyer a copy of the certificate of weight, quality and packing issued by SGS India. Buyer forwarded a copy of the certificate to SGS Geneva with the request to issue the necessary certificate in respect of the sale contract which Buyer had concluded with the *Office Algerien Interprofessionnel des Céréals* (OAIC) in respect of the wheat bought from Seller. On 23 August 1994, after the goods had reached OAIC, Buyer informed Seller that the analysis carried out by SGS Geneva showed that the wheat was soft common wheat rather than durum wheat and therefore Seller was in breach of contract for failing to provide goods according to contractual specifications. Seller replied that SGS India had inspected the goods before loading, confirming that the wheat was durum wheat.

On 4 November 1994, Buyer commenced GAFTA arbitration as provided for in the sale contract. On 16 October 1995, a GAFTA arbitral tribunal in London issued an interim award holding, inter alia, that it had jurisdiction over the dispute.

In the meantime, Seller had filed a petition in the Delhi High Court for a declaration that there was no valid arbitration agreement between the parties. The petition was finally dismissed by the court. On 5 May 1997, Buyer filed a separate request for GAFTA arbitration, claiming that Seller was in breach of the arbitration agreement by commencing the Indian court action.

On 4 December 1997, the GAFTA arbitral tribunal rendered two awards in favor of Buyer in both arbitration proceedings. Seller appealed. On 21 September 1998, the GAFTA Board of Appeal substantially affirmed the awards below by appeal awards no. 3782 and no. 3783. Seller's challenge of appeal award no. 3782 in the High Court of Justice in London was dismissed on 21 December 1998.

Buyer sought enforcement of the GAFTA appeal awards in India. The Delhi High Court granted enforcement, dismissing Seller's objection that enforcement would violate public policy because the Board of Appeal erred in accepting the SGS Geneva report, while finding that the contract provided for a report by SGS India. The High Court held that the GAFTA award was based on an appreciation of the evidence supplied by the parties which included – in addition to the report of SGS Geneva – the reports of three independent labs finding that the consignment at issue contained only 9 percent durum wheat. On the basis of this evidence, reasoned the court, the arbitrators could only reach the conclusion that the goods supplied by Seller did not comply with contractual specifications. This conclusion – which was shared by the High Court in London, the country of

rendition of the awards, which denied Seller's petition to set aside appeal award no. 3782 – could not be held to be contrary to the terms of the contract or to the public policy of India. The Delhi court added that the enforcement court may not re-determine questions of fact by reviewing the award on the merits.

By the present decision, the Supreme Court of India, before R.M. Lodha, Madan B. Lokur and Kurian Joseph, JJ, in an opinion by Lodha, dismissed Seller's appeal, finding that enforcement of the appeal awards would not be contrary to the public policy of India in the narrow meaning this term has in the context of the enforcement of a foreign award.

The Court first examined the scope of the review under Sect. 48(2)(b) of the Indian Arbitration and Conciliation Act of 1996 (the 1996 Act), which mirrors Art. V(2)(*b*) of the 1958 New York Convention and provides that the court may refuse enforcement of a foreign award if it finds that enforcement would be contrary to the public policy of India.

Seller contended that the Supreme Court held in *Saw Pipes*, a 2003 case, that the term "public policy of India" includes the case in which the award is contrary to the contract between the parties and/or is patently illegal. Seller argued that this expansive construction of the term "public policy of India", though given in the context of an action for setting aside an award under Sect. 34 of the Indian 1996 Act , also applies to the same term as used in Sect. 48(2)(b). Buyer argued in turn that the Supreme Court held earlier in *Renusagar* that the meaning of "public policy" in Sect. 7(1)(b)(ii) of the Foreign Awards Act 1961 (the Act in force in 1994 when *Renusagar* was rendered), which also provided that enforcement may be refused on public policy grounds, was narrower than its meaning in domestic law, and that the public policy defense must be construed narrowly and covers only the violation of fundamental policy of Indian law; the interests of India; or justice or morality. Buyer argued that this reasoning is equally applicable to Sect. 48(2)(b) of the 1996 Act.

The Court agreed with Buyer, holding that the reasoning in *Renusagar* must equally apply to the ambit and scope of Sect. 48(2)(b) of the 1996 Act. Hence, the term "public policy" must be given narrow meaning and the enforcement of a foreign award may be refused on public policy grounds only in the three cases enumerated in *Renusagar*. Although the same expression "public policy of India" is used both in Sect. 34(2(b)(ii) and Sect. 48(2)(b) of the 1996 Act and this concept is the same in both sections, its application for the purposes of Sect. 48(2)(b) is more limited.

Hence, enforcement of a foreign award may be refused under Sect. 48(2)(b) of the 1996 Act only if such enforcement would be contrary to (1) fundamental policy of Indian law; (2) the interests of India; or (3) justice or morality as

indicated in *Renusagar*. The wider meaning given to the expression "public policy of India" in Sect. 34(2)(b)(ii) by the Supreme Court in *Saw Pipes* is not applicable where the public policy objection is raised to oppose enforcement of a foreign award under Sect. 48(2)(b) of the 1996 Act.

In the present case, enforcement of the GAFTA appeal awards would not lead to such violation. Seller argued that the GAFTA Board of Appeal went beyond the terms of the contract by finding that SGS India was the certifying agency nominated by Buyer according to the contract but then ignoring its quality certificate because it found that SGS India's certification did not follow the mode of sampling specified in the contract and because the analysis done by SGS India was doubtful.

The Supreme Court noted that Seller's challenge of the award reaching this result had been unsuccessful in the English court and reasoned that if this ground "was not good enough for setting aside the award by the court competent to do so, a fortiori, such ground can hardly be a good ground for refusing enforcement of the award". Further, added the Court, the scope of inquiry by the enforcement court does not permit review of the foreign award on merits.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345045-n>.

Excerpt

[1] "The question for consideration in this appeal by special leave is whether appeal award no. 3782 and appeal award no. 3783 both dated 21 September 1998 passed by the Board of Appeal of the Grain and Feed Trade Association, London (for short, 'Board of Appeal') in favour of the respondent are enforceable under Sect. 48 of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act')."[1]

I. BACKGROUND

[2] "By a contract dated 12 May 1994 between Shiv Nath Rai Harnarain (India) Company, New Delhi (sellers) and Italgrani SpA, Naples, Italy (buyers) a transaction relating to 20,000 MT (+/- 5 percent) of Durum wheat, Indian Origin (for short, 'goods') for a price at US$ 162 per MT was concluded. Some of the salient terms of the contract are as follows:

'Commodity:	Durum Wheat Indian Origine new crop
Test Weight:	80 KG/HL.MIN
Moisture	12 PCT.MAX
Vitrious	80 PCT. MIN
Broken	3 PCT. MAX
Proteine	12 PCT. MIN
Foreign Matter	2 PCT MAX
Sprouted/Spotted	1 PCT. MAX
Soft Wheat	1.5 PCT. MAX
Quantity:	20,000 MT With 5 percent +/- Sellers Option in 1 single shipment
Shipment:	1-30 June 1994; Quantity final at loading
Quality,	

1. Sect. 48(2) of the Indian Arbitration and Conciliation Act, 1996 (Npo. 26 of 1996) reads:

"48. *Conditions for enforcement of foreign awards*
(….)
(2) Enforcement of an arbitral award may also be refused if the Court finds that –
(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
(b) the enforcement of the award would be contrary to the public policy of India."

Conditions:	All final at time and place of loading As per first class Intl Company Cert. "SGS", nominated by the buyers certificate and quality showed at the certificate will be the result of an average samples taken jointly at port of loading by the representatives of the sellers and the buyers.
Price:	US Dlrs 162.00 per MT FOB stowed Kandla, Buyers to give 10 days preadvise of vessels arrival
Payment:	Against 100 PCT L/Credit irrevocable and confirmed for 100 PCT payable at sight against Foll. Shipping docs
Other conditions:	All other terms and conditions not in contradictions with the above to be as per GAFTA Rules, 64/125 and its successive Amendments (In force at time and place of shipment date) which the parties admit that they have knowledge and notice.'

[3] "The buyers opened a letter of credit (L/C) on 17 June 1994 in favour of the sellers. The sellers claim that all documents required under the L/C, including the SGS India Limited certificate, were submitted by them which were accepted by the buyers' bankers and payment was duly released to the sellers.
[4] "The buyers nominated *M/V HACI RESIT KALKAVAN* as the vessel for loading of the goods. There was delay in shipment but that is not material for the purposes of this appeal. The ship completed loading on 13 August 1994 and sailed for discharge port. The Bill of Lading was dated 8 August 1994.
[5] "The sellers faxed a copy of SGS India certificate of weight, quality and packing to the buyers on 16 August 1994. The buyers passed a copy of that certificate to SGS Geneva with the request to them to issue the necessary certificate under the sale contract which the buyers had entered with '*Office Algerien Interprofessional des cereals*' (OAIC). After the goods had reached the destination, the buyers sent a fax to the sellers on 23 August 1994 advising that analysis carried out by SGS Geneva showed the wheat loaded was soft common wheat and not durum wheat as required under the contract. The buyers considered the sellers to be in breach of the contract for shipping uncontractual goods and held sellers responsible for all losses/damages both direct and indirect arising out of and the consequence of such breach.
[6] "The sellers on 31 August 1994 responded to the above communication and asserted that SGS India was an inspection agency; the wheat supplied was inspected by SGS India at the time of procurement and also before loading the

vessel and the inspection agency had confirmed that the wheat supplied met typical characteristics of Indian durum wheat and complied with the specifications provided in the contract.

[7] "The buyers claimed arbitration on 4 November 1994 which was registered as case no. 11715A. The Arbitral Tribunal, [Grain and Feed Trade Association (GAFTA)] proceeded to arbitrate the dispute. The Arbitral Tribunal, GAFTA in its award dated 4 December 1997 accepted the buyers' case that in appointing SGS Geneva, their aim was to safeguard the performance of both contracts by having one company to coordinate all operations regarding inspection, control and the issue of certificate relating to the cargo and rejected the sellers' assertion that having loaded the goods, and presented a certificate provided by an international superintendence company, they had fulfilled their contractual obligations. The sellers' contention that SGS India were nominated by the buyers and they were agents for buyers was rejected. The Arbitral Tribunal, GAFTA concluded that wheat described on the certificate of quality and condition presented by the sellers as durum wheat of Indian origin was, in fact, soft wheat. The certificate was held to be uncontractual and with regard to description, it was held that sellers were in breach of contract and the buyers were entitled to damages based on the difference between the contract price and the FOB value of the goods as delivered and buyers were also entitled to any further proven loss directly and
naturally resulting in the ordinary course of events from the breach.

[8] "The Arbitral Tribunal, GAFTA passed the final award in the following terms:

> 'We do hereby award that Sellers shall pay Buyers forthwith the sum of US$ 1,023,750.00 (One million twenty three thousand seven hundred and fifty United States dollars) being the difference between the FOB contract price – US$ 162.00 per tonne less US $2.00 per tonne penalty for extending the shipment period, i.e. US$ 160.00 per tonne – and the FOB price of the Soft wheat shipped on *M/V HACI RESIT KALKAVAN*, i.e. US$ 111.25 per tonne amounting to US$ 48.75 per tonne on 21,000 tonnes, equating to US$ 1023.750 together with interest thereon at the rate of 7 percent (Seven percent) per annum from 24 August 1994 to the date of this Award.
>
> We do further award that Sellers shall pay Buyers forthwith the sum of US$ 303,007.60 (Three Hundred and three thousand and seven United States dollars and 60 cents) being the loss incurred in replacing the wheat shipped on *M/V HACI RESIT KALKAVAN* with Durum wheat shipped on

M/V EUROBULKER 1 and *M/V SEA DIAMOND H* together with interest thereon at 7 percent (Seven percent) per annum on: US$ 276,512.40 (the loss on *M/V EUROBULKER 1*) from 1 October 1994 to the date of this Award; and US$ 26,495.20 (the loss on *M/V SEA DIAMOND H*) from 5 December 1994 to the date of this Award.

We do further award that sellers shall pay Buyers forthwith the sum of US$ 138,590.28 (One hundred and thirty eight thousand five hundred and ninety United States dollars and 28 cents) being demurrage incurred on *M/V HACI RESIT KALKAVAN* amounting to 19 days 10 minutes at US$ 7,000 per day/pro-rata equating to US$ 138.590.28 together with interest thereon at a rate of 7 percent (Seven percent) per annum from 30 September 1994 to the date of this Award.

We do further award that Sellers claim for the return of US$ 42,000 fails.'

[9] "It appears that following the commencement of arbitration proceedings, the sellers contested the jurisdiction of the Arbitral Tribunal, GAFTA. The sellers filed a petition in Delhi High Court for a declaration that there was no arbitration agreement between the parties. They also prayed for an order restraining the Arbitral Tribunal, GAFTA from proceeding with the arbitration initiated by the buyers. Although initially interim order was granted but the petition was finally dismissed by Delhi High Court. The special leave petition from that order was dismissed by this Court.

[10] "In the meanwhile, the Arbitral Tribunal, GAFTA had passed an interim award on 16 October 1995 holding, inter alia, that the arbitration claim was properly made and it had jurisdiction to decide both the preliminary and substantive issues.

[11] "On 5 May 1997, buyers made a separate claim for arbitration for sellers' alleged breach of the arbitration agreement in bringing legal proceedings in India concerning the first dispute before it had been determined under the GAFTA Rules. As regards this claim also, the Arbitral Tribunal, GAFTA was constituted and an award No. 12159 dated 4 December 1997 came to be passed by the Arbitral Tribunal, GAFTA.

[12] "From the above two awards, namely, award no. 11715A and award no. 12159, the two appeals being appeal award no. 3782 and appeal award no. 3783 were filed by the sellers before the Board of Appeal. The Board of Appeal disposed of appeal award no. 3782 (arising out of award No. 11715A) on 21 September 1998 and passed the award in the following terms:

'We do hereby award that Sellers shall forthwith pay to Buyers the sum of US$ 1,023,750.00 (one million, twenty three thousand seven hundred and fifty United States Dollars) being the difference in value of US$ 48.75 per tonne between the goods supplied and goods of the contractual description calculated on 21,000 tonnes, together with interest thereon at 7 percent (seven per centum) per annum from 24 August 1994 to the date of this Award.

We further award that Sellers shall forthwith pay to Buyers the sum of US$ 138,590.28 (one hundred and thirty eight thousand five hundred and ninety United States Dollars and twenty-eight cents), being demurrage incurred at load, together with interest thereon at 7 percent (seven per centum) per annum from 30 September 1994 to the date of this Award.

We further award that Buyers' claim for consequential damages fails.

We further award that Sellers shall forthwith pay to Buyers the sum of [UK]£ 4,340.00 (four thousand three hundred and forty pounds sterling only), being the fees and expenses of Arbitration 11715A.

We further award that Sellers shall forthwith pay to Buyers the sum of £ 1,750 (one thousand seven hundred and fifty pounds only), being the costs and expenses of Buyers' Representative in preparing and presenting this case.'

Appeal award no. 3783 (arising out of award no. 12159) was disposed of also on the same day by the following award:

'We do hereby award that sellers shall forthwith pay to Buyers as part of their damages the sum of £ 1,762.90 (one thousand seven hundred and sixty two pounds and ninety pence), being the reasonable charges and disbursements of Middleton Potts incurred in considering and responding to the proceedings taken by Sellers in India.

We further award that Sellers shall pay to Buyers as the balance of their damages the sum of £ 15,924.00 (fifteen thousand nine hundred and twenty four pounds), being the total of O.P. Khaitan's four invoices nos. ATP/804 of 1995/6, ATP/206 of 1996/7, ATP/286 of 1996/7 and ATP/767 of 1996/7, or such lesser sum as shall be agreed by the parties or assessed by an appropriate officer or person in India, in either Indian rupees or sterling as being the reasonable fees, expenses, etc. incurred in considering and responding to the proceedings taken by Sellers in India. But we reserve to ourselves the right to assess these fees, expenses, etc. upon application of one or both of the parties, in the event that the parties

are neither able to agree them, nor able to agree upon an appropriate officer or person in India to assess them.

We further award that Sellers shall forthwith pay to Buyers the costs and expenses of the first tier arbitration no. 12159 in the amount of £2,190.00 (two thousand one hundred and ninety pounds) together with £ 85.00 (eighty five pounds), being the fee for appointment of an arbitrator on Sellers' behalf.

We further award that Sellers shall forthwith pay to Buyers the sum of £ 500 (five hundred pounds only) being the costs and expenses of Buyers' Representative in preparing and presenting this case.'

[13] "The sellers challenged the appeal award no. 3782 in the High Court of Justice at London. The appeal was dismissed on 21 December 1998. The sellers did not challenge the award passed by the Board of Appeal in appeal award no. 3783. Both awards, thus, have attained finality.

[14] "It was then that buyers instituted a suit in the Delhi High Court for enforcement of the awards both dated 21 September 1998 passed by the Board of Appeal in appeal award no. 3782 and appeal award no. 3783. The sellers raised diverse objections to the enforcement of the above awards.

[15] "The appellant, Shri Lal Mahal Limited, is successor in interest of the sellers while the respondent Progetto Grano SpA is the successor in interest of buyers. When the proceedings were pending before the Delhi High Court, the substitution in the proceedings took place. This is how the parties are now described in the appeal. For the sake of convenience, we shall continue to refer the appellant as 'sellers' and the respondent as 'buyers'."

II. THE PUBLIC POLICY OBJECTION

[16] "Inter alia, the submission of the sellers before the High Court was that the appeal awards passed by the Board of Appeal which are sought to be enforced are contrary to the public policy of India inasmuch as they are contrary to the express provisions of the contract entered into between the parties. The sellers submitted before the Delhi High Court that the Board of Appeal erred in accepting the test report by SGS Geneva whereas under the contract, it was the test report of SGS India that was material. The goods in question were inspected at the port of discharge in the absence of the sellers. In terms of the contract between the parties, the inspection certificate was given by SGS India which was nominated by the buyers themselves. There was no requirement for any inspection at the

point of discharge of the consignment. Responsibility of the sellers ceased after the said obligation was fulfilled.

[17] "On the other hand, it was submitted on behalf of the buyers before Delhi High Court that the plea raised before the Board of Appeal on the certificate issued by the SGS Geneva was a matter of appreciation of evidence and determination of question of fact which is beyond the scope of the proceedings under Sect. 48 of the 1996 Act. The buyers submitted that the sellers cannot be permitted to reopen questions of fact as already decided by the Board of Appeal which were affirmed by the High Court of Justice at London. Seeking enforcement of the awards of the Board of Appeal, it was submitted that there was nothing in the awards which could be said to be against the public policy of India.

[18] "Dealing with the submissions made on behalf of the parties, the High Court considered the objections of the sellers and recorded its conclusion as follows:

> '23. The above conclusion of the GAFTA Arbitral Tribunal is based on an appreciation of the evidence produced by the parties. The stark finding, confirmed by the reports of three independent analysts, two in Greece (one a private lab and another State lab) and the FMBRA in England, was that the consignment sent by the Defendant contained only 9 percent durum wheat. 90 percent was soft wheat. In the circumstances, the only conclusion possible was the one arrived at by the Arbitral Tribunal viz., "the wheat, described on the Certificate of Quality and Condition presented by Sellers as Durum wheat of Indian origin, was soft wheat". This conclusion has been affirmed by the impugned Appeal Award No. 3782 by the Board of Appeal, GAFTA. It has been further affirmed by the rejection by the High Court of Justice at London of the Defendant's petition challenging the Appeal Award No. 3782. The above conclusion cannot be held to be contrary to the terms of the contract or to the public policy of India. Further, this Court is not expected in enforcement proceedings, re-determine questions of fact. The grounds enumerated in Sect. 48 of the Act are meant to be construed narrowly and does not permit a review of the foreign award on merits.'

Then in para. 25 of the impugned judgment, the High Court observed that there was no serious defence in opposition to the enforcement of two foreign awards. The High Court overruled the objections raised by the sellers to the enforcement

of foreign awards and held that they were enforceable under Part II of the 1996 Act."

III. SCOPE OF THE PUBLIC POLICY ENQUIRY

[19] "We have heard Mr. Rohinton F. Nariman, learned senior counsel for the appellant (sellers) and Mr. Jayant K. Mehta, learned counsel for the respondent (buyers) at quite some length.

[20] "Having regard to Sect. 48(2)(b) of the 1996 Act, we shall immediately examine what is the scope of enquiry before the court in which foreign award, as defined in Sect. 44,[2] is sought to be enforced. This has become necessary as on behalf of the appellant it was vehemently contended that in light of the two decisions of this Court in *Saw Pipes*[3] and *Phulchand Exports*,[4] the Court can refuse to enforce a foreign award if it is contrary to the contract between the parties and/or is patently illegal. It was argued by Mr. Rohinton F. Nariman, learned senior counsel for the appellant, that the expression 'public policy of India' in Sect. 48(2)(b) is an expression of wider import than the expression 'public policy' in Sect. 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961.[5] The expansive construction given by this Court to the term 'public

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2. Sect. 44 of the Indian Act 1996 reds:

   "44. *Definition*
   In this Chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 –
   (a) in pursuance of an agreement in writing for arbitration to which the [1958 New York] Convention set forth in the First Schedule applies, and
   (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

3. "*Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* (2003) 5 SCC 705."
4. "*Phulchand Exports Limited v. O.OO. Patriot* (2011) 10 SCC 300."
5. Sect. 7(1) of the Indian Foreign Awards (Recognition And Enforcement) Act 1961 read:

   "(1) A foreign award may not be enforced under this Act –
   (….)
   (b) if the court dealing with the case is satisfied that –
   (i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

policy of India' in *Saw Pipes* must also apply to the use of the same term 'public policy of India' in Sect. 48(2)(b).

[21] "Mr. Jayant K. Mehta, learned counsel for the respondent, on the other hand, placed heavy reliance upon the decision of this Court in *Renusagar*[6] and submitted that what has been stated by this Court while interpreting Sect. 7(1)(b)(ii) of the Foreign Awards Act in that case is equally applicable to Sect. 48(2)(b) of the 1996 Act and the expression 'public policy of India' in Sect. 48(2)(b) must receive narrow[er] meaning than Sect. 34.[7] *Saw Pipes* never meant to give wider meaning to the expression, 'public policy of India' insofar as Sect. 48 was concerned. According to Mr. Jayant K. Mehta, *Phulchand Exports* does not hold that all that is found in para. 74 in *Saw Pipes* is applicable to Sect. 48(2)(b). He argued that in any case both *Saw Pipes* and *Phulchand Exports* are decisions by a two-Judge Bench of this Court whereas *Renusagar* is a decision of three-Judge Bench and if there is any inconsistency in the decisions of this Court in *Saw Pipes* and *Phulchand Exports* on the one hand and *Renusagar* on the other, *Renusagar* must prevail as this is a decision by the larger Bench.

[22] "The three decisions of this Court in *Renusagar*, *Saw Pipes* and *Phulchand Exports* need a careful and close examination by us.

[23] "We shall first deal *with Renusagar*. It is not necessary to narrate in detail the facts in *Renusagar*. Suffice it to say that Arbitral Tribunal, GAFTA in Paris passed an award in favour of General Electric Company (GEC) against Renusagar. GEC sought to enforce the award passed in its favour by filing an arbitration petition under Sect. 5 of the Foreign Awards Act in the Bombay High Court. Renusagar contested the proceedings for enforcement of the award filed by GEC in the Bombay High Court on diverse grounds. Inter alia, one of the objections raised by Renusagar was that the enforcement of the award was contrary to the public

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(ii) the enforcement of the award will be contrary to public policy."

This Act is no longer in force.

6. "*Renusagar Power Co. Limited v. General Electric Company*, 1994 Supp (1) SCC 644 [reported in Yearbook XX (1995) pp. 681-738 (India no. 22)]."
7. Sect. 34(2) of the Indian Act 1996 reads:

"34. *Application for setting aside arbitral award*
(2) An arbitral award may be set aside by the Court only if –
(….)
(b) the Court finds that –
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(ii) the arbitral award is in conflict with the public policy of India."

policy of India. The Single Judge of the Bombay High Court overruled the objections of Renusagar. It was held that the award was enforceable and on that basis a decree in terms of the award was drawn. Renusagar filed an intra-court appeal but that was dismissed as not maintainable. It was from these orders that the matter reached this Court. On behalf of the parties, multifold arguments were made. A three-Judge Bench of this Court noticed diverse provisions, including Sect. 7(1)(b)(ii) of the Foreign Awards Act which provided that a foreign award may not be enforced if the court dealing with the case was satisfied that the enforcement of the award would be contrary to public policy. Of the many questions framed for determination, the two questions under consideration were: (1) 'Does Sect. 7(1)(b)(ii) of the Foreign Awards Act preclude enforcement of the award of the Arbitral Tribunal, GAFTA for the reason that the said award is contrary to the public policy of the State of New York?' and (2) 'What is meant by public policy in Sect. 7(1)(b)(ii) of the Foreign Awards Act?'

[24] "This Court held that the words 'public policy' used in Sect. 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the application of the doctrine of 'public policy' in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved. Explaining the concept of 'public policy' vis-à-vis the enforcement of foreign awards in *Renusagar*, this Court in paras. 65 and 66 (pp. 681-682) of the Report stated:

> '65. *This would imply that the defence of public policy which is permissible under Sect. 7(1)(b)(ii) should be construed narrowly*. In this context, it would also be of relevance to mention that under Art. I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Sect. 7(1) of the Protocol & Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. *Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression,*

contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. .... *This would mean that "public policy" in Sect. 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.* Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Sect. 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria *it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.*' (Emphasis supplied by us)

[25] "In *Saw Pipes*, the ambit and scope of the court's jurisdiction under Sect. 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Sect. 34 to set aside an award passed by the Arbitral Tribunal, GAFTA which was patently illegal or in contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase 'public policy of India' occurring in Sect. 34(2)(b)(ii). Alive to the subtle distinction in the concept of 'enforcement of the award' and 'jurisdiction of the court in setting aside the award' and the decision of this Court in *Renusagar*, this Court held in *Saw Pipes* that the term 'public policy of India' in Sect. 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Sect. 34 this Court said that the expression 'public policy of India' was required to be given a wider meaning. Accordingly, for the purposes of Sect. 34, this Court added a new category – patent illegality – for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

[26] "From the discussion made by this Court in *Saw Pipes* in para. 18 (pp. 721-722),[8] para. 22 (pp. 723-724)[9] and para. 31(pp. 727-728)[10] of Report, it can

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8. "**18.** Further, in *Renusagar Power Co. Ltd. v. General Electric Co.* this Court considered Sect. 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which inter alia provided that a foreign award may not be enforced under the said Act, if the court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the conclusion that public policy comprehended in Sect. 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the 'public policy of India' and does not cover the public policy of any other country. For giving meaning to the term 'public policy', the Court observed thus: … (SCC p. 682, para 66)."
9. "**22.** The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Sect. 28(3) of the Act which specifically provides that 'Arbitral Tribunal shall decide in accordance with the terms of the contract'. Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 percent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of subsections (2) and (3) of Sect. 28. Sect. 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Sect. 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."
10. "**31.** Therefore, in our view, the phrase 'public policy of India' used in Sect. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower

be safely observed that while accepting the narrow meaning given to the expression 'public policy' in *Renusagar* in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Sect. 34.

[27] "In our view, what has been stated by this Court in *Renusagar* with reference to Sect. 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Sect. 48(2)(b) of the 1996 Act. In *Renusagar* it has been expressly exposited that the expression 'public policy' in Sect. 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression 'public policy' used in Sect. 7(1)(b)(ii) was held to mean 'public policy of India'. A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar*. For all this there is no reason why *Renusagar* should not apply as regards the scope of inquiry under Sect. 48(2)(b). Following *Renusagar*, we think that for the purposes of Sect. 48(2)(b), the expression 'public policy of India' must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in *Renusagar*. Although the same expression 'public policy of India' is used both in Sect. 34(2(b)(ii) and Sect. 48(2)(b) and the concept of 'public policy in India' is same in nature in both the sections but, in our view, its application differs in degree insofar as these two sections are concerned. The application of 'public policy of India' doctrine for the purposes of Sect. 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

[28] "We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression 'public policy of India' in Sect. 48(2)(b) is an expression of wider import than the 'public policy' in Sect. 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that *Renusagar* must apply for the purposes of Sect. 48(2)(b) of the 1996 Act. Insofar as the proceeding for

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meaning given to the term 'public policy' in *Renusagar* case it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interests of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

setting aside an award under Sect. 34 is concerned, the principles laid down in *Saw Pipes* would govern the scope of such proceedings.

[29] "We accordingly hold that enforcement of foreign award would be refused under Sect. 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression 'public policy of India' occurring in Sect. 34(2)(b)(ii) in *Saw Pipes* is not applicable where objection is raised to the enforcement of the foreign award under Sect. 48(2)(b).

[30] "It is true that in *Phulchand Exports*, a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression 'public policy of India' in Sect. 34 in *Saw Pipes* must be applied to the same expression occurring in Sect. 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para. 16 of the Report that the expression 'public policy of India used in Sect. 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal' does not lay down correct law and is overruled.

[31] "Having regard to the above legal position relating to the scope of 'public policy of India' under Sect. 48(2)(b), we shall now proceed to consider the submissions of the parties."

IV. THE CASE AT ISSUE

[32] "Mr. Rohinton F. Nariman, learned senior counsel for the appellant, argued that the appeal awards by the Board of Appeal cannot be enforced on the touchstone that they are contrary to public policy of India. It is so as both the Arbitral Tribunal, GAFTA and the Board of Appeal have gone beyond the terms of the contract between the sellers and the buyers. Despite the contract being FOB contract between the parties which specifically sets out that the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., SGS would be final and the certifying agency in fact issued such a certificate, the Arbitral Tribunal, GAFTA as well as the Board of Appeal relied upon evidence procured unilaterally by the buyers from other certifying agencies beyond the terms of the contract which was based on quality specifications of a forward contract which the buyers had signed with OAIC Algiers. In this regard, learned senior counsel referred to the certificate issued by SGS India which confirmed that weight, quality and packing of the goods met the contractual specifications both in terms of description and quality. The Merchandise was

found to be sound, loyal, merchantable, free from living insects, defects, diseases and contamination of any nature. However, the buyers appointed Crepin Analysis and Controls, Rouen for testing the sample of the goods for their forward contract with OAIC Algiers. The said agency tested the goods on a completely different set of parameters as stipulated under the contract. Crepin did not even test the goods for their contents of vitreous and moisture.

[33] "Learned senior counsel for the appellant submitted that being an FOB contract the title of the goods and risk is passed on to the buyers the moment the goods were loaded on the ship. The goods were admittedly loaded on 8 August 1994 after which the risk fell on the buyers. In this regard reliance was placed on a decision of this Court in *D.K. Lall*.[11]

[34] "Mr. Rohinton F. Nariman vehemently contended that once parties had agreed that certification by an inspecting agency would be final, it was not open to the Arbitral Tribunal, GAFTA as well as Board of Appeal, to go behind that certificate and disregard it even if the certificate was inaccurate (which was not the case). In this regard, reliance was placed on two judgments of the English courts, namely, *Agroexport*[12] and *Alfred C. Toepfer*.[13] He submitted that House of Lords in *Gill & Duffus*[14] has affirmed the decision in *Alfred C. Toepfer*. It was, thus, submitted that the Arbitral Tribunal, GAFTA and the Board of Appeal having disregarded the finality of the certificate issued by SGS India, the awards were plainly contrary to contract and, therefore, not enforceable in India. It was submitted on behalf of the appellant that it was not an issue in dispute and not the buyers' case before the Arbitral Tribunal, GAFTA and/or the Board of Appeal that the procedure adopted by SGS India was not in conformity with the contract. It was, therefore, not open to the Board of Appeal to render a finding which went beyond the scope of the buyers' very case. Accordingly, it was argued that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, award cannot be enforced because it is contrary to Sect. 48(1)(c) of the 1996 Act as well.

[35] "Learned senior counsel for the appellant highlighted that the real problem in the present case was not that SGS India did not properly certify the goods and/or that they did not meet the contractual specifications provided for under the contract between the buyers and sellers but because the buyers were unable to use it for their forward contract with OAIC Algeria. This is further fortified

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11. *"Contship Container Lines Limited v. D.K. Lall and Others* (2010) 4 SCC 256."
12. *"Agroexport Enterprise d'Etat Pour Le Commerce Exterieur v. N.V. Goorden Import CY. U.S.A* (1956) 1 Q.B. 319."
13. *"Alfred C. Toepfer v. Continental Grain Co* (1974) 1 Lloyds Law Reports 11."
14. "*Gill & Duffus S.A. v. Berger & Co.Inc.* (1984) 1 Lloyd's Law Reports 227."

from the fact that the buyers entered into a further contract with the sellers on 9 September 1994 for a much larger quantity of the goods with the very same specifications. He, thus, submitted that the judgment of the High Court should be set aside and the appeal awards must be held to be not enforceable in India.
[36] "Mr. Jayant K. Mehta, learned counsel for the respondent, on the other hand, supported the impugned judgment and submitted that the High Court was justified in dismissing the objections of the appellant as no ground was established or proved by the appellant on which enforcement of the foreign awards could be refused under Sect. 48 of the 1996 Act.
[37] "Learned counsel submitted that the FOB contract has no relevance to the liability of a seller to sell the contractual goods or to the quality of the goods sold. It is only relevant for determination of risk and liability during transportation of the goods which is not the issue in the present case. With reference to *D.K. Lall* relied upon by the learned senior counsel for the appellant, it was submitted that *D.K. Lall* was only on issue of insurance liability and in that context the nature of FOB contract had been discussed. *D.K. Lall* does not concern with the issue of sellers' breach in selling uncontractual goods.
[38] "Mr. Jayant K. Mehta submitted that the findings of the Arbitral Tribunal, GAFTA, as upheld by the Board of Appeal, are that

(a) the contract specified that the certification of quality is final at the time and place of loading;
(b) as per the contract certification by SGS India was to be conclusive based on sampling at the time and place of loading;
(c) two distinct aspects were required to be considered whether SGS India was the contractual party and, if yes, whether SGS India certificate was in the contractual form. While it was found that SGS India was the contractual agency, the sellers failed to establish that the SGS India certificate was in contractual form. Buyers, on the other hand, did establish that the SGS India certificate was not in contractual form;
(d) SGS India's certification was uncontractual as there were two fatal errors in the certification, firstly, it did not follow the contractual specified mode of sampling in that the contract required the result to be of an average sample taken at the port of loading, not the weighted average of pre-shipment and shipment, secondly, the analysis done by SGS India was doubtful;
(e) as the buyers held the sellers to be in breach on the grounds of defective sampling and certification by SGS India, the buyers requested the sellers to attend at discharge for joint sampling which was not accepted by the sellers; and

(f) the method used for determining soft wheat used by SGS India obviously produced very different results to the methods used by Crepin and other laboratories. On the balance of probabilities, the Arbitral Tribunal, GAFTA found and the Board of Appeal agreed that the wheat described in the certificate of quality and condition was soft wheat and, therefore, buyers were entitled to damages.

[39] "Learned counsel submitted that the findings recorded by the Arbitral Tribunal, GAFTA and the Board of Appeal were in the realm of interpretation of the contract and appreciation of the evidence which cannot be reopened by arguing that the foreign award is contrary to the contract and, therefore, its enforcement would offend public policy of India. About the decisions of the English courts in *Agroexport* and *Alfred C. Toepfer*, learned counsel submitted that decisions of English courts cannot form part of public policy of India. This Court does not exercise appellate jurisdiction over the foreign awards and cannot be called upon to enquire as to whether foreign awards are contrary to the principles of English law. Learned counsel submitted that in any case the judgments of the English courts in *Agroexport* and *Alfred C. Toepfer* do not apply to the fact situation of the present case. Learned counsel also submitted that the decision of House of Lords in *Gill & Duffus* has no application to the present case.
[40] "Learned counsel for the respondent argued that once the sampling by SGS India has been found to be uncontractual, that certificate cannot bind the buyers and, therefore, no error or illegality was committed by the Arbitral Tribunal, GAFTA, or the Board of Appeal to look into the certificate issued by Crepin. Learned counsel for the respondent thus, submitted that the Delhi High Court was justified in rejecting the objections of the appellant.
[41] "It is not necessary to advert to the findings recorded by the Arbitral Tribunal, GAFTA as what is sought to be enforced by the buyers is the two awards of the Board of Appeal.
[42] "The challenge to the enforceability of the foreign awards passed by the Board of Appeal is mainly laid by the sellers on the ground that the Board of Appeal has gone beyond the terms of the contract by ignoring the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., SGS India which was final under the contract. The Board of Appeal, while dealing with the question whether the SGS India certificate was issued by the contractual party and in contractual form, noticed the clause in the contract in respect of quality and condition and it held that SGS India was an acceptable certifying party under the contract. As regards the other part of that clause that provided, 'certificate and quality showed in the certificate will be the result of

an average samples taken jointly at port of loading by the representatives of the sellers and the buyers', the Board of Appeal recorded its finding as follows:

> 'The SGS India certificate shows that an inspection took place at the suppliers godowns inland, and representative samples taken. Sealed samples were inspected lotwise and the cargo meeting the contractual specifications was allowed to be bagged for dispatch to Kandla.
> Continuous supervision of loading into the vessel was also carried out at the port. The samples drawn periodically were reduced and composite samples were sealed; one sealed sample of each lot was handed over to the supplier, one sealed sample of each lot was analysed by SGS and the remaining samples were retained by SGS for a period of three months unless and until instructions to the contrary were given.
>
> The analysis section of the certificate states that "The above samples have been analysed and the weighted average Pre-shipment and Shipment results are as under:
>
> "*We find that this procedure was not in conformity with the requirements of the Contract, which required the result to be of an average sample taken at port of loading, not the weighted average of pre-shipment and shipment samples. Accordingly the certificate is uncontractual and its results are not final.*
> *In consequence the Board is obliged to evaluate all the evidence presented, including the evidence of the uncontractual SGS India certificate to decide whether or not the goods were of the contractual description, i.e. Durum wheat Indian origin.*"'
> (Emphasis supplied by us)

[43] "Thus, having held that SGS India was the contractual agency, the Board of Appeal further held that the sellers failed to establish that the SGS India certificate was in contractual form. Two fundamental flaws in the certification by SGS India were noted by the Board of Appeal, one, SGS India's certification did not follow the contractual specified mode of sampling and the other, the analysis done by SGS India was doubtful. The Board of Appeal then sifted the documentary evidence let in by the parties and finally concluded that wheat loaded on the vessel *HACI RESIT KALKAVAN* was soft wheat and the sellers were in breach of the description condition of the contract.

[44] "It is pertinent to state that the sellers had challenged the award (no. 3782) passed by the Board of Appeal in the High Court of Justice at London. The three decisions; (i) *Agroexport* by Queen's Bench Division, (ii) *Toepfer* by Court of Appeal, and (iii) *Gill & Duffus* by House of Lords, were holding the field at the

time of consideration of sellers' appeal by the High Court of Justice at London. In *Agroexport*, it has been held that an award founded on evidence of analysis made other than in accordance with contract terms cannot stand and deserves to be set aside as evidence relied upon was inadmissible. The Court of Appeal in *Toepfer* has laid down that where seller and buyer have agreed that a certificate at loading as to the quality of goods shall be final and binding on them, the buyer will be precluded from recovering damages from the seller, even if, the person giving the certificate has been negligent in making it. *Toepfer* has been approved by the House of Lords in *Gill & Duffus*. The High Court of Justice at London can be assumed to have full knowledge of the legal position exposited in *Agroexport*, *Toepfer* and *Gill & Duffus* yet it found no ground or justification for setting aside the award (no. 3782) passed by the Board of Appeal.

[45] "If a ground supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so, a fortiori, such ground can hardly be a good ground for refusing enforcement of the award. Accordingly, we are not persuaded to accept the submission of Mr. Rohinton F. Nariman that Delhi High Court ought to have refused to enforce the foreign awards as the Board of Appeal has wrongly rejected the certificate of quality obtained from the buyers' nominated certifying agency and taken into consideration inadmissible evidence in the nature of certificates obtained by the buyers' for the purposes of forwarding contract.

[46] "Moreover, Sect. 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award-enforcement stage. The scope of inquiry under Sect. 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

[47] "In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12 May 1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.

[48] "While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Sect. 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or

(2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Sect. 48(2)(b).

[49] "The contention of the learned senior counsel for the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, these awards cannot be enforced being contrary to Sect. 48(1)(c) is devoid of any substance and is noted to be rejected.

[50] "In the circumstances, we hold that appeal has no merit. It is dismissed with no order as to costs."

ISRAEL

Ratification: 5 January 1959
No Reservations

7. Beit ha-Mishpat ha-Elyon [Supreme Court of Israel], 27 June 2012, cases no. 5394/09 and no. 1926/10[1]

Parties:

Case no. 5394/09:
Appellant: Sohnut Mehoniyot Layam Hatihon Ltd. (Israel)
Respondents: (1) Kia Motors Corporation (Korea);
(2) Korea Motors Israel Ltd. (Israel);
(3) Avraham Ungar (nationality not indicated);
(4) Telecar Motors Ltd. (nationality not indicated);
(5) Ray Motors Ltd. (nationality not indicated)

Case no. 1926/10:
Appellants: (1) Avraham Ungar (nationality not indicated);
(2) Telecar Motors Ltd. (nationality not indicated);
(3) Ray Motors Ltd. (nationality not indicated)
Respondents: (1) Korea Motors Israel Ltd. (Israel);
(2) Sohnut Mehoniyot Layam Hatihon Ltd. (Israel);
(3) Kia Motors Corporation (Korea)

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1. The General Editor wishes to thank Tamar Meshel, SJD Candidate, University of Toronto, for her invaluable assistance in providing this decision and translating it from the Hebrew original.

Subject matters: – nonsignatory party
– stay of court proceedings (pending arbitration)

Topics: ¶ 217 + ¶ 226

Summary

The Supreme Court affirmed the district court's decision granting a stay of court proceedings in favor of arbitration in Korea. The exclusive distributorship agreement binding on some of the parties contained an arbitration agreement – and no exception set out in the 1958 New York Convention or extraordinary circumstances to deny a stay existed – and the implied contract alleged by the nonsignatory to the arbitration agreement resisting the stay of proceedings would include the terms of the exclusive distributorship agreement, including its arbitration clause. A party sought a stay until the Korea arbitration between the other parties was resolved. The Court affirmed the decision below denying the stay, because no arbitration clause was binding on this party, and the party's reliance on the lis alibi pendens doctrine was misplaced as no arbitration proceedings were yet pending. The Court added that at any event the application of this doctrine to arbitration seems doubtful, though the issue is as yet undecided in the Israeli courts.

Between 1994 and 2007, Korea Motors Israel Ltd. (Korea Motors Israel), a company entirely owned by Sohnut Mehoniyot Layam Hatihon Ltd. (Sohnut Mehoniyot), was the exclusive Israeli distributor of the cars manufactured by Kia Motors Corporation (Kia). The exclusive distributorship contract contained a clause referring disputes to arbitration in Korea and providing for the application of Korean substantive law.

On 30 October 2007, Kia informed Korea Motors Israel that it terminated the exclusive distributorship contract per 1 January 2008. Since 2008, Kia cars have been distributed in Israel by Telecar Motors Ltd. and Ray Motors Ltd., private companies owned by Avraham Ungar (collectively, Ungar).

Sohnut Mehoniyot and Korea Motors Israel commenced an action against Kia in the Tel Aviv-Jaffa District Court for breach of contract. Korea Motors Israel argued that it had invested significant funds in promoting the Kia brand in Israel, with the understanding that the exclusive distributorship contract would be extended. Sohnut Mehoniyot also argued (i) that Kia breached an implied contract, under which Kia committed to continue its contract with Korea Motors Israel in exchange for Sohnut Mehoniyot's establishment, in 2005, of a logistics center in 2005 for the maintenance of the cars Sohnut Mehoniyot distributed in Israel, including Kia cars, and (ii) that Ungar caused the breach of the exclusive

distributorship agreement and the implied contract by cooperating with Kia to replace Korea Motors Israel as Kia's distributor in Israel. Kia applied for a stay of proceedings because of the arbitration clause in the exclusive distributorship contract. Ungar applied for a stay of proceedings until the arbitration between Kia and Korea Motors Israel was resolved.

The district court granted Kia's request and stayed proceedings both in respect of Korea Motors Israel's claim and Sohnut Mehoniyot's claim, finding that although there was no arbitration agreement in writing between Sohnut Mehoniyot and Kia, the factual basis of Sohnut Mehoniyot's action was identical to that of Korea Motors Israel's action, and its cause of action was contingent on whether the contract between Korea Motors Israel and Kia had been breached. The court, however, dismissed Ungar's request for a stay, reasoning that arbitration had not yet commenced and whether it would be commenced was at the discretion of Korea Motors Israel and Sohnut Mehoniyot. Both Sohnut Mehoniyot and Ungar appealed (cases no. 5394/09 and 1926/10, respectively).

The Supreme Court, before Deputy President (Ret.) E. Rivlin, Justice E. Rubinstein and Justice S. Joubran, heard the two appeals together and affirmed the district court's findings. The Court, in an opinion by E. Rivlin, referred at the outset to its constant jurisprudence holding that arbitration clauses subject to the New York Convention are to be respected and shall lead to a stay of proceedings before the Israeli courts, unless the exceptions set out in the Convention apply or in extraordinary circumstances. No such exceptions or circumstances existed in respect of the arbitration clause between Korea Motors Israel and Kia, so that their dispute should be submitted to arbitration in Korea as provided for in the exclusive distributorship contract.

The Supreme Court then examined whether the dispute between Sohnut Mehoniyot and Kia was also "a dispute that was agreed to be submitted to arbitration" within the meaning of the Israeli Arbitration Act. No written contract containing an arbitration clause existed between these parties, so that the dispute could not be referred to arbitration on this basis. However, Sohnut Mehoniyot argued that it had concluded an implied contract with Kia. If such contract – as argued by Sohnut Mehoniyot itself – existed, then it was incomplete and the (many and essential) missing terms should be determined by reference to the exclusive distributorship contract. That is, if as alleged by Sohnut Mehoniyot, Kia did commit itself to continuing its contract with Korea Motors Israel in light of the establishment of the logistics center by Sohnut Mehoniyot, "surely it did so in accordance with the terms of the written contract it had entered into with Korea Motors Israel". Thus, an implied contract would

include the arbitration clause, and Sohnut Mehoniyot's conduct evidenced its intention to be bound by the arbitration clause.

The Supreme Court noted that other legal systems – in particular the United States – have developed doctrines concerning the obligation of non-signatories to an arbitration clause to submit their dispute to arbitration. However, as the Court found in the present case that the intention of all parties – Kia, Sohnut Mehoniyot and Korea Motors Israel – was to resolve their disputes by arbitration, the Court was not required to make a general finding in respect of this issue.

The Court then affirmed the district court's decision that no stay should be ordered in respect of the claims involving Ungar. There was no arbitration clause binding Ungar, and although case law has recognized that a court may deny a stay on efficiency grounds where only some of the parties have agreed to submit to arbitration, this discretion concerns only proceedings where an arbitration clause was agreed upon by some of the parties. It does not concern the possibility of staying proceedings without any such agreement.

The Supreme Court also dismissed Ungar's argument that the Israeli action should be stayed on the basis of the lis alibi pendens doctrine. Here, no arbitration proceedings were yet pending. The Court added that no clear decision has yet been issued in respect of the scope of application of this doctrine to arbitration, nor was such decision required in the present proceedings. However, in the Court's opinion the fact that parallel arbitration proceedings are pending does not seem to justify a stay of court proceeding, as the determinations made in the arbitration "will not – in most cases – have legal relevance in the court proceeding".

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345046-n>.

ISRAEL NO. 7

Excerpt

[1] "Sohnut Mehoniyot and Korea Motors Israel commenced an action against Kia and Avraham Ungar and his companies (hereinafter, Ungar). In two separate decisions, the Tel Aviv-Jaffa District Court stayed the proceedings against Kia in light of an arbitration clause contained in its agreement with Korea Motors Israel, and allowed the proceedings against Ungar and his companies to continue.
[2] "Should an agreed-upon arbitration clause lead to a stay of proceedings in all actions commenced on a similar factual basis? This is the question at the center of the two requests for leave to appeal before us."

I. FACTUAL BACKGROUND

[3] "Kia is a Korean company engaged in car manufacturing. Korea Motors Israel is a private company that served as the exclusive distributor of Kia cars in Israel between 1994 and 2007. On 30 October 2007, Kia informed Korea Motors Israel that it did not intend to extend their contract beyond 1 January 2008. Since 2008, the exclusive distributors of Kia cars in Israel have been Telecar Motors Ltd. and Ray Motors Ltd., private companies owned by Ungar.
[4] "In the Statement of Claim submitted by Korea Motors Israel and Sohnut Mehoniyot, a private company that owns 100 percent of the shares of Korea Motors Israel, it was argued that Kia's decision to end its engagement with them constituted a breach of contract. It was argued that Korea Motors Israel had invested significant funds in promoting the Kia brand in Israel, inserting it into the local market and strengthening its reputation, all with the understanding that the distribution contract would be extended. According to Korea Motors Israel, its efforts to market Kia cars in Israel were exploited in bad faith by Kia, and the latter will continue to profit from them after the termination of their contract. As for Sohnut Mehoniyot, it was argued in the Statement of Claim that Kia had breached an implied contract between the two, pursuant to which Sohnut Mehoniyot invested significant funds in the establishment of a logistics center in 2005 for the maintenance of cars it distributed in Israel (the Implied Contract). It was noted that these included Kia cars as well as other car brands. According to Sohnut Mehoniyot, Kia's knowledge of, and consent to, the establishment of the logistics center created an Implied Contract between them, in which Kia committed to continue its contract with Korea Motors Israel in exchange for Sohnut Mehoniyot's investment in the logistics center. Therefore, Sohnut Mehoniyot argued in the Statement of Claim, the termination of the contract

with Korea Motors Israel deprived it of the compensation that Korea Motors Israel would have paid it for the use of the logistics center, and breached the Implied Contract. As for Ungar and his companies, it was argued in the Statement of Claim that they had caused the breach of the distribution agreement and the Implied Contract by cooperating with Kia, without Korea Motors Israel's knowledge, to transfer the distribution rights to them."

II. THE DECISIONS OF THE DISTRICT COURT

[5] "Kia applied to the District Court to stay the proceedings against it. It based its request on the arbitration clause contained in its distribution agreement with Korea Motors Israel, which provided that any dispute between them would be resolved by arbitration in Korea in accordance with Korean substantive law. The District Court (Justice N. Yeshaya) found that the wording of the arbitration clause clearly indicated the parties' agreement to resolve their disputes by arbitration, and therefore ordered a stay of the proceedings. With respect to Sohnut Mehoniyot's claim for breach of its alleged Implied Contract with Kia, the District Court found that there was no written agreement between Sohnut Mehoniyot and Kia, and that there was no evidence that they had agreed to resolve their disputes by arbitration. Nevertheless, the District Court also stayed the proceedings in the action commenced by Sohnut Mehoniyot, finding that the factual basis of Sohnut Mehoniyot's action was identical to that of Korea Motors Israel's action. According to the District Court, Sohnut Mehoniyot's cause of action was contingent on whether the contract between Korea Motors Israel and Kia had been breached. Therefore, it found that once it was determined that the question of breach of contract was to be resolved by arbitration, Sohnut Mehoniyot's claim was to be transmitted to arbitration as well. Sohnut Mehoniyot applied for leave to appeal this decision of the District Court (5394/09).

[6] "Ungar and his companies also applied to the District Court to stay the proceedings against them until the arbitration between Kia and Korea Motors Israel was resolved. The District Court (Justice Y. Fargo) found that at the time of its decision, Korea Motors Israel and Sohnut Mehoniyot had yet to commence arbitration against Kia, and that commencing such proceedings was subject to their discretion. The District Court further found that the outcome of such arbitration in Korea would not end the dispute between Korea Motors Israel and Ungar and his companies, since the arbitration, if conducted, would deal only with the disputes with Kia. Therefore, the District Court dismissed the

application for a stay of proceedings. Ungar and his companies applied for leave to appeal this decision of the District Court (1926/10)."

III. THE PARTIES' CLAIMS

1. Case 5394/09

[7] "Sohnut Mehoniyot argues that its action is different and distinguishable from that of Korea Motors Israel, and therefore that the Arbitration Clause agreed upon by Korea Motors Israel and Kia should not have been applied to its relationship with Kia. According to Sohnut Mehoniyot, had it known that Korea Motors Israel would stop distributing Kia cars at the end of 2007, it would not have invested millions of shekels in establishing the Logistics Center for the maintenance of Kia cars two years before. It further argues that Kia's knowledge of the establishment of the Logistics Center and its representation to Sohnut Mehoniyot that its contract with Korea Motors Israel would continue for some time, resulted in the creation of the Implied Contract. Sohnut Mehoniyot objects to the finding of the District Court that where there are identical factual questions the proceedings should be stayed until such questions are resolved by arbitration; particularly in light of the absence of its agreement to resolve its disputes with Kia by arbitration. It argues that this finding has no basis in law and in the jurisprudence. Sohnut Mehoniyot further claims that the District Court's decision violates its right of access to the courts, and requires it to seek its remedy in a foreign country without its consent, thereby potentially violating its rights under Israeli law. Alternatively, Sohnut Mehoniyot argues that even if there is a basis for the legal test set out by the District Court, it erred in finding that there are common factual questions in this case. According to Sohnut Mehoniyot, even if it were found that Kia acted lawfully in terminating its contract with Korea Motors Israel, this would not be sufficient for a finding that it did not breach its Implied Contract with Sohnut Mehoniyot.

[8] "Kia rejects the argument that Sohnut Mehoniyot's action constitutes a separate action commenced by a separate claimant. According to Kia, Sohnut Mehoniyot is the sole shareholder in Korea Motors Israel, and both are run by the same principal, who is also the sole director in both companies. Kia further argues that the cause of action of Korea Motors Israel and Sohnut Mehoniyot is identical, since even if an Implied Contract exists between Kia and Sohnut Mehoniyot, its terms must be identical to those of the written contract between Kia and Korea Motors Israel, and it must be determined whether the termination

of the latter constituted a breach. Kia further argues that it has been recognized in the jurisprudence that an action by parties that are 'legally proximate' to, and have 'shared interests' with, parties who are bound by an arbitration agreement – will also be resolved by arbitration. Therefore, according to Kia, once it was agreed upon in advance that the parties' disputes would be resolved by arbitration in Korea, Sohnut Mehoniyot should not be allowed to evade its agreement by artificially separating itself from Korea Motors Israel."

2. Case 1926/10

[9] "Ungar and his companies, who are the applicants in this application, argue that the District Court erred in finding that there was no 'pending proceeding' that justified staying the action against them. They argue that, once the District Court stayed the action of Korea Motors Israel and Sohnut Mehoniyot against Kia, it effectively ruled that this dispute would be resolved by arbitration. Therefore, the applicants claim, Korea Motors Israel's failure to commence arbitration in Korea cannot assist it in advancing court proceedings against them. According to the applicants, Korea Motors Israel had to choose whether to commence arbitration or forego its claim against Kia, and the Court should not allow it to avoid this decision. The applicants further argue that the considerations justifying a stay of proceedings in favour of arbitration, such as: efficiency, time saving, preventing conflicting decisions and convenience of the parties, apply in this case and therefore a stay of proceedings is justified. Finally, the applicants argue that once it has been determined that Korean substantive law governs the execution of the contract, it would also govern the question of breach of the contract, even if the proceedings were conducted before an Israeli court.

[10] "Korea Motors Israel and Sohnut Mehoniyot, who are the respondents in this application, claim that there is no pending proceeding before an arbitrator in Korea and therefore that the applicants' request for a stay of proceedings is unfounded. According to the respondents, while the Court decided that the proceedings against Kia would not continue, this did not obligate them to commence arbitration proceedings. The respondents assert that the decision whether to commence arbitration against Kia is subject to their discretion, and in any event at this time there were no pending arbitration proceedings on this matter and so granting a stay until the conclusion of such proceedings would be groundless. Alternatively, the respondents argue that even if there were pending proceedings against Kia, such proceedings would not deal with the question of whether the applicants had breached the contract, since the applicants were not

party to this dispute. Moreover, according to the respondents, they agreed to resolve their disputes with Kia in accordance with Korean substantive law, however their action against the applicants should be resolved in accordance with Israeli substantive law. Therefore, the respondents argue that the arbitrator's decision in Korea, if arbitration indeed takes place there, should not be linked to the legal and factual questions before the Israeli court in the respondents' action against the applicants."

IV. ANALYSIS

[11] "We have decided to discuss the requests for leave to appeal as if such leave has been granted and an appeal has been submitted; both appeals should be dismissed."

1. Sohnut Mehoniyot's Appeal

[12] "Arts. 5 and 6 of the Israeli Arbitration Act, 1968 (henceforth, the Arbitration Act) stipulate:

> '5. *Stay of court proceedings*
> (a) Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and a party to the action who is a party to the arbitration agreement applies to the court to stay the proceedings in the action, the court shall stay the proceedings between the parties to the agreement, provided that the applicant has been and still is prepared to do everything required for the institution and continuation of the arbitration.
> ....
> (c) The court may refrain from staying the proceedings if it sees a special reason why the dispute should not be dealt with by arbitration.
>
> 6. *Stay of proceedings under international convention*
> Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and an international convention to which Israel is a party applies to the arbitration, and such convention lays down provisions for stay of proceedings, the court shall exercise its power under Art. 5 in accordance with and subject to those provisions.'

[13] "Israel is a party to [the 1958 New York Convention]. Therefore, there is no dispute that under Art. 6 of the Arbitration Act, the stay of proceedings should be examined in accordance with the provisions of the New York Convention. The relevant portion of the Convention is set out in Art. II:.... [Quotation of Art. II(1) and (3) omitted.]

[14] "In case 4716/04, *hotels.com v. Zuz Tayarut Ltd.*, 7 September 2005 (the *Hotels Case*),[2] it was decided that arbitration clauses subject to the New York Convention are to be respected and shall lead to a stay of proceedings before Israeli courts, unless the exceptions set out in the Convention apply or in extraordinary circumstances. In so deciding, the Supreme Court ruled that considerations of international certainty in the interpretation of the Convention, and respect for the desire of parties to international trade to avoid the risk of local courts preferring the interests of local parties, were to be preferred over various efficiency considerations.

[15] "Accordingly, and in light of the fact that the exceptions set out in the New York Convention do not apply in the present case, there is no doubt that the dispute between Korea Motors Israel and Kia should be submitted for resolution by an arbitrator in Korea.

[16] "The question arising with respect to Sohnut Mehoniyot is whether its dispute with Kia is 'a dispute that was agreed to be submitted to arbitration' within the meaning of Art. 6 of the Arbitration Act.

[17] "The way to determine whether there was an agreement to submit a dispute to arbitration is the same as with all agreements of parties under private law – by interpreting the contract they have concluded. Therefore, in the absence of a contract between the relevant parties that expresses a meeting of the minds and mutual agreement, there could be no agreement of the parties to submit a dispute to arbitration, and there would be no ground for staying proceedings under the Arbitration Act.

[18] "On its face, Sohnut Mehoniyot and Kia did not conclude any contract, and therefore seemingly there is no basis for the claim that they have agreed to resolve their disputes by arbitration. However, Sohnut Mehoniyot's claim against Kia is a *contractual* claim and the remedy it seeks is damages for breach of an Implied *Contract*. Although the parties are disputing whether an Implied Contract was in fact concluded, at this preliminary stage, since the proceedings were stayed before a statement of defence was submitted, we can only assume that the facts as set out in the Statement of Claim are true. Therefore, the question

2. Reported in Yearbook XXXI (2006) pp. 791-797 (Israel no. 2).

remains one of interpretation – did Sohnut Mehoniyot and Kia agree, as part of their alleged Implied Contract, to submit their disputes to an arbitrator?

[19] "The existence of an Implied Contract can be deduced from the parties' conduct. The Statement of Claim describes generally the nature of the alleged Implied Contract in this case. According to the Statement of Claim, the parties agreed that Sohnut Mehoniyot would build a logistics center for the maintenance of Kia cars in Israel, and in exchange Kia would continue its contract with Korea Motors Israel. Such an agreement is evidenced, according to the Statement of Claim, by the actions taken by Sohnut Mehoniyot to construct the logistics center and by Kia's knowledge of these actions and its implicit consent to them.

[20] "Even if we assume, without deciding, that such conduct by the parties evidences an Implied Contract, it must be determined whether such conduct also evidences its terms. The Implied Contract, as described in the Statement of Claim, is missing numerous important details – it does not describe the terms of the distribution of the cars, the system of monetary exchanges between the parties, the terms for termination of the contract, etc. It is impossible to view this alleged Implied Contract as containing *all* of the agreements of the parties. Certainly, Kia's obligation toward Sohnut Mehoniyot is not unlimited, and there are circumstances in which it will be permitted to choose another Israeli distributor.

[21] "In the absence of additional information regarding the nature of the alleged Implied Contract, the way to interpret the complete obligations of the parties is to examine the circumstances surrounding the conclusion of the [Implied] Contract. The inexplicit and after-the-fact nature of the Implied Contract indicates that if Kia indeed committed itself to continuing its contract with Korea Motors Israel in light of the establishment of the logistics center by Sohnut Mehoniyot, surely it did so in accordance with the terms of the written contract it had entered into with Korea Motors Israel. Kia was aware that its products were being distributed in Israel in accordance with the terms of the written contract, and there is no indication that it suddenly agreed to change these terms. Had Kia intended to change the contractual framework of the distribution of its products in Israel, surely it would have insisted that a new contract be concluded.

[22] "One of the terms of the written contract between Kia and Korea Motors Israel is the arbitration clause. This clause reflects Kia's intention, when entering into a distribution agreement with an Israeli distributor, that their disputes would be resolved in its country in accordance with its laws. Since the Implied Contract allegedly concluded between Kia and Sohnut Mehoniyot is grossly lacking, and the parties' intentions suggest that it should be supplemented in accordance with the provisions of the existing written contract, the addition of the arbitration

clause to the Implied Contract appears to be called for. Only in this way will the parties' agreement, which there is no indication that Kia backed away from, to conduct arbitration proceedings in Korea, be validated and materialized.

[23] "It should be assumed, therefore, that if the Implied Contract between Sohnut Mehoniyot and Kia was in fact concluded, it included the parties' consent to the arbitration clause. Indeed, Kia, according to Sohnut Mehoniyot, is also a party to the Implied Contract. Kia and Korea Motors Israel are parties to the original agreement. The factual basis of Korea Motors Israel's action and of Sohnut Mehoniyot's action is identical. The cause of action of the first depends on whether the contract between Kia and Korea Motors Israel was breached. Korea Motors Israel and Sohnut Mehoniyot share a common interest – avoiding the arbitration proceedings. When Korea Motors Israel realized that it could not avoid arbitration in its dispute with Kia, Sohnut Mehoniyot sought to initiate a separate action; however, as already mentioned, it also has an interest in bypassing the arbitration proceedings, and both actions are based on the same alleged breach of the distribution agreement.

[24] "The circumstances of this case demonstrate a clear attempt to evade an agreed-upon arbitration clause. Kia made clear its intentions regarding dispute resolution by way of arbitration, and if Sohnut Mehoniyot's assertion that Kia entered into an Implied Contract with it concerning the same agreement is true, then Kia's clear interest in resolving disputes by arbitration must be read into this Implied Contract. The parties therefore agreed, by way of conduct, to commit themselves to the terms of the *written* contract between Kia and Korea Motors Israel. This is sufficient to satisfy the writing requirement in Art. 1 of the Arbitration Act.[3]

[25] "Accordingly, we conclude that with regard to the relationship between Sohnut Mehoniyot and Kia, the parties also agreed that any disputes between them shall be resolved by an arbitrator. Therefore, Sohnut Mehoniyot's appeal is dismissed.

[26] "While unnecessary, it is noted that other legal systems have developed advanced doctrines concerning the obligation of third parties that are not formal

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3. Art. 1 of the Israeli Arbitration Law 5728 – 1968 (the Arbitration Act) reads:

> "*Definitions*
> 1. For the purposes of this Law –
> 'arbitration agreement' means a written agreement to refer to arbitration a dispute which has arisen between parties to the agreement or which may arise between them in the future, whether an arbitrator is named in the agreement or not…."

parties to an arbitration agreement to submit their dispute to arbitration. American courts, for instance, have relied on different doctrines from civil law, such as: assignment of debt, agency, estoppel, a contract in favor of a third party and lifting the veil, and have determined their application to arbitration (see, e.g.: *Thomas-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (1995); *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624 (2009)). It seems that Israeli jurisprudence has yet to develop parallel tools to prevent parties from evading an arbitration clause to which they have agreed. Since it was found in the present case that the intention of Kia, Sohnut Mehoniyot and Korea Motors Israel was to resolve their disputes by arbitration, we are not required to decide, for the time being, general questions regarding the imposition of arbitration clauses on third parties."

2. Ungar's Appeal

[27] "Ungar and his companies point to numerous factors that, they argue, make it more efficient to hear the claim against them in the arbitration to be conducted in Korea, but they do not point to any contract they have concluded with Korea Motors Israel.

[28] "In the absence of a contract, it cannot be said that the parties agreed to submit their dispute to arbitration, and therefore the grant of a stay of proceedings pursuant to the Arbitration Act is not within the court's authority.

[29] "Previous case law has recognized that the desire to prevent contradictory rulings and wasting of resources may lead the court to refuse to stay proceedings in an action where only some of the parties have agreed to submit to arbitration. This would be in accordance with the authority granted to the court in Art. 5(c) of the Arbitration Act to refuse to stay proceedings where it finds 'special reason' to do so. However, this discretion of the court concerns the possibility of refusing to stay proceedings even where an arbitration clause was agreed upon by the parties. It does not concern the possibility of staying proceedings without such agreement of the parties. The various efficiency considerations are irrelevant where there is no legal basis for staying the proceedings and denying the plaintiffs their procedural and substantive rights. This is particularly so where a foreign arbitration agreement is concerned, which provides that the dispute shall be resolved in accordance with a substantive law different from Israeli law. If Ungar and his companies violated Israeli law, Korea Motors Israel has a right to initiate an action against them in Israel, and its right to access the courts should not be deprived without legal basis.

[30] "In the absence of grounds for staying the proceedings under the Arbitration Act, Ungar and his companies rely on the judge-made doctrine of 'pending proceeding' – lis alibi pendens. According to this doctrine, a proceeding shall be stayed until the conclusion of a parallel legal proceeding that addresses an identical question. The main rationale behind this doctrine is twofold – preventing unnecessary burden on the opponent and preventing unnecessary bother to the court. A parallel proceeding concerning an identical substantive question could also result in the undesirable situation of two courts reaching opposite conclusions on the same issue. However, staying proceedings on the basis of a 'pending proceeding' is subject to the court's discretion, and there is nothing in this doctrine to detract from the court's authority to require a new proceeding. Since this concerns a discretionary authority that relates to the conduct of the proceedings, an appellate court will not easily intervene in the decision of a lower court not to stay proceedings until the conclusion of a pending proceeding.

[31] "In light of the above, we have not found any ground for intervening in the decision of the District Court to refuse to stay the proceedings against Ungar and his companies. On the contrary, considering that an actual 'pending proceeding' has yet to commence, there is no justification to wait for its conclusion and to violate Korea Motors Israel' fundamental right of access to the Israeli courts. The purpose of staying proceedings on the basis of 'pending proceeding' is to allow the first forum that began discussing a particular question to conclude its role, and this purpose does not materialize where the alleged 'first' proceeding is only theoretical.

[32] "While unnecessary, it should be noted that the courts have yet to clearly decide the scope of application of the 'pending proceeding' doctrine with respect to arbitration. On its face, the fact that parallel arbitration proceedings exist does not justify staying the court proceeding. The main reason for this is that even if certain determinations are made in the arbitration, they will not – in most cases – have legal relevance in the court proceeding. This is particularly where, as here, the substantive law governing the arbitration is different from Israeli substantive law, and therefore it is doubtful whether any good could come from staying the court proceeding until the arbitral award is rendered. In any event, there is no need to decide these questions here, and I therefore leave them as 'requiring further study'."

V. CONCLUSION

[33] "In conclusion, the appeals in cases 1926/10 and 5394/09 are dismissed. The applicants in case 1926/10 (Ungar and his companies) shall bear the costs of respondents 1-2 in the application in the amount of NIS 40,000. The applicant in case 5394/09 (Sohnut Mehoniyot) shall bear the costs of respondent 1 in the application (Kia) in the amount of NIS 30,000.

[34] "S. Joubran: I agree.

[35] "A. Rubinstein: I agree with my colleague the Deputy President (Ret.). This court has repeatedly emphasized the importance of respecting the New York Convention and the narrow approach to its exceptions. The fate of the applicant, Sohnut Mehoniyot, on which our decision imposes the arbitration clause, results from the specific circumstances of this case. I also concur with my colleague that the time has yet to come for formulating a rule concerning the imposition of an arbitration clause on third parties."

8. Beit ha-Mishpat ha-Elyon [Supreme Court of Israel], 11 October 2012, case no. 8613/10[1]

Parties:	Petitioner: Caspi Teufa Ltd. (Israel) Respondent: JSC Aerosvit Airlines (Ukraine)
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Articles:	II(3) (by implication)
Subject matter:	– waiver of arbitration by commencing court proceedings
Topics:	¶ 217

Summary

The Court affirmed the district court's decision finding that the petitioner could not seek a stay of proceedings because of the arbitration clause in its contract with respondent, having earlier filed an originating motion with the Israeli court in respect of the same dispute.

Caspi Teufa Ltd. (Caspi), a travel agency, and JSC Aerosvit Airlines (Aerosvit) entered into an agreement under which Caspi was to act as Aerosvit's exclusive general sales agent in Israel (the GSA Agreement). The GSA Agreement contained a clause providing that disputes between the parties would be governed by English law, that any legal proceedings related to the GSA Agreement would be commenced before the English courts, and that any dispute thereunder would be resolved in accordance with the ICC Arbitration Rules by a sole arbitrator appointed by the London Chamber of Commerce and Industry (LCCI).

A dispute arose between the parties when Caspi alleged that Aerosvit breached the GSA Agreement by transferring some of its Tel Aviv-Kiev flights to Donbasaero Airlines LLC (Donbasaero). On 24 January 2010, Caspi applied to the Tel Aviv-Jaffa District Court for a declaration that Aerosvit had breached the

1. The General Editor wishes to thank Tamar Meshel, SJD Candidate, University of Toronto, for her invaluable assistance in providing this decision and translating it from the Hebrew original.

GSA Agreement and for a temporary injunction to prevent Aerosvit from transferring flights to Donbasaero, which was joined to the application as a respondent. On 28 January 2010, the district court dismissed the request for a temporary injunction, holding that the GSA Agreement did not include a commitment by Aerosvit to maintain a certain number of flights, and that the decision to add a flight operator (Donbasaero) to the Tel Aviv-Kiev route was made by agreement of Israel and Ukraine and was not within the control of Aerosvit. In March 2010, the court denied Caspi's request for leave to appeal.

On 7 April 2010, Caspi's originating motion was struck at Caspi's request. At the same time, Caspi sought to offset the alleged breach of the GSA Agreement by confiscating funds owed to Aerosvit, whereupon Aerosvit terminated the GSA Agreement. Aerosvit commenced an action in the district court to recover the confiscated funds, and sought and obtained an order for provisional attachment. In turn, on 6 July 2010, Caspi requested the LCCI to appoint an arbitrator to hear its dispute with Aerosvit; Aerosvit allegedly did not react upon being informed of Caspi's commencement of the arbitration. Caspi also applied to the district court for a stay of proceedings under Art. 5 of the Israeli Arbitration Act because of the arbitration clause in the GSA Agreement.

On 9 November 2010, the district court denied the request for a stay, holding that Caspi waived its right to arbitration by filing its 24 January 2010 originating motion before the district court and thus evidencing that it was not prepared to do all that was required to conduct the arbitration as provided in the Israeli Arbitration Act as a condition for granting a stay. The court dismissed Caspi's argument that it filed its originating motion because of the urgency of the matter and Aerosvit's lack of reaction to Caspi's letter concerning the commencement of arbitration; the court found that Caspi could have requested a temporary remedy from the court (without filing an originating motion) under the Arbitration Act, which provides that courts have the same auxiliary powers in respect of arbitration as they have in respect of court actions, including issuing injunctions.

By the present unanimous decision, the Supreme Court of Israel, before Deputy President M. Naor, Justice Y. Danziger and Justice U. Shoham, in an opinion by Justice Y. Danziger, affirmed the decision below. The Court fist dealt with Caspi's argument that the district court should have granted a stay under Art. 6 of the Arbitration Act, which provides that the court shall exercise its power to stay proceedings under Art. 5 of the Act in accordance with the stay provisions of an applicable international convention – here, the "null and void, inoperative or incapable of being performed" requirements of Art. II(3) of the 1958 New York Convention. The Court held that Caspi could raise this

argument for the first time on appeal, but that the arguments and facts before the court below for the purpose of discussing the requirements of Art. 5 was insufficient for a discussion of the requirements of Art. 6 by an appellate court.

The Supreme Court then held that the district court correctly denied a stay under Art. 5 of the Arbitration Act, because Caspi's conduct proved that it was not prepared to do all that was required to conduct the arbitration as required by that Article.

The Court noted its own constant jurisprudence stressing the importance of respecting arbitration agreements, and its tendency to prefer, when called upon to interpret an arbitration clause, the interpretation that allows the dispute to be resolved by arbitration. However, in the present case the district court rightly exercised its discretion not to order a stay, in light of Caspi's apparent waiver of arbitration by electing to file its originating motion before the courts.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345047-n>.

ISRAEL NO. 8

Excerpt

[1] "Before us is an application for leave to appeal a decision of the Tel Aviv-Jaffa District Court (Justice A. Bachar) dated 9 November 2010, in which the court rejected the petitioner's request for a stay of proceedings on the basis of a binding arbitration clause between the parties pursuant to Art. 5(a) of the Arbitration Act, 1968 (the Arbitration Act or the Act)."[2]

I. FACTUAL BACKGROUND

[2] "The petitioner, a travel agency, and the respondent entered into an agreement, according to which the petitioner was to act as the respondent's exclusive General Sales Agent (GSA) in Israel. The agreement also included an arbitration clause providing that any dispute between the parties would be governed by English law, that any legal proceedings related to the agreement would be commenced before the English courts [and] that any dispute arising out of the agreement would be resolved in accordance with the ICC Rules by a sole arbitrator appointed by the Chamber of Commerce in London.

[3] "On 24 January 2010, the petitioner applied to the District Court [of Tel Aviv-Jaffa] for a declaration that the respondent had breached their agreement by transferring some of its Tel Aviv-Kiev flights to Donbasaero Airlines LLC (Donbasaero). At the same time, the petitioner requested a temporary injunction to prevent the respondent from transferring its flights to Donbasaero (which was also joined to the application as a respondent).

[4] "On 28 January 2010, the Tel Aviv-Jaffa District Court (Deputy President Y. Zapt) dismissed the petitioner's request for a temporary injunction. In its decision, the Court noted that:

> 'a. The agreement between the petitioner and Aerosvit does not entitle the petitioner to intervene in Aerosvit's business considerations, and does not

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2. Art. 5(a) of the Israeli Arbitration Act, Arbitration Law 5728 – 1968, reads:

> "Stay of proceedings.
> (a) Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and a party to the action who is a party to the arbitration agreement applies to the court to stay the proceedings in the action, the court shall stay the proceedings between the parties to the agreement, provided that the petitioner has been and still is prepared to do everything required for the institution and continuation of the arbitration."

include a commitment undertaken by Aerosvit towards the petitioner to maintain a certain volume of flights.
b. The decision to add another flight operator to the Tel Aviv-Kiev route … was made by agreement of the two countries, Israel and Ukraine, and is not, nor was it at the time, within the control or influence of Aerosvit.
c. As a result of the above, the petitioner's chances of obtaining the remedy it seeks are slim at best.'

Finally, the Court added that:

> 'The petitioner is advised to agree that, subject to its right to apply for leave to appeal my decision and the results of such proceeding should it take place, its application shall be dismissed without an additional order for costs.'

[5] "The petitioner's request for leave to appeal this decision of the District Court was rejected (Justice, as he then was, A. Grunis). In this decision, Justice Grunis observed that:

> 'According to the GSA agreement, disputes between the parties were to be resolved by arbitration in London. Also, the parties accepted English law and English jurisdiction. Nevertheless, the action and request for temporary relief were filed before the Israeli court. A review of the submissions before the trial court suggests that according to the petitioner, Aerosvit refused to appoint an arbitrator as required under the GSA agreement.… [T]here is no explanation as to why the request for an injunction was filed in Israel and not in England, as the jurisdiction clause in the agreement seems to require. In the submissions before me the parties did not address the question of which country has jurisdiction to hear the dispute (although according to the respondents the Israeli court does not have authority to grant the remedy sought by the petitioner). Therefore, I do not need to address this issue. My assumption is that, at least with regard to the present stage, it is agreed by all that the Israeli court has jurisdiction.'

[6] "On the merits, Justice Grunis dismissed the application, finding that although the petitioner's claim that the respondent acted in bad faith could not be ruled out at that stage, in the circumstances it would not be appropriate to intervene in the allocation of flights between the companies. The Court

emphasized that in any event it seemed that the dispute between the parties concerned the *number* of flights transferred by the respondent to Donbasaero, and not the *transfer* itself, since the allocation of flights to Donbasaero was required as a result of its designation as a second operator. The Court also noted the legal and practical difficulty involved with rendering a judicial order concerning the number of transferred flights where the authority to do so belonged (exclusively) to the Ukrainian flight authorities.

[7] "On 7 April 2010, about a month after the decision concerning the petitioner's request for leave to appeal was rendered, the petitioner requested to strike its originating motion and it was so struck.

[8] "At the same time, the petitioner proceeded to confiscate funds that it was supposed to transfer to the respondent, in an attempt to offset what it claimed was a breach of the agreement by the respondent. In response, the respondent declared the agreement terminated and filed an action against the petitioner in the District Court for the return of the confiscated funds. In parallel, the respondent filed a request for provisional attachment, which the Court granted.

[9] "The petitioner proceeded to file a request for a stay of proceedings pursuant to Art. 5(a) of the Arbitration Act, arguing that it had been and still was prepared to do all that was required in order to conduct the arbitration. The petitioner acknowledged that it was the first to apply to the Court (in its originating motion), but noted that it did so only after it had written to the respondent and the latter replied laconically, failed to agree to the appointment of an arbitrator as provided in the agreement, and did not undertake to cease breaching the agreement. Therefore, according to the petitioner, the respondent's conduct left it with no choice but to turn to the courts. In addition, the petitioner points out that on 6 July 2010 it requested the [London] Chamber of Commerce and Industry (LCCI) to appoint an arbitrator to resolve the dispute between the parties.

[10] "It should be noted that the respondent argued that the LCCI was not the appropriate forum to address the request, since under the arbitration clause the arbitrator was to be appointed in accordance with the ICC rules. The respondent therefore sent the LCCI a letter in which it stated:

> 'Our client is keen to ensure that any proposition of an arbitrator is in accordance with the agreement reached between the parties, that agreement contained as mentioned in section 10.1 of the GSA agreement.'

[11] "The District Court dismissed the petitioner's request for a stay of proceedings, finding that the petitioner chose to ignore the provisions of the

agreement when it filed its originating motion before the Court, which evidenced that it was not prepared to do all that was required to conduct the arbitration as provided in Art. 5(a) of the Arbitration Act. The District Court dismissed the petitioner's claim that it did so in light of the urgency of the matter, and found that it could have requested a temporary remedy from the Court (without filing an originating motion) based on Art. 16(a)(5) of the Act.[3] It was further found that the respondent's unresponsiveness to the petitioner's letter regarding the commencement of the arbitration did not justify applying to the courts. The Court also dismissed the petitioner's argument that it applied to the Court because Donbasaero was not a party to the arbitration agreement, finding that there was no procedural or substantive necessity in joining it."

II. THE APPLICATION

1. The Petitioner's Position

[12] "According to the petitioner, the District Court erred in finding that it was not prepared to do all that was required to conduct the arbitration. An examination of the agreement, as well as the decision of Justice Grunis (the relevant part of which was cited above), reveals that the parties entered into an agreement that included an arbitration clause. The petitioner reiterates its arguments regarding the necessity of applying to an Israeli court – the urgency of the matter, the presence of a third party that is not bound by the arbitration clause (Donbasaero) and the unresponsiveness of the respondent to the petitioner's letter regarding commencement of arbitration proceedings. The petitioner also adds that the District Court erred in addressing the possibility of applying to the Court under Art. 16(a)(5) of the Arbitration Act, since this Article requires a prior notification to the other side, which was not possible here in light of the limited time frame.

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3. At. 16(a)(5) of the Israeli Arbitration Act reads:

> "Auxiliary powers of court.
> (a) In the following matters, the court has, in respect of arbitration, the same powers to grant relief as it has in respect of an action brought before it:
> ....
> (5) attachment of property, prevention of departure from Israel, security for the production of property, appointment of a receiver, mandatory injunction and prohibitive injunction."

[13] "The petitioner further argues that the District Court erred in refusing to grant a stay of the proceedings under Art. 6 of the Arbitration Act[4] in conjunction with Art. II(3) of [the 1958 New York Convention]. The petitioner asserts that a stay of proceedings was appropriate in light of previous findings of this Court that only in rare cases will a court refuse to stay proceedings under Art. 6 of the Arbitration Act. It was further argued that the District Court erred in failing to respect the principle of freedom of contract and the parties' wish to conduct arbitration – particularly where the respondent explicitly admitted that it had agreed to conduct arbitration in London (for instance, in its letter to the LCCI)."

2. The Respondent's Response

[14] "According to the respondent, only in rare cases will an appellate court intervene in a lower court's decision regarding a stay of proceedings under the Arbitration Act. The respondent further argues that the arbitration clause in the agreement does not provide for foreign arbitration proceedings under Art. 6 of the Act, since it does not set out the seat of the arbitration or provide for arbitration in London. The respondent also contends that the petitioner's arguments concerning Art. 6 of the Act constitute a change of position, since the petitioner applied to the District Court for a stay of proceeding only under Art. 5 of the Act.

[15] "On the merits of the issue, the respondent claims that by suing it in the District Court by way of originating motion, the petitioner revealed its intention to waive or retract the arbitration clause in the agreement, and by so doing it created a new jurisdiction clause granting jurisdiction to the Israeli courts. Alternatively, the respondent argues that the agreement falls within the exceptions in Art. II(3) of the New York Convention since it is void, inoperative or incapable of being performed. The respondent also adds that the petitioner attempted to 'forum shop' and that its request for a stay of proceedings at this stage constitutes bad faith and estoppel."

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4. Art. 6 of the Israeli Arbitration Act reads:

> "Stay of proceedings under international convention.
> Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and an international convention to which Israel is a party applies to the arbitration, and such convention lays down provisions for stay of proceedings, the court shall exercise its power under section 5 in accordance with and subject to those provisions."

3. The Petitioner's Reply

[16] "The petitioner contends that the respondent's response reveals that the parties are in fact in agreement on the question of the existence of an arbitration clause – even if disagreement remains concerning the geographic location where it is to be conducted. The petitioner further argues that Art. 6 of the Arbitration Act applies to this dispute, since the courts tend to interpret this Article broadly – also in cases where there is doubt as to its application. Finally, the petitioner submits that it was permitted to invoke Art. 6 for the first time on appeal since its argument concerns a legal claim grounded in undisputed facts, and the Court clearly has judicial notice of the Act and the New York Convention."

III. DISCUSSION AND DECISION

[17] "After reviewing the parties' submissions and hearing their arguments, I propose to discuss the application as if leave to appeal has been granted and an appeal has been filed accordingly, and to dismiss the appeal.

[18] "The parties disagree on several issues. One such issue is the applicability of Art. 6 of the Arbitration Act to the agreement in light of, among other things, the time at which the petitioner raised it in its arguments. As already mentioned, the respondent claims that this Court should not allow the petitioner to raise this argument for the first time on appeal, considering that it had the opportunity to do so before the District Court. The parties also disagree on the appropriate interpretation of the arbitration clause in the agreement, the respondent arguing that it should not be treated as a foreign arbitration clause.

[19] "With respect to the timing of the Art. 6 argument, it is indeed correct that the Court has judicial notice of the Act and the New York Convention. Therefore, it would seem appropriate to dismiss the respondent's claim that the petitioner's arguments regarding Art. 6 of the Act constitute a change of position. Furthermore, it is an accepted rule that an appellate court has the discretion to decide whether to hear a legal argument raised before it for the first time, if such an argument is grounded in undisputed facts and concerns merely legal interpretation within the confines of the cause of action and the parties' submissions.

[20] "However, in the present case there is a *factual disagreement* concerning the applicability of the New York Convention to the dispute between the parties in accordance with the arbitration clause in their agreement, as well as concerning

whether or not the exceptions set out in Art. II(3) of the Convention apply in the circumstances of this case.

[21] "Indeed, the parties addressed in much detail before the District Court the question of the status of the arbitration clause in light of their delayed conduct, but they did so with regard to the question of whether the circumstances of this case suggest that the petitioner was prepared to proceed with the arbitration as required under Art. 5(a) of the Arbitration Act."

1. *Is this Factual Basis Sufficient to Determine the Question of the Applicability of Art. 6 of the Arbitration Act?*

[22] "As with Art. 5 of the Arbitration Act, Art. 6 of the Act also concerns a stay of proceedings pursuant to an arbitration clause. The question of the precise relationship between these provisions has yet to be entirely clarified, however it is clear that the conditions required for a stay of proceedings in a dispute subject to an arbitration agreement under Art. 6 of the Act are not identical to the conditions required under Art. 5 of the Act.

[23] "Determining the question of the applicability of Art. 6 of the Arbitration Act requires discussion of the respondent's claim that the exceptions set out in the New York Convention, which address an agreement that is void, inoperative or incapable of being performed, apply in this case. In my view, the arguments and facts placed before the District Court during the discussion of Art. 5 of the Arbitration Act are insufficient for a discussion of the applicability of these exceptions.

[24] "Therefore, the factual basis placed before the District Court for the purpose of discussing the requirements of Art. 5 of the Act is insufficient in these circumstances for a discussion of Art. 6 of the Act by an appellate court (even if these have a common factual ground). In this respect, it will be difficult for this Court to discuss an argument or an explanation that was not raised before the trial court. I would add that the petitioner had the opportunity to raise this argument before the trial court, since the relevant details and facts were not discovered at the appeal stage so as to prevent the petitioner from raising it in time.

[25] "In these circumstances, I find that the petitioner should not be permitted to raise the argument that the lower court should have stayed the proceedings in the action on the basis of Art. 6 of the Arbitration Act."

2. *Should the District Court Have Stayed the Proceedings Under Art. 5 of the Arbitration Act?*

[26] "Therefore, the remaining disagreement is whether the District Court erred in refusing to stay the proceedings in the respondent's action on the basis of Art. 5 of the Arbitration Act, in light of a binding arbitration clause between the parties. I immediately note that in my view the Court was correct in finding that the proceedings should not be stayed in this action.
[27] "As already mentioned, the petitioner considered that the transfer by the respondent of some of its Tel Aviv-Kiev flights to Donbasaero constituted a breach of their agreement. Initially, the petitioner reacted by sending a letter to the respondent (on 18 January 2010). In this letter it was claimed by the petitioner that the respondent had fundamentally breached the agreement and that it must do all that was required to amend this breach. In this letter the petitioner also noted that:

> '[I]n accordance with the agreement between the parties, our client requests the appointment of an arbitrator which shall deal with the breach of your obligations towards our client.'

The petitioner further noted that:

> 'Accordingly, you are hereby requested to confirm to us in writing within 72 hours that, until the determination of the arbitrator of our client's claims, you do not intend to breach your obligations towards our client….'

[28] "In response to this, the respondent replied to the petitioner in a short letter (of 20 January 2010) as follows:

> '1. Without prejudice to any of Aerosvit Airlines ("Aerosvit") rights, please be advised that Aerosvit Airlines requires some time to examine and to seek legal advise [sic] as to contents of your above mentioned letter.
> 2. However, it should be clarified at this stage, that Aerosvit has never, is not and does not intent [sic] to breach any of its contractual obligations towards your clients.'

[29] "A few days after the receipt of the respondent's reply letter, the petitioner commenced an action before the District Court against the respondent and against Donbasaero. At the same time, the petitioner requested a temporary injunction against these companies. It should be noted that in its request for the

injunction the petitioner addressed the existence of an arbitration clause between the parties and even stated, after detailing the background to the action, that:

> 'The foregoing reveals that Caspi had no choice but to commence the present action in order to protect its contractual and proprietary rights and to prevent Aerosvit from denying their agreement.'

[30] "However, the petitioner did not reveal in its request why it considered that it could not commence arbitration in accordance with the agreement at that stage, or whether it was seeking to enforce the parties' arbitration clause.
[31] "The respondent, on its part, also did nothing to stay the proceedings in the action. Instead, it replied to the merits of the action without challenging the petitioner's ability to take legal steps against it in Israel. Furthermore, the respondent also initiated legal proceedings in Israel later on against the petitioner – proceedings that now stand at the center of this stay of proceedings application.
[32] "In light of the events just described, I find that there is no justification for altering the District Court's decision, according to which the petitioner was not prepared to do all that was required to conduct the arbitration in accordance with Art. 5 of the Arbitration Act and therefore the respondent's action should not be stayed. As is well known, once a trial court has decided on a request for a stay of proceedings before it, an appellate court will tend not to intervene in this decision. Granting such a stay of proceedings is within the discretion of the first instance court and only where a substantive error has been made in exercising this discretion will an appellate court intervene. I am not convinced that there was any error in the District Court's decision, even less so a substantive error that justifies the intervention of this Court.
[33] "An arbitration agreement expresses the parties' agreement to refer a future dispute between them for determination by an agreed arbitrator. This Court has noted many times the importance of respecting arbitration agreements, and has acted to thwart attempts to avoid them in bad faith. For this reason the Court will tend to give effect to an arbitration agreement between the parties, and when called upon to interpret an arbitration clause, will prefer, among the possible interpretations, the interpretation that allows the dispute to be resolved by arbitration over an interpretation that provides for resolution by the court.
[34] "The law applicable to those cases where, despite the existence of a valid arbitration agreement, a party exercises its right to apply to the courts, has been designed with this approach in mind. The legal route that the legislator set out for these cases is to stay the proceedings in an action filed before the court in

light of the arbitration agreement. The main provision governing the issue of stay of proceedings in favour of arbitration is Art. 5 of the Arbitration Act, which stipulates that:

> '(a) Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and a party to the action who is a party to the arbitration agreement applies to the court to stay the proceedings in the action, the court shall stay the proceedings between the parties to the agreement, provided that the petitioner has been and still is prepared to do everything required for the institution and continuation of the arbitration.
> (b) An application to stay the proceedings may be submitted in the statement of defence or otherwise, but not later than the day on which the petitioner first pleads to the substance of the action.
> (c) The court may refrain from staying the proceedings if it sees a special reason why the dispute should not be dealt with by arbitration.'

[35] "Where an action is filed before the court in a matter that is subject to an arbitration agreement, the court is authorized to stay the proceedings in the action and to transfer it to arbitration in accordance with the agreement. By so doing, the court will avoid taking part in the violation of the agreement. Nonetheless, it should be emphasized that even if all the conditions set out in Art. 5(a) of the Arbitration Act are satisfied, the court still maintains its discretion whether to stay the proceedings or not. An agreement to submit a dispute to arbitration does not deprive the court of its substantive authority to hear the matter. However, the court will tend to stay the proceedings in an action where the conditions required by law are satisfied, and a special reason will be required for it to refuse to stay the proceedings, in accordance with its authority under Art. 5(c) of the Act.
[36] "The petitioner argues that the District Court erred in 'ignoring' the arbitration clause agreed upon by the parties and thereby violated the principle of freedom of contract. I cannot accept this position. I already mentioned the principles set out by this Court, according to which arbitration agreements should be validated and given precedence. In addition, another aspect of the principle of freedom of contract is that the wish of parties to a dispute, as reflected in their conduct and actions, should be respected – even after the conclusion of the agreement. It seems that Art. 5(a) of the Arbitration Act adopts a similar rationale in providing that the court shall stay the proceedings between

parties to an agreement "so long as the petitioner has been willing to do all that is required to conduct the arbitration and still is".

[37] "Against this background, logic dictates that when a party to a contract does not insist on its right to resolve its disputes with the other party by arbitration, and when the other party does not insist on observing this provision, the parties thereby express their view that the provision has lost its force. I have already stated my position on this issue in the past, when I noted that:

> 'An application by a party to the court to hear an action that according to the parties' agreement should be resolved by arbitration may lead to the conclusion that the petitioner is not prepared to observe the parties' agreement regarding the resolution of their dispute by arbitration.'

[38] "Ottolenghi made this point in her book by noting that:

> 'The defendant cannot have it both ways – on the one hand requesting a stay of proceedings in the action against it in order to refer it to arbitration; and on the other hand submitting its own action to the court.'

[39] "A similar rationale is reflected in cases related to the one before us, where arbitration was abandoned when – for instance – a party delayed the arbitration proceedings, or the parties did not comply with the deadlines set out in the agreement or did not activate the mechanism for appointing an arbitrator. In all of these cases the court may find that the conduct of the parties suggests that the arbitration proceedings were abandoned or that the arbitration agreement expired – even without any formal declaration to this effect.

[40] "In its request, the petitioner claims that the filing of its action should not be viewed as a waiver of its right under the arbitration clause. As already noted, the petitioner emphasizes that it was forced to file the action in light of the short time frame, the respondent's unresponsiveness and its desire to include Donbasaero in the proceedings. On this point, I accept the finding of the District Court that the petitioner has failed to satisfy its burden of proving that it acted out of necessity. It should be noted that in any event this is a factual determination in which an appellate court will not easily intervene. The petitioner indeed noted in its request the existence of an arbitration clause between the parties, and added that it was applying to the court since it had 'no other choice'. However, words and declarations are one thing, and actions are another. Mere statements are insufficient to evidence the petitioner's willingness to conduct the arbitration proceedings at that time, when its actions in fact

suggest the opposite intention. As is well known, the burden of proving willingness to conduct arbitration lies with the party requesting a stay of proceedings.

[41] "The District Court found that the petitioner failed to satisfy this burden, and in my view it is correct. Had the petitioner wished to conduct the arbitration, it could have applied to the Court for temporary relief only, without filing the originating motion. Art. 16(a)(5) was intended precisely for this purpose by providing that:

> '(a) In the following matters, the court has, in respect of arbitration, the same powers to grant relief as it has in respect of an action brought before it:
>
> ....
>
> (5) attachment of property, prevention of departure [from Israel], security for the production of property, appointment of a receiver, mandatory injunction and prohibitive injunction.'

It should be noted that in certain circumstances the Court may grant a remedy pursuant to this Article even if an arbitrator has not yet been appointed.

[42] "Nothing prevented the petitioner from applying to the District Court in Israel for temporary relief and at the same time requesting the Chamber of Commerce in London to appoint an arbitrator in order to commence arbitration proceedings. It is recalled that the petitioner argues that the notice requirement under Art. 16(b) of the Arbitration Act (referring to Art. 8(b) of the Act), which provides that several days must pass from the day that the notice was delivered before filing a request for temporary relief, frustrated its ability to act in accordance with this Article in light of the short time frame. However, the District Court rejected this urgency claim. I am also of the opinion that the petitioner has failed to prove that there was such substantial urgency, and that had it waited five additional days – in addition to the two-day gap between the time it received the respondent's reply letter and the time it filed its action – it would have suffered irreparable harm.

[43] "To summarize, the petitioner's filing of the originating motion evidenced the legal route it wished to take at the time. Once the respondent chose not to apply for a stay of proceedings on the basis of an agreed upon arbitration clause – the opportunity to conduct arbitration was 'missed'.

[44] "It should be reiterated that had the petitioner avoided filing the originating motion directed at resolving the merits of the claim, its arguments regarding the necessity of applying to the court in light of the short time frame and the

respondent's unresponsiveness might have been acceptable (subject to the circumstances of this case of course). By its actual conduct (filing the originating motion), the petitioner expressed its intention to resolve the alleged breach of the agreement in court. Against this background, the petitioner's attempt to 'revive' the arbitration clause at a later stage is doomed to fail.

[45] "My conclusion that a stay of proceedings should be refused where the petitioner itself has expressed its desire to conduct court proceedings is strengthened by the *timing* of the petitioner's request to strike its action – after the courts had considered its request for temporary relief and found that it was doubtful whether the respondent indeed breached the agreement as claimed by the petitioner. In any event, and without setting anything in stone, it seems to me that this conduct of the petitioner is peculiar. The respondent described it as 'forum shopping', and at least on the face of it this claim seems to have merit.

[46] "Accordingly, as decided by the District Court, the argument that the petitioner was prepared to do all that was required to conduct the arbitration in accordance with Art. 5(a) of the Arbitration Act cannot be accepted. Therefore, the Court was right in refusing to stay the proceedings in the respondent's action.

[47] "It should be emphasized that in light of this finding – that the requirements of Art. 5(a) of the Arbitration Act, which allows the Court to stay proceedings in an action, are not satisfied in this case – the various efficiency considerations that the Court may take into account as part of its authority under Art. 5(c) of the Act are no longer relevant. This is so since there is no legal basis for staying the proceedings and depriving the respondent of its procedural and substantive rights. Therefore, the petitioner's arguments that a stay of proceedings should be ordered so as to avoid multiple proceedings or the conduct of proceedings in Israel under English law, are irrelevant, particularly 'where a foreign arbitration agreement is concerned, which provides that the dispute shall be resolved in accordance with a substantive law different from Israeli law'.

[48] "Accordingly, I propose to dismiss the appeal and order the petitioner to bear the costs of the respondent in the amount of NIS 40,000."

9. Magistrate Court, Netanya, 4 March 2013, No. 20089-10-12[1]

Parties:	Applicant: Iredale Mineral Cosmetics Ltd. (nationality not indicated) Respondent: Dermal Group Israel Ltd.(nationality not indicated)
Published in:	Available online at <www.nevo.co.il> (subscription required)
Articles:	II(3)
Subject matters:	– stay of court proceedings – discretion to refuse stay of proceedings outside New York Convention's exceptions
Topics:	¶ 220

Summary

The court granted an application to stay proceedings in favor of arbitration in New York as provided for in the parties' contract. Under the 1958 New York Convention, a stay may be refused only on the three grounds in Art. II(3). The Israeli Arbitration Act provides that a stay may be refused also if the court finds "special cause" for the dispute not to be referred to arbitration. The fact that the applicant waited over two years to seek a stay did not constitute, in the circumstances of the case, such special cause. Whether this delay amounted to bad faith had to be ascertained within the confines of Art. II(3) in order to safeguard the Convention's objective to introduce uniformity and certainty.

Iredale Mineral Cosmetics Ltd. (Iredale) and Dermal Group Israel Ltd. (Dermal) entered into a contract containing a clause providing for arbitration of disputes in the United States.

Iredale filed a court action against Dermal in the Netanya Magistrate Court in respect of an undisputed debt; the dispute was subsequently broadened to other issues.

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1. The General Editor wishes to thank Tamar Meshel, SJD Candidate, University of Toronto, for her invaluable assistance in providing this decision and translating it from the Hebrew original.

Over two years later, Dermal filed an action against Iredale concerning the same contract before the Netanya Magistrate Court. The case was assigned to a different judge, Judge Smadar Kollende-Abramovitch. Before Dermal's case was heard, Iredale filed an application to stay Dermal's action and refer the dispute to arbitration pursuant to the arbitration clause in the contract. This application was filed under Art. 5(a) of the Israeli Arbitration Act, which provides for a stay of court proceedings in actions not governed by an international treaty. On 17 February 2013, the Judge denied this request, inter alia, in light of Iredale's choice to commence an action before the Israeli court two years before.

Iredale then made a second application, seeking a stay of proceedings under Art. 6 of the Act, which provides that where an action is commenced in the Israeli courts concerning a dispute that the parties have agreed to submit to arbitration, and the arbitration is subject to an international convention to which Israel is a party and that contains provisions regarding the stay of proceedings, the court shall use its authority to stay proceedings under Art. 5 of the Act.

The Magistrate Court, per Judge Smadar Kollende-Abramovitch, granted the application. The court noted at the outset that the 1958 New York Convention – an international convention to which Israel is a party – applied in the present case, and that Art. II(3) of the Convention provides for a stay of court proceedings. Hence, the court could exercise its authority to stay proceedings under Art. 5 of the Act. Specifically – reasoned the court – Art. II(3) provides that a court of a Contracting State shall refer a dispute falling withing the scope of an arbitration agreement to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. These are therefore the only grounds for refusing a stay.

Dermal argued that pursuant to Art. 5(c) of the Act, a court may refuse to stay proceedings also if it finds special cause for the dispute not to be referred to arbitration. In the present case, it argued, there was such special cause as Iredale disregarded the arbitration agreement when it commenced its court action in Israel, and acted in bad faith by seeking a stay over two years after the commencement of that action.

The court disagreed, holding that there was no ground for finding a special cause for non-referral. Iredale did commence court proceedings first, but it did so because the debt originally at issue was undisputed and it did not anticipate Dermal to broaden the dispute. The fact that a case is filed in an Israeli court first does not necessarily mean that it cannot be later transferred to arbitration in New York in accordance with the parties' agreement.

As to the principle of good faith, the judge reasoned that this fundamental principle of Israeli law may be applied to an international arbitration subject to

the New York Convention only in accordance with the requirements of Art. II(3), in order to safeguard the Convention's objective to introduce uniformity and certainty.

The court also referred to a 2004 Supreme Court decision that held that a court's discretion not to stay proceedings in Convention cases under Art. 6 is considerably narrower than the discretion the court has under Art. 5 of the Act.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345048-n>.

Excerpt

[1] "The Applicant has submitted this request for a stay of proceedings and referral to arbitration pursuant to Art. 6 of the Israeli Arbitration Act, 1968 (henceforth, Act).[2] It should be noted that the Applicant has previously submitted a request for a stay of proceedings pursuant to Art. 5(a) of the Act.[3] I dismissed that request on 17 February 2013 on the ground, inter alia, that by filing an action in this court approximately two years ago concerning the same agreement, which is currently being heard by another judge, the Applicant expressed its view on the appropriate forum in which the dispute should be heard.

[2] "As detailed in this request, Clause 15 of the parties' agreement provides for an arbitration mechanism to resolve any disputes arising between the parties, including the arbitration institution and the place of arbitration (New York, USA). Pursuant to Art. 6 of the Arbitration Act, where an action is commenced concerning a dispute that the parties have agreed to submit to arbitration, and the arbitration is subject to an international convention to which Israel is a party and that provides directions regarding stay of proceedings, the court shall use its authority under Art. 5 of the Act.

[3] "Art. II(3) of the [1958 New York Convention] provides that a court of a contracting party that is faced with an action concerning a matter with respect to which the parties have concluded an agreement within the meaning of this Article, shall refer the parties to arbitration pursuant to a request filed by one of

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2. Art. 6 of the Israeli Arbitration Act, Arbitration Law 5728 – 1968, reads:

> "*Stay of proceedings under international convention*
> Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and an international convention to which Israel is a party applies to the arbitration, and such convention lays down provisions for stay of proceedings, the court shall exercise its power under section 5 in accordance with and subject to those provisions."

3. Art. 5(a) of the Israeli Arbitration Act reads:

> "*Stay of proceedings*
> (a) Where an action is brought before a court in a dispute which the parties have agreed is to be referred to arbitration, and a party to the action who is a party to the arbitration agreement applies to the court to stay the proceedings in the action, the court shall stay the proceedings between the parties to the agreement, provided that the petitioner has been and still is prepared to do everything required for the institution and continuation of the arbitration."

them unless it finds that their agreement is void, inoperative or incapable of being performed.

[4] "According to the Applicant, since Israel and the United States are signatories to the New York Convention and in accordance with the above, the proceedings should be stayed and referred to arbitration in New York, USA.

[5] "The Applicant further notes that the Respondent has also requested to stay the proceedings in the action commenced by the Applicant and to refer them to arbitration in New York.

[6] "In its reply, the Respondent argues that the Applicant disregarded the agreement when it commenced the first action in Israel approximately two-and-a-half years ago. It further argues that pursuant to Art. 5(c) of the Act,[4] the court is authorized to refuse to stay proceedings if it finds special cause for the dispute not to be referred to arbitration. It further claims bad faith on the part of the Applicant in raising this claim only now, when the first action between the parties has been pending for over two years.

[7] "There is no dispute that the Convention applies to this arbitration. Nonetheless, in its response to the Respondent's reply, the Applicant argues that Art. 5(c) does not apply where Art. 6 is concerned, since this would render the provisions of the New York Convention meaningless.

[8] "As Judge Grunis (as he then was) held in *hotels.com v. Zuz Tayarut Ltd.*, Supreme Court of Israel, 4716/04,[5] the totality of considerations leads to the conclusion that the court's discretion pursuant to Art. 6 of the Act together with Art. II(3) of the Convention is considerably narrower than that pursuant to Art. 5 of the Act. In the case of an arbitration to which the Convention applies and the relevant requirements of Art. 6 of the Act and Art. II(3) of the Convention are satisfied, the proceedings should be stayed unless one of the three exceptions set out in Art. II(3) of the Convention applies. At the same time, the Judge found that there may be rare and exceptional instances where the court would be authorized to refuse to stay the proceedings even if none of the three exceptions applies.

[9] "Is the case before me such a rare and exceptional case? I do not think so. In another matter where an action was commenced before the court and later the plaintiff requested to stay the proceedings in favor of arbitration, claiming that

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4. Art. 5(c) of the Israeli Arbitration Act reads:

> "The court may refrain from staying the proceedings if it sees a special reason why the dispute should not be dealt with by arbitration."

5. Reported in Yearbook XXXI (2006) pp. 786-790 (Israel no. 1).

it had forgotten about the arbitration clause, it was found that the court did not have discretion since Art. 6 of the Act gave preference to the directions of international conventions over the discretion of the court. See in this matter, *Swisa v. Arieli*, Tel-Aviv, 17047/94.

[10] "It should be noted that the Applicant in its response points out that it indeed commenced proceedings in Israel first, but that it did so since the case concerned a debt that was not disputed. It did not anticipate that the Respondent would complicate the proceedings and broaden the dispute between them. Therefore, by way of similar analogy it seems that Art. 6 prevails also in this case. The fact that a case, which has yet to be heard, was filed in Israel first does not necessarily mean that it cannot be transferred to arbitration in New York in accordance with the parties' agreement.

[11] "As for the principle of good faith, even though this is a fundamental principle of Israeli law, it may be applied to an international arbitration subject to the New York Convention only in accordance with the requirements of Art. II(3) of the Convention, since the implementation of the Convention could not be subjected to the principle of good faith under Israeli law when this principle is not accepted in states party to the Convention. If this were done, the implementation of the Convention would lead to different outcomes in every country, while the objective of the New York Convention is to introduce uniformity and certainty. See on this matter, *Midatlantic International Inc. v. Sherutei Proyektim Meyuhadim Ltd.*, Tel Aviv, 32914/99.

[12] "In light of the above I am of the opinion that the proceedings should be stayed pursuant to Art. 6 of the Act.

[13] "The Respondent shall bear the costs of this request in the amount of NIS 2,000."

JAMAICA

Accession: 10 July 2002
1st and 2nd Reservations

1. Supreme Court of Judicature of Jamaica, 29 March 2010, Claim no. 2009 HCV 05413

Parties:	Claimant: Rose Hall Resort, L.P. (nationality not indicated) Defendant: The Ritz Carlton Hotel Company of Jamaica Limited (nationality not indicated)
Published in:	Available online at <http://supremecourt.gov.jm/node/240> and <http://carilaw.cavehill.uwi.edu/results.aspx?ac=QBE_QUERY&tn=carilaw&qy=find%20RecordID%20=39537&RF=webfull&DF=webfull&MR=10&NP=255>
Articles:	II(3); V(2)(*b*)
Subject matters:	– arbitrability of disputes concerning immovable property – arbitration agreement "incapable of being performed" because dispute non-arbitrable (no) – narrow concept of public policy
Topics:	¶ 220 + ¶ 223 + ¶ 518 + ¶ 519

Summary

The court stayed the action by which claimant sought an injunction to vacate the resort managed by defendant on claimant's behalf, finding that the dispute fell within the scope of the arbitration agreement between the parties under the applicable law of Georgia, United States; the court referred to a Georgia court decision holding that it did. There were no grounds for refusing a stay: (1) as a matter of Jamaican law, the subject matter was arbitrable as it involved in personam rights to the possession of Jamaican land rather than

in rem possession of that land; (2) the arbitration agreement was not "incapable of being performed" under Art. II(3) of the 1958 New York Convention because of the alleged non-arbitrability of the subject matter: first, the matter was arbitrable and, second, "incapable of being performed" means that there must be some obstacle which cannot be overcome by parties willing and able to perform the agreement; (3) the non-arbitrability argument raised in terms of public policy also failed on the merits as the dispute was arbitrable; further, it was premature at the agreement-enforcement stage, and it did not meet the standards of public policy in the context of the enforcement of foreign awards (basic conceptions of morality and fairness).

On 6 July 1998, Rose Hall Resort, LP (Rose Hall) and The Ritz Carlton Hotel Company of Jamaica Limited (Ritz-Carlton) entered into an Operating Agreement under which Ritz-Carlton undertook to manage the Ritz-Carlton Golf & Spa Resort, Rose Hall, Jamaica (the Resort), owned by Rose Hall. The Operating Agreement was concluded for twenty-five years beginning on 1 August 2000. The Operating Agreement could be terminated by a written Notice of Termination "upon any Event of Default". It was governed by the laws of the State of Georgia, United States. It contained a clause referring all disputes to arbitration in Washington, DC.

A dispute arose between the parties when Ritz-Carlton allegedly breached the Operating Agreement by failing properly to operate and manage the Resort for Rose Hall's account. Rose Hall served four Notices of Default upon Ritz-Carlton for those breaches on 20 May 2008 and 13 February, 30 April and 8 September 2009. On 1 July 2009, Rose Hall commenced arbitration in Washington, DC, as provided for in the Operating Agreement, seeking damages in the amount of US$ 145,000,000. On 3 September 2009, it served a Notice of Termination requiring Ritz-Carlton to vacate the Resort by 1 October 2009.

On 19 October 2009, Rose Hall also commenced a court action in the United States. On 29 October 2009, the Superior Court of Gwinnett County, Georgia, stayed the action, finding that the claims before the court involved a dispute under the Operating Agreement and therefore fell within the scope of the arbitration clause therein.

In Jamaica, when Ritz-Carlton did not comply with the Notice of Termination of 3 September 2009, Rose Hall applied for an interim injunction requiring Ritz-Carlton to vacate the Resort. Ritz-Carlton sought a stay of the injunction on the basis of the arbitration clause in the Operating Agreement.

The Supreme Court of Judicature of Jamaica, per Jones J., granted the stay, finding that the injunction related to a matter falling within the scope of the arbitration clause in the Operating Agreement and that there were no grounds for refusing a stay under Jamaican law or the 1958 New York Convention.

Rose Hall argued that an issue involving possession of immovable property in Jamaica – the Resort – is not arbitrable; it framed this argument under Jamaican law, the New York Convention and public policy. The Court disagreed, noting first that while a dispute concerning the (*in rem*) possession of Jamaican land is not arbitrable under Jamaican law, a dispute concerning the (*in personam*) rights between the parties in respect of the possession of Jamaican land is arbitrable. Here, an arbitration between the parties would not relate to the possession of the Resort, but rather to the parties' rights in respect of the possession of the Resort. Thus, the subject matter of the dispute was arbitrable under Jamaican law.

Rose Hall's contention that the arbitration agreement was incapable of being performed within the meaning of Art. II(3) of the Convention because the Jamaican courts would not enforce an agreement referring disputes relating to immovable property to arbitration also failed. The Court accepted Ritz-Carlton's argument that Rose Hall commenced arbitration on the basis of the arbitration clause in the Operating Agreement and could not now argue that the arbitration clause was "incapable of being performed". Furthermore, added the Court, "incapable of being performed" means that there must be some obstacle which cannot be overcome even if the parties are ready, willing and able to perform the agreement. This was not the case here.

Rose Hall also claimed that an ensuing award between the parties could not be enforced in Jamaica on grounds of public policy as it dealt with the possession of Jamaican land. The Court denied this argument too, reasoning that it was raised prematurely and failed on the merits, since the Court had already concluded that an arbitration could only relate to the rights between the parties to the possession of the land, rather than the possession itself. Also, the Jamaican courts will recognize foreign awards unless contrary to basic conceptions of morality and fairness. Rose Hall's allegations did not meet this standard.

Finally, the Supreme Court found that the dispute fell within the scope of the arbitration clause in the Operating Agreement under the law of Georgia chosen by the parties. The Court reasoned that although the parties submitted expert evidence on the law of Georgia, the decision rendered by the Superior Court of Gwinnett County on 29 October 2009 – holding that the dispute was covered by the arbitration clause in the Operating Agreement – was "the best indication of what Georgia law is and how it should be applied" to the present issue.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345049-n>.

JAMAICA NO. 1

Excerpt

[1] "The Ritz-Carlton Rose Hall Resort in Jamaica is unquestionably a good approximation of paradise. Turquoise coloured water laps around warm white sand beaches shaded by palm trees. In the distance, a line of jungle covered hills rise up to a cloudless sky, and smiling 'Ladies and Gentlemen' hold out glasses of rum punch, to dull the minds of thankful guests. The hotel section of the property has 427 guestrooms, 52 suites, upscale convention facilities, and an award winning championship golf course.

[2] "But, appearances deceive. The owners of the property, Rose Hall Resort L.P. (hereafter called Rose Hall) terminated the Operating Agreement with its manager, Ritz Carlton Hotel Company of Jamaica Limited (hereafter called Ritz-Carlton). The Operating Agreement is governed by the laws of the State of Georgia, United States of America, and contractual disputes arising from the Operating Agreement are subject to an arbitration clause. The site of the arbitration is stipulated to be in Washington DC, USA. It is common ground between the parties that Rose Hall has effectively terminated the Operating Agreement for the reasons stated in their Notice of Termination.

[3] "Sect. 3 of The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001 [the 2001 Act] which gives effect to the [1958 New York Convention] provides that it shall have the force of law in Jamaica. The Convention applies to any difference between the parties arising from any legal relationship which is commercial. Art. II(3) of the Convention requires the Court to refer to arbitration any matter which is capable of being settled by arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[4] "Under an Operating Agreement Rose Hall the owner allowed Ritz-Carlton to operate and manage the hotel known as The Ritz-Carlton Golf & Spa Resort Hall, Jamaica (hereafter called the Resort) and the adjacent golf course for Rose Hall providing personal services for a fee.

[5] "Rose Hall contends that Ritz-Carlton defaulted by failing to manage the Resort properly. Accordingly, on 3 September 2009, they terminated the Operating Agreement requiring Ritz-Carlton to vacate the Resort by 1 October 2009. Rose Hall also applied for an interim injunction in this court requiring Ritz-Carlton to deliver up possession of the Resort. Ritz-Carlton applied for a stay of the injunction on the basis that an application to the court at this time is in breach of their agreement to arbitrate any difference arising from their legal relationship in accordance with Sect. 3 of the 2001 Act and Art. II(3) of the Convention."

I. ISSUES

[6] "Is this court constrained under the 2001 Act and Art. II(3) of the Convention to:

(i) Stay the injunction brought by Rose Hall and allow the foreign arbitration to proceed?
(ii) If yes, would this court recognize or enforce an award by the foreign arbitrators with respect to the possession of Jamaican land?
(iii) Is the action brought by Rose Hall within the scope of the arbitration clause under the laws of the State of Georgia?"
(….)

II. RELEVANT SECTIONS OF THE 2001 ACT

[7] "Sects. 2 and 3 of the Act provide as follows:

> '2. In this Act:
> "the Convention" means the Convention on the recognition and Enforcement of Foreign Arbitral Awards, done in New York on the 10th day of June 1958.'
>
> '3. (1) Subject to sub-section (2), the Convention shall have the force of law in Jamaica.
> (2) The provisions of the Convention shall apply –
> (a) To any award where reciprocal provisions have been made in relation to the recognition and enforcement of such an award in the territory of a State party to the Convention; and
> (b) To any difference which may arise out of any legal relationship, whether or not contractual, which in Jamaica is a commercial relationship.
> (3) The text of the Convention is set out in the Schedule.'

[8] "The Schedule to the 2001 Act is the same as Arts. II and V of the Convention. [Quotation of Art. II and Art. V(2) Convention omitted.]
[9] "I accept that through this statute Jamaica has given legal recognition to its international obligation to recognize and implement non-domestic arbitration agreements. These agreements are in foreign countries and are decided according

to the laws of that country or between persons, one of whom is not a national of Jamaica."

III. STAY OF INJUNCTION

1. Arbitrability

[10] "Dr. Lloyd Barnett (hereafter called Counsel for Rose Hall) concedes that the arbitration agreement is valid. However, he raises three ambitiously intricate arguments. In the first argument, he contends that the 2001 Act which recognizes each Contracting State's obligation to recognize arbitration agreements only extends under Art. II to differences between parties to an arbitration agreement 'in respect of a defined legal relationship'. He submits that in this case, there is no legal relationship in the Operating Agreement between Rose Hall and Ritz-Carlton, which gives Ritz-Carlton any right to possession of the property of Rose Hall. In essence there is no expressed or implied right of Ritz-Carlton to remain in possession of the Resort against the will of Rose Hall. On the basis, he submits that the claim of Rose Hall to possession does not raise any dispute capable of settlement by arbitration within the meaning of Art. II of the Convention.

[11] "Counsel for Rose Hall submits further that the right of Rose Hall as the owner to the possession of Jamaican land [is] an issue within the sole jurisdiction of the courts in Jamaica and are matters of Jamaican law. The case brought by Rose Hall he contends is only for recovery of its property and so cannot be part of the Operating Agreement and therefore subject to arbitration.

[12] "In support of his first argument, Counsel for Rose Hall cites the Canadian case of *Duke v. Andler* [1932] S.C.R. 734. In delivering the judgment of the court Smith J had this to say:

> 'The courts of a country have no jurisdiction to adjudicate upon the title or the right to possession of immovables situate in another country. Not only must such a dispute be decided according to the lex situs; it must be adjudicated upon by the courts of the country of the situs. The line of cases in England, in which it has been laid down that the English courts will enforce rights affecting real estate in foreign countries if such rights are based on contract fraud or trust and the Defendant resides in England, are all limited to the exercise of jurisdiction in personam, and the courts in those cases did not purport to adjudicate upon questions of title.'

[13] "Counsel for Ritz-Carlton on the other hand, submits that there is an 'opt-out' provision in the Convention with respect to immovable property and that this provision has not been exercised by either Jamaica or the United States. On this basis, he argues that where the Convention applies unless there are express words in an arbitration clause, all disputes involving immovable property are subject to arbitration and the decision of the arbitrators in relation to the property is enforceable under the provisions of the 2001 Act. The logical extension of this argument, he submits, is that foreign arbitrators have power to grant injunctive relief in respect of immovable property in Jamaica, and further that this is enforceable under Arts. I, II and III of the Convention by the Courts of Jamaica.

[14] "Sir Michael Mustill (later Lord Mustill, of the House of Lords) and Stewart Boyd, the learned authors of *The Law and Practice of Commercial Arbitration in England*, 2nd ed. at page 149 deal with the issue of what matters are capable of settlement by arbitration in this way:

> 'This question may arise at different stages of the arbitration. At the outset it may be relevant to the question whether the court will enforce the arbitration agreement by staying proceedings brought in breach of it, or by other means at its disposal. And at the conclusion of the arbitration it may be relevant to the question of whether the court will enforce the award.... In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award.... [T]he general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration. This principle is subject to certain reservations.'

[15] "Amongst the reservations listed by the learned authors are the following:

> 'the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State ... nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order etc.'

[16] "The learned authors then go on to make the following point:

> 'It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration….'

[17] "Lord Hoffman in *Fiona Trust v. Privalov* 2007 AllER (D) 233[1] has set out the modern approach to construing arbitration clauses. The following passage is taken from the judgment:

> 'In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction…. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ. remarked … "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so".'

[18] "In *Channel Tunnel Group Ltd v. Balfour Beatty Construction* [1993] 2 W.LR. 262, 276[2] Lord Mustill in delivering the leading judgment of the court made it clear that the courts will be inclined to grant a stay and against an interim injunction where the parties are awaiting arbitration proceedings and the

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1. Reported in Yearbook XXXII (2007) pp. 654-682 (UK no. 77).
2. Reported in Yearbook XIX (1994) pp. 736-747 (UK no. 37).

applicant is merely seeking from the court what the arbitrator is asked to decide. He said:

> 'The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of commercial contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognized the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take the their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point.... The purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.... Amidst all these assumptions, there is one hard fact which I believe to be conclusive, namely that the injunction claimed from the English court is the same as the injunction to be claimed from the panel and the arbitrators, except that the former is described as an interlocutory or interim. In reality its interim character is largely illusory, for as it seems to me an injunction granted in November 1991, and an injunction granted today, would largely pre-empt the very decision of the panel and arbitrators whose support forms the raison d'etre of the injunction.... In these circumstances, I do not consider that the English court would be justified in granting the very far-reaching relief which the appellants claim. It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court

> should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief.... There is always tension when the court is asked to order, by way of interim relief in support of arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that the panel and the arbitrators can decide whether to order a final mandatory injunction. If the court now orders an interlocutory mandatory injunction, there will be very little for the arbitrators to do. Any doubts on this score are to my mind resolved by the choice of the English rather than the Belgian courts as the source of interim relief. Whatever exactly is meant by the words "competent judicial authority" in Art. 8.5 of the ICC Rules, the Belgian Court must surely be the natural court for the source of the interim relief. If the appellants wish the English court to prefer itself to this natural forum it is for them to show the reason why, in the same way as a plaintiff who wishes to pursue a substantive claim otherwise than in a more convenient foreign.'

[19] "It is common ground between the parties that the arbitration clause in the Operating Agreement is valid; Rose Hall itself has invoked the provision. The issue raised by Rose Hall in these proceedings is whether any arbitrator can appropriately settle an issue involving possession of immovable property in Jamaica. You may recall that Sect. 3 of the 2001 Act and Art. II(1) of the Convention provides that each Contracting State shall recognize an arbitration agreement in writing in which differences have arisen in the subject matter that 'must capable of being settled by arbitration'.

[20] "So which is it to be: is the subject matter of the arbitration agreement, capable of being settled by arbitration or incapable of being settled by arbitration? As a general proposition disputes which affect the rights of third parties or rights which are enforceable against the world or involve issues of criminal liability are incapable of settlement by arbitration.

[21] "In this case, however, there is a difference which Counsel for Rose Hall has not addressed. In my view the subject matter of the arbitration is not

possession of Jamaican land (in rem) as claimed by Counsel for Rose Hall, but the rights as between the parties (in personam) in the arbitration to the possession of Jamaican land. Counsel for Rose Hall has sought to equate the determination of possession of the Resort as between the parties to the arbitration with an order in rem by a foreign arbitrator, which I hold to be incapable of recognition in Jamaica.

[22] "In *Catania v. Giannattasio* [1999] I.LPr. 630 the Ontario Court of Appeal in dealing with the right of the Canadian Court to make orders in relation to property overseas had this to say:

> 'It is a general rule of Canadian law that courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country. By way of exception, Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if those rights are based on contract, trust or equity and the Defendant resides in Canada. They will, however, only exercise this exceptional in personam jurisdiction if four criteria are met: (1) the court must have in personam jurisdiction over the defendant; (2) there must be some personal obligation between the parties; (3) the jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment; and (4) the court will not exercise jurisdiction if the order would be of no effect in the situs.'

[23] "More recently, in *Pattni v. Ali* [2006] UKPC Lord Mance in delivering the judgment of the Board made it clear at paras. 25 and 26 that

> 'An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and the lex situs of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to rules 120 and 124 in *Dicey, Morris & Collins*. Immovables fall into a different and special category in private international law.... Even so, it has long been accepted in England that an English court may, as between parties before it, give an in personam judgment to enforce contractual or equitable rights in respect of

immoveable property situate in a foreign country: see *Dicey, Morris & Collins* rule 122(3).'

[24] "Applying the approach of Lord Hoffman in *Fiona Trust* any court considering the interpretation of on arbitration agreement 'should start on the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal'. He went on further to point out that the court should construe the clause 'in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction'.

[25] "In my judgment the issues raised in the arbitration are capable of being settled by arbitration as it involves only the rights as between the parties in the arbitration to the possession of Jamaican land being the Resort. Whatever the result of the foreign arbitration, it cannot affect the rights of third parties involving the Resort or any rights which are enforceable against the world."

2. "Incapable of Being Performed"

[26] "The main point raised here by Counsel for Rose Hall is essentially the first argument under a separate sub-section of the Convention. It is that the arbitration agreement itself is 'incapable of being performed' as the subject matter of the arbitration is Jamaican land and that this is not capable of settlement by arbitration. As I have already noted the point is connected to the first argument but raises the objection under Art. II(3) of the Convention.

[27] "The essence of the argument is that any reference under Art. II(3) must fail as any agreement to refer the right of Rose Hall to possession of Jamaican land to foreign arbitration would be 'inoperative or incapable of being performed' because the Jamaican courts would not recognize or enforce such an order. Counsel for Rose Hall submits that a contrary interpretation would require unambiguous language in the statute or failing that necessary implication.

[28] "This court takes the view that where the action brought by Rose Hall is within the terms of the arbitration provisions (as I have found), Art. II(3) of the Convention is clearly relevant. Art. II(3) requires the court to 'refer the parties to arbitration' in respect of a matter which falls within the Article. Where this is so, a stay on any other proceeding brought by either party is obligatory. To evade the statutory process, Rose Hall (the party in this case resisting the stay) would have to show that the 'agreement is null and void, inoperative or incapable

of being performed'. If they were able to establish this, then a stay would be refused by the court.

[29] "I accept the submission of Vincent Nelson Q.C. (hereafter called Counsel for Ritz-Carlton) that as Rose Hall started the arbitration process by invoking the arbitration clause and demanding arbitration they cannot now say that the arbitration clause is 'incapable of being performed'. Furthermore, 'incapable of being performed' has a special meaning, The learned authors of *The Law and Practice of Commercial Arbitration in England* (referred to earlier) make the point that:

> '"Incapable of being performed" connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. There must be some obstacle which cannot be overcome even if the parties are ready, willing and able to perform the agreement … for example where the mechanism for constituting the tribunal breaks down in a way which the court has no ability to repair, or where the sole arbitrator named in the agreement cannot or will not act….'

[30] "To give an example. Even if one were to accept that the result of the foreign arbitration may not be recognized or enforced by the courts in Jamaica that does not make the arbitration agreement 'incapable of being performed'. In this case, Rose Hall – as the party resisting the application for the stay – has failed to establish any circumstances which would rule out a compulsory stay on their action.

[31] "Consequently, I hold that the arbitration clause in the Operating Agreement is not only valid but is subject to Sect. 3 of 2001 Act and Art. II(3), which imposes a mandatory stay on the proceeding for an injunction brought by Rose Hall."

IV. PUBLIC POLICY

[32] "The contention here is that this court should refuse recognition or enforcement of a foreign arbitral award dealing with the possession of Jamaican land as to do so would be contrary to public policy. This point is also connected to the first argument but raises the objection under Art. V of the Convention.

[33] "This argument can be disposed of quickly. Firstly, for the other reasons given, the foreign arbitration can only relate to the rights between the parties to the arbitration to the possession of the land. Secondly, I agree with Counsel for

Ritz-Carlton that it is a matter of public policy that Jamaica should comply with its international obligations. I go further to say that it is a matter of public policy that the Jamaican courts should recognize awards of foreign arbitral tribunals unless the awards are contrary to conceptions of morality and fairness. That is clearly not the case here. Thirdly, objections to the award of a foreign arbitral tribunal are available under the 2001 Act and Art. V of the Convention at the enforcement stage, not prior to the award as Rose Hall is attempting here."

V. SCOPE OF THE ARBITRATION CLAUSE

[34] "As I have said before, the Operating Agreement provides that the relationship between the parties is governed solely by the laws of the State of Georgia, United States of America. Rose Hall contends that under Georgia law Ritz-Carlton has no right to remain in occupation of the Resort. The expert evidence given to the Court on that issue has not been helpful as it conflicts in important areas. In any event, as Counsel for Rose Hall says, proof of foreign law is evidential and is to be treated as fact, not law.

[35] "Counsel for Rose Hall argues that where there is doubt as to what foreign law says this Court should presume that the foreign law is the same as Jamaican law. On this basis, he has asked this court to hold that Ritz-Carlton has no proprietary interest in the Resort and must leave on the demand of Rose Hall.

[36] "I disagree for two reasons. First, the parties have agreed to arbitration in accordance with Georgia law, so there cannot be any doubt that the construction of the arbitration agreement and issues arising from it are to be settled by applying that law. Second, on 29 October 2009, the Superior Court of Gwinnett County, State of Georgia, stayed Rose Hall's Complaint and ordered as follows:

> 'The underlying agreement between the parties at paragraph 13.6 requires the parties to submit to arbitration any dispute, controversy, or claim arising out of or relating to the agreement. It is undisputed that Plaintiff made its demand for Arbitration on 1 July 2009. Defendant Ritz-Carlton Jamaica does not dispute that the matter should be properly decided in arbitration in accordance with the underlying agreement.
>
> As the claim(s) raised in this Complaint and/or Amended Complaint, filed 19 October 2009, involve a dispute, controversy, or claim arising out of or relating to the underlying agreement, the Motion to Compel Arbitration is hereby granted, and the above-styled civil action file is hereby stayed during the pendency of that arbitration.

> If there are matters raised in the instant Complaint not resolved at the conclusion of the arbitration proceedings, and for good cause shown, either party may petition the Court to reopen this matter at that time.'

[37] "Consequently, without minimizing the volumes of expert evidence on Georgia law submitted by the parties, it is my view that the decision of the Superior Court of Gwinnett County in the State of Georgia is the best indication of what Georgia law is and how it should be applied on the issue here. I so hold."

VI. CONCLUSION

[38] "In summary then, this court holds that:

(i) The injunction brought by Rose Hall is subject to an arbitration agreement in writing to submit to arbitration all or any differences which have arisen or may arise under the Operating Agreement;
(ii) The arbitration agreement is to be interpreted under the laws of the State of Georgia;
(iii) The subject matter of the arbitration is capable of being settled by arbitration within the meaning of Sect. 3 of 2001 Act and Art. II(2) of the Convention as it involves the rights (in personam) as between the parties in the arbitration to the possession of Jamaican land;
(iv) The arbitration agreement is subject to Sect. 3 of the 2001 Act and Art. II(3) of the Convention, which imposes a mandatory stay on the proceedings for an injunction brought by Rose Hall.

[39] "For all these reasons the application for an injunction brought by Rose Hall is stayed pending the completion of the arbitration proceedings between itself and Ritz-Carlton. Costs in the cause."

LITHUANIA

Accession: 14 Mar. 1995
1st Reservation

1. Lietuvos Respublikos Aukščiausiasis Teismas [Supreme Court of Lithuania], 21 February 2011, Civil case No. 3K-3-65/2011[1]

Parties:	Appellant/Claimant: K. M. (nationality not indicated) Respondent/Defendant: JSC A. Sabonio Žalgirio krepšinio centras (Lithuania)
Published in:	Available online at <www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html>
Articles:	V(2)(*a*); V(2)(*b*)
Subject matter:	– arbitrability of sports dispute
Topics:	¶ 519

Summary

The Supreme Court reversed the decision of the court of appeal denying enforcement of a Swiss award because the subject matter of the dispute – a sports contract – equaled an employment contract and was therefore not arbitrable under Lithuanian law. The Court held that unless the parties agree otherwise, sports contracts are not the same as employment contracts and create rather a separate relationship regulated by a specific Law which does allow for arbitration of disputes.

On 15 June 2000, K. M., a professional basketball player, entered into a contract with a Lithuanian club, JSC A. Sabonio Žalgirio krepšinio centras (the Club) to

1. The General Editor wishes to thank Justinas Jarusevicius, Associate at Motieka & Audzevicius, Vilnius, and Assistant at Vilnius University Faculty of Law, for his invaluable assistance in providing this decision and translating it from the Lithuanian original.

play in three consecutive seasons (2000/2003) in the Lithuanian football league. Art. X of the contract provided that the contract was governed by Lithuanian law; it also provided that disputes arising under the contract would be referred to arbitration by a sole arbitrator.

A dispute arose between the parties when the Club terminated the contract before expiry. K. M. claimed payment of arrears and the difference in unrealized income. Arbitration proceedings ensued before a sole arbitrator at the Arbitration Court of the Lugano Chamber of Commerce, Industry and Handicraft. On 30 March 2010, the arbitrator issued an award in favor of K. M., directing the Club to pay K. M. arrears in the amount of US$ 233,412, including individual income tax.

On 28 April 2010, K.M. filed a request for recognition and enforcement of the Swiss award with the Court of Appeal of Lithuania. On 28 September 2010, the court dismissed K. M.'s request, finding that the relationship between the parties was a labor relationship; since labor disputes cannot be submitted to arbitration under Lithuanian law, enforcement should be denied under Art. V(2)(*a*) of the 1958 New York Convention and the corresponding provision of the Lithuanian Law on Commercial Arbitration, for lack of arbitrability of the subject matter of the dispute.

The Supreme Court of Lithuania, before Judges Janina Januškienė, Egidijus Laužikas and Algis Norkūnas, in an opinion by Judge Januškienė, reversed the lower court's decision and sent the case back to the court of appeal for a review of the case.

The Court reasoned at the outset that it appears from Lithuanian jurisprudence and doctrine that although the relationship arising from a sports contract does have certain features of a labor relationship, a sports contract is not deemed to be an employment contract unless it clearly appears so to be or the parties so agree. Otherwise, a sports contract is a sui generis relationship regulated by a specific Lithuanian law, the Law on Physical Education and Sport. This Law allows sports disputes to be settled by arbitration.

The Supreme Court found that the court of appeal incorrectly found that the legal relationship at issue most closely resembled a labor contract and thus the ensuing award could not be enforced in Lithuania. The court of appeal ruled in conflict with the above jurisprudence of both the court of appeal itself and the Supreme Court, which holds that a sports contract is not per se an employment contract. The decisions should therefore be reversed.

The Court added that because it reached the (incorrect) conclusion that the subject matter of the dispute was not arbitrable, the court below did not deal with the public policy objections raised by the Club. These objections – that the

provisions of the contract were discriminatory against the Club, that recognition and enforcement would violate the principles of reasonableness and justice and be incompatible with good morals, that the award awarded punitive damages, etc. – should be dealt with by the court of appeal in new proceedings.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345050-n>.

LITHUANIA NO. 1

Excerpt

I. BACKGROUND

[1] These cassation proceedings concern the recognition and enforcement of a foreign arbitral award in the Republic of Lithuania, after the parties to the case raised a legal question whether a dispute arising from the performance of a sports contract is capable of settlement by arbitration, i.e., whether the subject matter of the dispute belongs to the exclusive jurisdiction of national courts, or whether parties can agree to submit it to arbitration.

[2] "The Arbitration Court of the Lugano Chamber of Commerce, Industry and Handicraft in its final award of 30 March 2010 ('the arbitral award') awarded the claimant (appellant) K. M. arrears for US$ 233,412, including individual income tax, against the defendant (respondent) JSC A. Sabonio Žalgirio krepšinio centras [the Club], arising from the performance of the sports contract of 15 June 2000 between the parties.

[3] "On 28 April 2010, K.M. submitted a request to the Court of Appeal of Lithuania for the recognition and enforcement of the arbitral award in the Republic of Lithuania. The request is based on the fact that on 15 June 2000 the parties entered into a contract, which provides that all disputes arising out of or in connection with the contract shall be finally settled by arbitration. The arbitral tribunal settled the dispute concerning the payment of remuneration (compensation) after the unlawful termination of the contract by the Club. According to K. M., Lithuanian law, chosen by the parties as the applicable law, allows the subject matter of the dispute to be submitted to arbitration; the arbitral award does not contravene international public order or the main legal principles, moral rules, national and public interests of the Republic of Lithuania."

II. THE DECISION OF THE COURT OF APPEAL OF LITHUANIA

[4] "The ruling of 28 September 2010 of the Panel of Judges of the Civil Division of the Court of Appeal of Lithuania dismissed K. M.'s request.

[5] "The Court found that K. M. is a professional sportsman (basketball player); on 15 June 2000 the parties entered into a sports contract, according to which the Club hired K. M. to provide the service of basketball playing for three seasons (2000-2001, 2001-2002 and 2002-2003). The dispute arose because the Club terminated the contract before the expiry of its term due to, in its view,

premeditated actions of the basketball player, whereas the latter demanded the payment of the arrears for the preceding season and the difference in the unrealized income during a certain season. In Art. X of the contract the parties agreed that all disputes arising out of or in connection with the contract shall be finally settled by a sole arbitrator … [and that] the contract is interpreted and executed in accordance with Lithuanian laws.

[6] "The Court of Appeal referred to the ruling of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania in Case No. 3K-3-602/2000 (*R.S. v. Vilniaus 'Statybos' krepšinio klubas*) of 24 May 2000, where it was found that when there is a special law regulating professional sport and a contract is signed in accordance with the provisions of that law, the dispute arising between the parties must be settled on the basis of these acts, and legal norms which regulate labor relations are not applicable.

[7] "In the view of the Court of Appeal of Lithuania, the fact that sports contracts are regulated by a special law (the Law on Physical Education and Sport) has absolutely no influence on the legal qualification of the relationship – whether that is a relationship arising solely from sports activity, or whether it must be regarded as a labor relationship.

[8] "Art. 29 of the Law on Physical Education and Sport defines a professional sportsman as a sportsman who receives remuneration for preparation for and participation in competitions from a sports organization with whom he has concluded a sports contract. Art. 31 of the Law on Physical Education and Sport provides that a sports organization which has concluded a sports contract with a professional sportsman or referee makes the social security payments on behalf of the sportsman in accordance with the relevant laws.

[9] "The contract of 15 June 2000 provides the amount of the wage to be paid to the player and states that the remuneration is the player's income, after the individual income tax and social security payments applicable in Lithuania (Art. VII of the contract). In Art. I of the contract the player undertook, inter alia, to follow the rules established by the Club for the discipline of players. This qualifies as subordination, an attribute of labor relations or analogous relations: the employee obeys the orders of the employer and the established work regulations.

[10] "The Court qualified the disputed legal relationship as a labor relationship on the basis of the provisions of the contract related to the payment of remuneration to the player irrespective of whether he shall manage to achieve the anticipated level of performance, i.e., irrespective of the result of the service (work) provided, as well as provisions relating to the safeguards to the player that the contract shall not be terminated on the grounds of sickness or injury during

the provision of the services (while working in the interests of the Club) (Art. III of the contract). The Court stated that the aforementioned provisions of the contract are clear; therefore, the rule of *contra proferentem* is inapplicable in their interpretation (Art. 6.193(4) of the Civil Code). The Court concluded that the disputed legal relationship is closer to a labor relationship than to a civil legal relationship.

[11] "Art. 39(1) of the Law on Commercial Arbitration provides that a decision of an arbitral tribunal, issued in any state party to [the 1958 New York Convention], is recognized and enforced in the Republic of Lithuania pursuant to Arts. 39 and 40 of the Law on Commercial Arbitration and the provisions of the New York Convention. In line with Art. 11(1) of the Law on Commercial Arbitration, disputes arising from labor relationships cannot be submitted to arbitration. Consequently, under the national law, the subject matter of the dispute is not capable of settlement by arbitration (Art. V(2)(*a*) of the New York Convention; Art. 40(2)(1) of the Law on Commercial Arbitration). Parties to the contract could not submit to arbitration disputes arising out of or in connection with a sports contract; therefore, recognition of a foreign arbitral award must be refused."

III. THE PARTIES' POSITIONS

[12] "In his cassation appeal, K. M. requests the reversal of the ruling of 28 September 2010 of the Panel of Judges of the Civil Division of the Court of Appeal of Lithuania and to issue a new ruling to recognize and enforce the final award of 30 March 2010 of the Arbitration Court of the Lugano Chamber of Commerce, Industry and Handicraft. The cassation appeal provides the following grounds for cassation and arguments supporting them:

> 'The cassation disagrees with the conclusion in the Court of Appeal's ruling that the disputed relationship, which was submitted to arbitration, constitutes a labor relationship, and indicates that such conclusion was drawn in light of an incorrect interpretation of the nature of the relationship arising from the contract and of Art. 11(1) of the Law on Commercial Arbitration. When interpreting the concept of labor relations, the court of cassation has stated that in order to qualify a legal relationship as a labor relationship it is essential to determine that it meets all the criteria of an employment contract listed in Art. 93 of the Labor Code (ruling in Case No. 3K-3-387/2006 *N.J. v. M. Žagminienės įmonė*

'Oldtaunas' of 27 June 2006 of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania). At the time when the parties entered into the contract, the Law on Employment Contracts, applicable to the qualification of the relationship between the parties, was also in force; its Art. 3 (as well as Art. 93 of the Labor Code currently in force) provides that an employment contract is an agreement between an employee and an employer whereby the employee undertakes to perform work of a certain profession, speciality, qualification or to perform specific duties in accordance with the work regulations established at the workplace, whereas the employer undertakes to pay the employee the agreed wage and to ensure working conditions as set in labor laws, other regulatory acts, the collective agreement and by agreement between the parties. Sports contracts are regulated by a special law – the Law on Physical Education and Sport. The court of cassation has noted that although sports activity is a professional sportsman's work activity of a certain special type, for which the sportsman receives a wage, nonetheless, when there is a contract concluded in accordance with the provisions of the Law on Physical Education and Sport, legal norms which regulate labor relations are not applicable (ruling in Case No. 3K-3-602/2000 *R.S. v. Vilniaus 'Statybos' krepšinio klubas* of 24 May 2000 of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania). Professional sports relations are underpinned by the principle of freedom of contract, which is typical to civil legal relations but not to labor relations. Sports relations also lack other attributes of labor relations, such as restrictions in the termination of employment contracts, safeguards to employees, etc. – in sports relations they are subject to the agreement of the parties. A sportsman, unlike an employee, may become a party to a sports relationship via a representative (Art. 30(5)-(6) of the Law on Physical Education and Sport). A sports contract must indicate the duration of its validity (Art. 30(2)(7) of the Law on Physical Education and Sport), whereas limited duration is not typical to employment contracts. Legal doctrine also recognizes that a sports contract is a civil contract.[2] Furthermore, the need to ensure the stability of a contractual relationship by upholding the duration set in the contract is important in sports relations, unlike in the case of an employment contract, where the employee or employer may institute the procedure of terminating the employment contract for various reasons. That is why disputes arising from a sports contract are not

2. "V. Tiažkijus, *Labor Law: Theory and Practice* (Justitia 2005) p. 120."

> equivalent to disputes arising from labor relations, and parties to a contract have the right to submit the disputes arising from it to arbitration; this right is not limited by the Law on Commercial Arbitration. Account must also be taken of the principle of legality of restrictions on individual rights, which requires any such restrictions to be clear and provided by law. In addition, Art. 51(2) of the Law on Physical Education and Sport provides that parties to the dispute may submit their dispute to sports arbitration if they so wish. Imposing limitations on the settlement of disputes which arise from sports relations would preclude Lithuanian sportsmen and sports organizations from submitting disputes to arbitration, including the International Court of Arbitration for Sport, located in Lausanne, Switzerland, whose jurisdiction is recognized by nearly all international and national sports organizations. In this case, the limitation to recognize arbitral jurisdiction would breach the legitimate expectations on the recourse to arbitration which the parties to the case had when entering into the contract. The cassation appeal also draws attention to the fact that the disputed ruling of the Court of Appeal contradicts an earlier ruling adopted by the Court of Appeal in Case No. 2T-94/2009 of 13 July 2009, which recognized and enforced a foreign arbitral award issued in a dispute arising from sports relations.'

[13] "In its response to the cassation appeal, the Club requests dismissal of the cassation appeal and uphold the ruling of 28 September 2010 of the Panel of Judges of the Civil Division of the Court of Appeal of Lithuania. The response to the cassation appeal provides the following arguments for disagreement with the cassation appeal:

> 'In the contract, the parties, expressing their will, agreed to establish labor relations – the appellant undertook to perform duties and gained the right to receive remuneration, and the Club undertook to pay remuneration. The contract includes the obligation to comply with the rules of the basketball club, sets office hours, the appellant undertook to play the game of basketball professionally. Thus, the true will of the parties was to create a relationship revolving around the performance of work and remuneration for the work. The contract does not indicate a particular legislative act, on the basis of which the parties concluded the contract. The qualification of the legal relationship between the parties to the dispute depends on their agreement. Pursuant to the Regulations of the Lithuanian Basketball Clubs Association, which were in force at the time when the disputed

relationship came into being, clubs could register players and coaches on the basis of both sports contracts and employment contracts. The ruling of the Court of Appeal of Lithuania in Case No. 2-291/2009 of 23 April 2009 stated that sports activity is a professional sportsman's activity of a certain special type, for which he receives a wage which is his source of income (source of living). The ruling in Case No. 3K-3-602/2000 *R.S. v. Vilniaus 'Statybos' krepšinio klubas* of 24 May 2000 of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania, cited in the cassation appeal, is distinguishable from the present case on the basis of facts. Indisputable evidence that the contract was concluded solely in line with the provisions of the Law on Physical Education and Sport has not been provided in this case. In the amendments of the Law on the State Social Insurance and the Law on the Health Insurance, which entered into force on 1 January 2009, the income received on the basis of employment contracts and sports activity is treated almost identically for the purposes of compulsory social insurance and health insurance payments. Art. 51(2) of the Law on Physical Education and Sport provides not only that parties to a dispute may submit their dispute to sports arbitration if they so wish, but also that parties may submit their dispute to sports arbitration and the establishment of such arbitration and its regulations shall be provided by the Department on Physical Education and Sport, which to date has not established such sports arbitration. This provision does not refer to dispute settlement in foreign arbitral tribunals. Furthermore, it must be noted that in the contract the parties agreed that the contract will be interpreted and executed in accordance with Lithuanian laws. Therefore, Art. 11(1) of the Law on Commercial Arbitration must be applied, according to which disputes arising from labor relations are not capable of settlement by arbitration.'"

IV. ANALYSIS

[14] "The Panel of Judges finds [as follows]."

1. Arbitrability of a Dispute Arising from a Sports Contract

[15] "The jurisdiction of an arbitral tribunal to decide particular disputes is determined by the agreement of the parties (arbitration clause) to submit certain types of issues to arbitration. The [1958 New York Convention] does not establish arbitral jurisdiction to decide all disputes of any kind. Arbitral

jurisdiction does not extend to disputes which, according to national law, must be decided by national courts. Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement are sought (in the case of Lithuania – the Court of Appeal of Lithuania) finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country (Art. V(2)(*a*) of the New York Convention). In line with Art. 11(1) and Art. 40(2)(1) of the Law on Commercial Arbitration of the Republic of Lithuania, disputes arising from labor relations are not capable of settlement by arbitration.

[16] "An arbitration clause agreed by the parties to a sports contract expresses an alternative dispute settlement mechanism of their choice, i.e., submitting disputes to arbitration.

[17] "When distinguishing labor relations from other legal relations, the Supreme Court of Lithuania has clarified that in order to qualify a legal relationship as a labor relationship it is essential to determine that it meets all the criteria of an employment contract listed in Art. 93 of the Labor Code. The essential attributes of an employment contract which distinguish it from other remunerative contracts, provided in Art. 93, are the following:

(1) the employee performs work of a certain profession, speciality, qualification or performs specific duties;
(2) the employee works in accordance with the established rules and regulations of the workplace.

The first requirement means that the employee performs certain generic working functions rather than specific tasks; the second requirement means that the employee is not independent when performing his work and must comply with the lawful orders given by the employer (ruling in Case No. 3K-3-387/2006 *N.J. v. M.Ž. įmonė 'Oldtaunas'*of 27 June 2006 of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania). In another ruling the Supreme Court of Lithuania noted that sports activity is a professional sportsman's work activity of a certain special type, for which he receives a wage; however, when there is a contract concluded in line with the provisions of the Law on Physical Education and Sport, legal rules which regulate labor relations are not applicable (ruling in Case No. 3K-3-602/2000 *R.S. v. Vilniaus 'Statybos' krepšinio klubas* of 24 May 2000 of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania).

[18] "It must be noted that professional sports relations are underpinned by the principle of freedom of contract, which is typical to civil legal relations but not

to labor relations. Sports relations also lack other typical features of labor relations, such as subordination, restrictions on terminating an employment contract, safeguards to employees, right to paid leave, etc. – in sports relations they are subject to the agreement of the parties. Furthermore, in professional sports relations, unlike labor relations, the emphasis is not on the performance of functions but on the achievement of a concrete (sports) result; besides, sports contracts have other typical features, such as establishing a training regime, medical care, accommodation of the sportsman, transportation, health insurance, etc. This determines that a sports contract by its nature is classified as first and foremost a services contract. Only in those cases where parties agree in a sports contract that such a contract is also an employment contract, or when the provisions of such contract clearly show that the parties have established a labor relationship, then such a contract is qualified as also establishing labor relations. Legal doctrine also recognizes that a sports contract is a civil contract.[3]

[19] "The Panel of Judges accepts the legal merit of the argument provided in the response to the cassation appeal that the legal qualification of the relationship between the parties to the dispute depends upon their agreement. It must be acknowledged that the relationship between the parties arising from a sports contract has certain features of labor relations; however, if the provisions of a sports contract are insufficient to make it equal to an employment contract, then the laws of the Republic of Lithuania do not recognize professional sport relations as labor relations but instead they are considered a separate type of legal relations arising from a sports contract and regulated by the special Law on Physical Education and Sport.

[20] "With regard to another argument presented in the response to the cassation appeal, namely that the Regulations of the Lithuanian Basketball Clubs Association, which were in force at the time when the disputed relationship came into being, permitted clubs to register players and coaches on the basis of both sports contracts and employment contracts, the Panel of Judges notes that in the case at hand the dispute between the parties arose precisely from a sports contract and not an employment contract. Part I of the sports contract includes a provision on the subject matter of the contract – i.e., providing basketball services during the period of validity of the contract. Consequently, in accordance with the content of the contract, the legal relationship between the parties which arises during its validity, most closely resembles and must be legally qualified as provision of remunerative services, regulated by the general provisions of Chapter XXXV 'Provision of Remunerative Services' of Book Six

3. *Op. cit.*, fn. 2.

of the Civil Code. It must also be noted that the qualification of professional sports relationship under private law, i.e., distinguishing between civil legal relations and labor relations, does not have an impact on their qualification under public law (i.e. tax law), since the aforementioned relations are regulated by the taxation provisions of tax law.

[21] "Attention must be further drawn to the fact that Art. 51 of the Law on Physical Education and Sport provides that disputes relating to the protection of rights set out in the Law shall be settled in accordance with the laws of the Republic of Lithuania; parties to a dispute may submit it to sports arbitration if they so wish. This provision was confirmed and applied by the Court of Appeal of Lithuania in the ruling in Case No. 2-291/2009 of 23 April 2009 and the ruling in Case No. 2T-94/2009 of 13 July 2009. The response to the cassation appeal mistakenly claims that the ruling by the Court of Appeal issued in the present case followed the aforementioned case law.

[22] "According to the data of the case at hand, the Swiss Arbitration Court of Lugano settled the dispute concerning the award of remuneration (compensation) to K. M. after the Club unlawfully terminated the sports contract. The Court of Appeal of Lithuania stated that the disputed legal relationship, arising from a sports contract, more closely resembles labor relations and not civil legal relations.

[23] "The Panel of Judges of the court of cassation, deciding this case, cannot fully agree with this conclusion of the Court of Appeal of Lithuania. This conclusion was made without taking into consideration the essential differences, discussed above, between the content (provisions) and purpose of the sports contract which exists in the present case and the concept of an employment contract, provided in the Labor Code and elaborated in jurisprudence.

[24] "It must be concluded that the ruling of the Court of Appeal of Lithuania, which is disputed in these cassation proceedings, is in conflict with the above-mentioned practice of interpretation and application of law of both the Court of Appeal of Lithuania and the Supreme Court of Lithuania, namely the interpretation that a sports contract is not in and of itself regarded as a type of an employment contract, as well as the interpretation that disputes arising from such a contract are capable of settlement by arbitration upon the agreement of the parties.

[25] "The Court of Appeal of Lithuania in its ruling incorrectly decided that the dispute arising from a sports contract presented in the case at hand is not capable of settlement by arbitration, and on this basis groundlessly refused to recognize the jurisdiction of the arbitral court to settle the dispute between the parties

arising from the performance of such contract. Thus, the aforementioned ruling cannot be considered legal and valid, and is thereby reversed."

2. Public Policy

[26] "The Court of Appeal of Lithuania in its ruling considered the arbitral [tribunal's] lack of jurisdiction to settle the dispute between the parties arising from the performance of a contract, thus, it made a conclusion not to recognize the arbitral award and accordingly it did not need to make and did not make any pronouncements on the other conditions which are essential for recognition and enforcement of an arbitral award in the Republic of Lithuania.

[27] "Attention must be drawn to the fact that the Club, which argues against the recognition and enforcement of the arbitral award, in its response to the appellant's request to the Court of Appeal of Lithuania presented arguments – on the provisions of the contract being discriminatory against a party to the contract (the Club); on the infringement of principles of reasonableness and justice by the recognition and enforcement of the arbitral award and its incompatibility with good morals; on punitive damages, etc. – aiming to show that the arbitral award is contrary to the public policy of the Republic of Lithuania.

[28] "This is an independent ground which must be examined by the Court of Appeal of Lithuania as the court of first instance deciding on the recognition and enforcement of an arbitral award (Art. V(2)(*b*) of the New York Convention; Art. 40(2)(2) of the Law on Commercial Arbitration; Art. 810(1)(5) of the Code of Civil Procedure), after hearing the parties and examining the grounds of the Club's arguments concerning infringement of public policy. Since this question was not examined by the Court of Appeal of Lithuania, the Supreme Court of Lithuania does not make any pronouncement in this regard, for there is no matter of cassation in this part of the case (Art. 340(1) of the Code of Civil Procedure).

[29] "The case is transferred to the Court of Appeal of Lithuania for review (Art. 359(1)(5) of the Code of Civil Procedure)."

VI. DECISION

[30] "The Panel of Judges of the Civil Division of the Supreme Court of Lithuania, pursuant to Art. 359(1)(5) of the Code of Civil Procedure, rules: To reverse the ruling of 28 September 2010 of the Panel of Judges of the Civil

Division of the Court of Appeal of Lithuania and transfer the case to the Court of Appeal of Lithuania for review.

[31] "This ruling of the Supreme Court of Lithuania is final, not subject to appeal and effective as from the day of its adoption."

2. Lietuvos Apeliacinis Teismas [Court of Appeal of Lithuania), 17 December 2012
Lietuvos Aukščiausiasis Teismas [Supreme Court of Lithuania], 10 October 2013, Civil Case No. 3K-7-326/2013[1]

Parties:	Appellant/Claimant: OAO Gazprom (nationality not indicated) Respondent/Defendant: The Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania
Published in:	*Court of Appeal*: available online at <http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=51e483dc-0f43-4ac7-876b-aeebac8f03a9>; *Supreme Court*: available online at <www.lat.lt/lt/naujienos/lietuvos-auksciausiasis-teismas-zxua.html>
Articles:	II(3); III; V; V(2)(*a*); V(2)(*b*)
Subject matters:	– public policy and arbitration and court proceedings on (arbitral) jurisdiction pending at the same time – public policy and right of state court to rule on own jurisdiction – competence-competence regarding existence, validity of arbitration clause – jurisdiction of court to determine existence, validity of arbitration agreement – review of merits of award (no) – limited review of award to ascertain grounds for refusal – narrow concept of public policy

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– relationship 1958 New York Convention and European Union Council Regulation (EC) no. 44/2001
– anti-suit injunction (injunction enjoining foreign law-suit)

Topics: [10] = ¶ 301; [11] = ¶ 502; [12]-[14] = ¶ 500; [15]-[16] = ¶ 519; [15] + [18]-[30] = ¶ 524 (arbitration and court proceedings on jurisdiction; right of state court to rule on own jurisdiction); [29] = ¶ 518; [33]-[92] = ¶ 229 + ¶ 704(C)

Summary

Court of Appeal: an SCC award was denied recognition on grounds of public policy, in its stricter meaning applicable in international arbitration. The award directed the defendant to withdraw or amend claims it had brought in a Lithuanian court, finding that this action was in violation of the arbitration clause in the shareholders' agreement between the parties. The Court of Appeal noted that both the arbitral tribunal (under the competence-competence principle) and the state court (under Art. II(3) of the 1958 New York Convention and Lithuanian law) may review the existence and validity of an arbitration agreement: an arbitration agreement does not rule out completely a recourse to the courts to determine whether a dispute should be arbitrated or not. However, arbitration and court proceedings on the same subject matter may not be pending at the same time. Here, the proceedings did not have identical parties and subject matters, but both addressed the issue whether the defendant could commence and pursue the Lithuanian action. The SCC arbitrators, who found that they had jurisdiction, should not have dealt with this issue that was already before the Lithuanian court (which eventually found that jurisdiction lay with the court). As the award limited a party's right to seek judicial remedies as well as the jurisdiction of the national court to rule on its own competence, it should be denied recognition for violation of public policy. Supreme Court: On appeal, the Supreme Court decided to refer three questions to the European Court of Justice. The proceedings commenced in the Lithuanian courts were a civil case involving parties of different EU nationalities and were therefore governed by Regulation (EC) no. 44/2001 (Brussels I Regulation), while recognition of the SCC award was sought under the New York Convention. Also, the award had the nature of an antisuit injunction as it sought to limit the defendant's right to request certain measures in the Lithuanian courts, as well as the Lithuanian court's right to issue those measures ex officio. The Court therefore asked the ECJ for guidance on the relationship between the New York Convention and the Brussels I Regulation, and in particular: (1) whether a court may refuse to recognize an award containing an antisuit injunction ordering a party not to commence court proceedings; (2) if yes, whether the same is true where the injunction orders a party to

restrict its claims; and (3) whether the award may also be refused recognition if it restricts the right of the national court to rule on its own jurisdiction.

On 24 March 2004, OAO Gazprom (Gazprom), Ruhrgas Energy Beteiligungs AG (Ruhrgas) and the State Property Fund acting on behalf of the Republic of Lithuania entered into a shareholders' agreement in respect of AB "Lietuvos dujos" (Lietuvos dujos), a Lithuanian limited liability company engaged in the natural gas industry. The shareholders' agreement contained a clause providing for arbitration of disputes in Stockholm in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) by three arbitrators appointed by the SCC.

A dispute arose in respect of Lietuvos dujos. On 25 March 2011, the Republic of Lithuania, represented by its Ministry of Energy, filed a claim against Lietuvos dujos, its director and board members (collectively, the defendants) in the Vilnius Regional Court in Lithuania (the Vilnius proceeding). The Ministry asked the court to investigate the defendants' activities and to take certain measures if these activities were found to be improper as alleged.

On 29 August 2011, Gazprom commenced SCC arbitration against the Ministry of Energy of the Republic of Lithuania (acting on behalf of the Republic of Lithuania), claiming that the Lithuanian court action was in breach of the arbitration clause in the shareholders' agreement.

On 31 July 2012, an SCC tribunal rendered an award holding that the Vilnius proceeding partially breached the arbitration clause in the shareholders' agreement. The arbitral tribunal ordered the Republic of Lithuania to withdraw certain claims filed before the Lithuanian court and to amend other claims. Gazprom sought enforcement of the SCC award in Lithuania.

In the meantime, on 3 September 2012, the Vilnius court issued its decision in the Vilnius proceeding. It held that the request for an investigation into the activities of Lietuvos dujos and its officers involved a discussion of whether the dispute should be heard by an arbitral tribunal, found that it had jurisdiction and dismissed the defendants' request to stay the proceedings and refer the dispute to arbitration.

By the first reported decision, rendered on 17 December 2012, the Court of Appeal of Lithuania denied Gazprom's application to recognize and enforce the SCC award.

The court noted at the outset that the review of a foreign award in recognition and enforcement proceedings is limited to a review of the grounds for refusal in Art. V of the 1958 New York Convention and may not extend to the merits of the award. The grounds for refusal may be raised either by the party resisting

recognition and enforcement or by the court ex officio (Art. V(1) and Art. V(2) of the New York Convention, respectively).

In the present case, the Republic of Lithuania did not rely on any of the grounds in Art. V(1); hence, the court did not take them into account even if they were discussed by Gazprom in its request. The Republic of Lithuania also did not raise any grounds under Art. V(2) of the Convention; however, the court dealt with these grounds as they are to be examined by the recognition and enforcement court on its own initiative and in all cases.

Gazprom argued that the arbitration concerned the issue whether the Republic of Lithuania violated its obligations under the valid and binding arbitration clause in the shareholders' agreement by filing a claim with the Vilnius court, and that both shareholders' disputes and disputes concerning the investigation of the activities of a legal entity are arbitrable under Lithuanian law. The court held that these arguments did not warrant granting Gazprom's request for recognition, which the court found should be denied on grounds of public policy.

The Court of Appeal reasoned that in accordance with the principle of competence-competence – which is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and accepted in Lithuanian jurisprudence and arbitration law, which is modeled on the Model Law – the arbitral tribunal has the right to rule on its own jurisdiction. However, courts also have the right to decide on the existence and validity of the arbitration agreement under Art. II(3) of the New York Convention and the Lithuanian Law on Commercial Arbitration and Code of Civil Procedure.

In a 2006 decision, the Lithuanian Supreme Court accordingly found that both the arbitral tribunal and the court are competent to decide whether the dispute is subject to arbitration. The Supreme Court further specified that parallel arbitration and court proceedings on the same subject matter and the same basis may not be pending at the same time.

Here, although the SCC arbitration and the proceedings before the Vilnius court did not have identical parties and subject matter, they both addressed the same question, namely whether the Republic of Lithuania could bring certain claims in the Lithuanian court. Hence, the Court of Appeal held that the SCC arbitral tribunal should not have examined this issue, which had already been raised before and considered by the Vilnius court. The court explicitly noted that the existence of an arbitration agreement does not prohibit recourse to the state courts absolutely, or rule out the possibility that the issue of the scope of the agreement be raised before those courts.

The Court of Appeal then found that the award of the SCC arbitrators limited the right of the Republic of Lithuania to seek judicial remedies before the

Lithuanian court, as well as the competence of that court to rule on its own jurisdiction. As a consequence, recognition and enforcement of the SCC award would violate constitutional principles related to a party's right to an objective, impartial and fair court, and affect the sovereignty of the Lithuanian state. These are violations of public policy in the stricter international meaning, applicable in the international arbitration doctrine and practice, which encompasses only the fundamental principles of the Lithuanian legal system. Recognition and enforcement should thus be denied under Art. V(2)(*b*) of the New York Convention. This is the first decision reported.

By the second reported decision, rendered on 10 October 2013, the Supreme Court of Lithuania, before Gražina Davidonienė, Virgilijus Grabinskas, Sigitas Gurevičius, Rimvydas Norkus, Antanas Simniškis (president), Janina Stripeikienė and Dalia Vasarienė, JJ, in an opinion by Antanas Simniškis, heard Gazprom's appeal and decided to refer the case to the European Court of Justice (ECJ) for an opinion on three issues.

The Court noted at the outset that the Vilnius proceedings concerned (i) a request to investigate the activities of Lietuvos dujos and its officers and (ii) a request to take certain measures, provided for in the Lithuanian Civil Code, if those activities were found to be inappropriate. (These measures range from removing the persons who acted improperly to putting in place an interim management, etc., and can be either requested by a party or ordered by the court at its own initiative.) According to Lithuanian law, the Vilnius proceeding was therefore a civil case in respect of rights falling within the regulatory scope of the Civil Code. Civil and commercial matters are covered in principle by Council Regulation (EC) no. 44/2001 (the Brussels I Regulation).

Further, the Vilnius proceeding concerned more than one European Union Member State, because one of the main shareholders of Lietuvos dujos was Ruhrgas, a German enterprise; hence, any decision to be issued by the Supreme Court in this case could have an effect in another Member State.

The Supreme Court then summarized the SCC arbitration initiated by Gazprom and the resulting award, in which the arbitrators found, relevantly, that the commencement of the Vilnius proceedings was in breach of the shareholders' agreement and ordered the Republic of Lithuania to withdraw or amend certain requests. In particular, the SCC award directed the Republic of Lithuania (i) to withdraw the request that Lietuvos dujos be compelled "to enter into genuine negotiations with Gazprom for a fair and equitable price of gas, and to provide documents concerning these negotiations to the company's governing board") and (ii) to limit its request for the measures provided for in the Lithuanian Civil Code – to be taken if Lietuvos dujos's activities were found to be inappropriate –

to requests which did not breach the rights and obligations under the shareholders' agreement and which the defendant would not be able to request before an arbitral tribunal convened in accordance with the arbitration clause in the agreement.

The present proceeding, noted the Court, concerned Gazprom's request to recognize and enforce the SCC award under the 1958 New York Convention.

Having stated the main aspects of the situation before it, the Supreme Court explained why it decided to seek the legal opinion of the ECJ on three issues.

First, pursuant to the Brussels I Regulation, conventions regulating the recognition and enforcement of decisions in the European Union apply only to the extent that the Regulation's principles of free movement of decisions and mutual trust in the administration of justice in the European Union (*favor executionis*) are upheld. Thus in principle a national court, which must ensure the full effectiveness of EU law, should be able not to rely on the provisions of the New York Convention, which regulate the recognition and enforcement of arbitral awards, if their application violates the principle of the supremacy of EU law. However, the New York Convention is a widely applied international convention to which all EU Member States are parties. A question is therefore whether this justifies a different approach, reasoned the Court.

The Supreme Court stated that guidance by the ECJ on the relationship between the New York Convention and the Brussels I Regulation was essential in order to properly decide the case at hand and ensure that the Supreme Court would not violate its duty to ensure the full effectiveness of EU law.

Further, the SCC award at issue had, in the Court's opinion, the nature of an antisuit injunction, as it restricted a party – here, the Republic of Lithuania – from fully continuing proceedings in the Lithuanian courts.

The Court noted that the ECJ never addressed a situation such as the present one, namely an antisuit injunction issued by an arbitral tribunal in an award whose recognition is sought under the New York Convention. Hence, the ECJ never decided whether in granting such recognition the national court would not ensure the effective operation of the Brussels I Regulation.

ECJ jurisprudence clearly indicates, added the Court, that an antisuit injunction issued by a court of a Member State – restraining a party 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 is in violation of the Brussels I Regulation and should not be recognized by the courts of Member States. In the Supreme Court's opinion, antisuit injunctions in awards should be similarly treated, as a contrary

interpretation would mean that dispute settlement in arbitration would gain a distinct advantage over dispute settlement in national courts.

Finally, the question arose in the present case whether an arbitral tribunal may issue an antisuit injunction limiting the right of a national court to issue a decision. The SCC award – which limited the measures the Republic of Lithuania could request in the Vilnius proceedings to requests that did not affect the rights and obligations under the shareholders' agreement and could not be sought in an arbitration thereunder – sought to limit the right of the Vilnius court to order such measures, which are provided for in the Lithuanian Civil Code in the context of an investigation of the activities of a legal entity, on its own initiative.

The Supreme Court therefore referred the following questions to the ECJ:

(1) Whether, if an arbitral tribunal issues an antisuit injunction by which it restricts a party from bringing a case with certain claims before a court of a Member State, which, under the rules of jurisdiction in the Brussels I Regulation, has jurisdiction to rule on the merits of the civil case, the court of a Member State has the right to refuse to recognize such arbitral award, because the award restricts the court's right to determine itself whether it has jurisdiction in the case under the rules of jurisdiction in the Brussels I Regulation;
(2) In case the answer to the first question is in the affirmative, whether the same is true in the case when the antisuit injunction issued by the arbitral tribunal orders a party to the proceedings to restrict its claims in a case that is being examined in another Member State, and the court of that Member State has jurisdiction to examine that case under the rules of jurisdiction in the Brussels I Regulation;
(3) Whether a national court seeking to ensure the supremacy of EU law and the full effectiveness of the Brussels I Regulation may refuse to recognize an award by an arbitral tribunal, if such award by the arbitral tribunal restricts the right of the national court to rule on its jurisdiction and competence in a case that falls under the jurisdiction of the Brussels I Regulation.

This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345051>.

Excerpt

Court of Appeal, 17 December 2012

[1] "The Panel of Judges of the Civil Division of the Court of Appeal of Lithuania, consisting of Judges Artūras Driukas, Vytas Milius and Egidijus Žironas (Chairperson and Rapporteur), at the court hearing by written procedure, examined the request of [Gazprom] to recognize and enforce the award of 31 July 2012 of the Arbitration Institute of the Stockholm Chamber of Commerce of the Kingdom of Sweden in the Republic of Lithuania [the Arbitration Institute]; the party in interest [i.e., the defendant] is the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania.
[2] "The Panel of Judges, having examined the request, has established [the following]."

I. BACKGROUND

[3] "On 25 March 2011, the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, filed a claim against [Lietuvos dujos], V.G., K.S. and V.V. before the Vilnius Regional Court. [The Republic of Lithuania] requested [the court] to launch an investigation into the activities of Lietuvos dujos and, if it found that the activities of Lietuvos dujos and/or of members of its managing bodies – V.G., K.S. and/or V.V. – were improper, to remove these individuals from the company's managing bodies, to put in place an interim management of the company and to oblige Lietuvos dujos to undertake certain actions (negotiating, releasing information, establishing procedures and rules) related to the purchase of natural gas. On 9 December 2011, [the Republic of Lithuania] submitted a revised claim, additionally requesting to enforce other measures provided in Art. 2.131(1) of the [Lithuanian] Civil Code, in order to ensure that Lietuvos dujos and its managing bodies (the board and the director) act properly.
[4] "On 29 August 2011, Gazprom filed a claim before the Arbitration Institute against the Ministry of Energy of the Republic of Lithuania (acting on behalf of the Republic of Lithuania). In its claim, Gazprom stated that Lietuvos dujos is a limited liability company whose major shareholders are [Ruhrgas], Gazprom and the Republic of Lithuania. Gazprom contended that the claim submitted to the Vilnius Regional Court by the Ministry of Energy of the Republic of Lithuania was in breach of the agreement between shareholders (the

State Property Fund acting on behalf of the Republic of Lithuania, Gazprom and Ruhrgas) of 24 March 2004. Clause 7.14 of the shareholders' agreement provides that

> 'any disputes or disagreements related to this agreement or its breach, validity, entry into force or termination shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; arbitration shall take place in Stockholm, Sweden; there shall be three arbitrators (all appointed by the Arbitration Institute); the arbitral proceedings shall be held in the English language'.

[5] "Arguing that the claim submitted by the Republic of Lithuania before the national court concerns a dispute between shareholders and is related to the shareholders' agreement, Gazprom requested the Arbitration Institute to order the Ministry of Energy of the Republic of Lithuania to terminate the proceedings before the Vilnius Regional Court, to compensate the loss incurred by Gazprom as a result of the proceedings before the Lithuanian court which were initiated in breach of the arbitration agreement, and to cover the costs of arbitration.
[6] "The Arbitration Institute in its award of 31 July 2012 held that the claim brought before the Vilnius Regional Court by the defendant in the arbitration proceedings, the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, partially breached the arbitration clause of the shareholders' agreement of 24 March 2004. [The tribunal] ordered the defendant:

(i) to withdraw the requests listed in paras. 1.1, 1.3 and 1.4 of the revised claim of 9 December 2011 ('to order Lietuvos dujos to enter into genuine negotiations with Gazprom for a fair and equitable price of gas, and to provide documents concerning these negotiations to the company's governing board');
(ii) to limit the request in para. 1.6 of the revised claim ('to enforce other measures provided for in Art. 2.131(1) of the Civil Code') to measures which do not breach the rights and obligations provided in the shareholders' agreement of 24 March 2004 and which the defendant would not be able to request before an arbitral tribunal, convened in accordance with the arbitration clause of the shareholders' agreement of 24 March 2004.

The Arbitration Institute dismissed the claim for the compensation of loss in its entirety, and divided the costs of arbitration.

[7] "Gazprom submitted a request to the Court of Appeal of Lithuania for recognition and enforcement of the arbitral award of 31 July 2012 of the Arbitration Institute in the Republic of Lithuania. The request indicates that foreign arbitral awards must be recognized in the Republic of Lithuania in accordance with the [1958 New York Convention]. [Gazprom] notes that the parties entered into an arbitration agreement; the defendant (Ministry of Energy of the Republic of Lithuania) was duly notified of the arbitration proceedings; the dispute in question falls, in its entirety, within the scope of the arbitration agreement; the composition of the arbitral body and the proceedings complied with the necessary requirements; the arbitral award is final and has not been invalidated or suspended; and the dispute is subject to arbitration. [Gazprom] requests [the court] to recognize the award of 31 July 2012 of the Arbitration Institute and to issue an order enforcing this award.

[8] "The party in interest, the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, requests [the court] in its response to deny recognition and enforcement of the foreign arbitral award, and to set a time limit for [Gazprom] to cure the deficiencies in the appeal. The response contains only arguments of a formal nature, related to the quality of the translation of the arbitral award at issue."

II. ANALYSIS

[9] "[Gazprom's] request is denied.

[10] "The case at hand concerns the recognition and enforcement of a foreign arbitral award in the Republic of Lithuania. Recognition of a foreign arbitral award grants the award an equivalent legal effect in the territory of the Republic of Lithuania to the legal effect of a decision rendered by a national court (Art. 18 of the Code of Civil Procedure (CCP)). In accordance with Art. 809(1) CCP, foreign arbitral awards can be enforced in the Republic of Lithuania only after they have been recognized by the Court of Appeal of Lithuania – the judicial authority authorized to recognize such awards. The conditions for recognition and enforcement of foreign arbitral awards in the territory of the Republic of Lithuania are provided for in the [1958 New York Convention] (pursuant to Art. 810(6) CCP)[2] and the Law on Commercial Arbitration of the Republic of

2. Art. 810(6) of the Lithuanian Code of Civil Procedure (CCP) reads:

"6. Conditions for recognition of awards of foreign arbitration tribunals are defined by the New

Lithuania. Art. 51(1) of this Law states that an arbitral award issued in any state party to the 1958 New York Convention is recognized and enforced in the Republic of Lithuania in accordance with the provisions of this Article and the 1958 New York Convention.

[11] "As the Supreme Court of Lithuania has established in its jurisprudence, the aim of the procedure for the recognition of foreign arbitral awards is to ascertain whether there are any grounds for refusing to recognize the award, listed in Art. V of the New York Convention, without examining the legality or validity of the award in question (Art. 810(4) CCP;[3] Art. V of the New York Convention). Accordingly, the court deciding on the recognition of a foreign arbitral award is not entitled to examine the merits of the dispute resolved by the arbitral tribunal, i.e., to resolve the issues of fact or substantive law related to the merits of the dispute (rulings of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania: ruling in civil case No. 3K-3-323/2011 of 8 July 2011; ruling in civil case No. 3K-3-443/2008 of 30 September 2008; ruling in civil case No. 3K-7-179/2006 of 7 March 2006; ruling in civil case No. 3K-3-612/2004 of 17 November 2004; ruling in civil case No. 3K-3-278/2003 of 26 February 2003; etc).

[12] "The grounds for refusing to recognize foreign arbitral awards, listed in Art. V of the New York Convention, are divided into two groups which are distinguished by who has the authority/obligation to initiate the application of such grounds and who bears the burden of proof.

[13] "Art. V(1) of the New York Convention provides for the grounds which are applicable only when their application is requested by the party to arbitration against whom the recognition and enforcement of the foreign arbitral award is sought. In the present case, the party in interest, the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, does not seek refusal of recognition and enforcement of the award of 31 July 2012 of the Arbitration Institute on the grounds provided in Art. V(1) of the New York Convention. Thus, even though these grounds are discussed in detail by Gazprom in its request, they will not be considered by the Panel of Judges as they are

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York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958."

3. Art. 810(4) CCP reads:

"4. When resolving the matter of recognition of a judgment of a foreign court, lawfulness and reasonability of the judgment may not be checked."

irrelevant for deciding on the recognition and enforcement of the arbitral award in question in the Republic of Lithuania.

[14] "Art. V(2) of the New York Convention lists the grounds for refusing to recognize foreign arbitral awards which must be examined by the court ex officio, i.e., in every case, regardless of whether the party against whom the foreign arbitral award has been issued invokes them (rulings of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania: ruling in civil case No. 3K-3-145/2002 of 21 January 2002; ruling in civil case No. 3K-3-146/2002 of 21 January 2002, etc.). This examination must encompass both procedural and substantive law (ruling of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania in civil case No. 3K-3-161/2008 of 12 March 2008). Accordingly, the Panel of Judges shall ex officio address the grounds for refusing to recognize foreign arbitral awards provided in Art. V(2) of the New York Convention, despite the fact that the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, does not rely on them in support of its position in the present case.

[15] "Art. V(2) of the New York Convention provides that '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'.

[16] "The first ground – 'the subject matter of the difference is not capable of settlement by arbitration under the law of that country' – is given significant attention in [Gazprom's] request. [Gazprom] notes that the shareholders of Lietuvos dujos (Ruhrgas, Gazprom and the Republic of Lithuania, represented by the State Property Fund) agreed in the shareholders' agreement on the settlement of disputes by arbitration; that the arbitration agreement is valid and binding on the parties; and that Gazprom initiated the arbitration proceedings in order to determine whether the party in interest, when submitting a claim to the Vilnius Regional Court, complied with its obligations under the arbitration clause. The request separately notes that Lithuanian national laws do not prohibit solving disputes between shareholders by arbitration, and that Art. 12 of the Law on Commercial Arbitration (as amended on 30 June 2012), which establishes a definitive list of non-arbitrable disputes, does not prohibit arbitral settlement of disputes which concern investigation of the activities of a legal entity. [Gazprom] additionally argues that the dispute which was resolved by the arbitral award whose recognition is sought was not related to investigation of activities of a legal entity.

[17] "The Panel of Judges, having examined these arguments, finds that they do not warrant granting [Gazprom's] request.
[18] "The Panel of Judges has taken into account the above-mentioned arguments of [Gazprom] that the Arbitration Institute has the right to rule on its jurisdiction over a particular dispute and that at [Gazprom's] request it did so in the award whose recognition is presently sought, where it established that if there is a valid shareholders' agreement, the Arbitration Institute is competent to resolve disputes between the shareholders, including the dispute regarding investigation of activities of a legal entity.
[19] "The Panel of Judges notes that [Gazprom's] argument that the arbitral tribunal has the right to decide on its own jurisdiction is not disputed. The Panel of Judges of the Civil Division of the Supreme Court of Lithuania in its ruling in civil case No. 3K-3-116/2010 of 16 March 2010 pointed out that the right of an arbitral tribunal to rule on its own jurisdiction, as well as to resolve issues of the validity of the arbitration agreement, is universally recognized (the doctrine of competence-competence). This is enshrined in Art. 16 of the UNCITRAL Model Law on International Commercial Arbitration, on the basis of which the [Lithuanian] Law on Commercial Arbitration has been drafted, and in Art. 19(1) of the latter Law, which establishes that an arbitral tribunal has the right to rule on its jurisdiction to resolve the dispute, including cases where there are doubts concerning the existence or validity of the arbitration agreement.
[20] "As already mentioned above, the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, submitted a claim to the Vilnius Regional Court on 25 March 2011, and Gazprom submitted a claim to the Arbitration Institute on 29 August 2011, arguing that initiating the proceedings before the national court was unlawful.
[21] "The right of a court to decide upon the existence of an arbitral agreement, its legality/validity and impact on the possibility to resolve the dispute in a court of general competence is enshrined in (1) Art. II(3) of the New York Convention, which states that '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 within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration …'; (2) Art. 10 of the Law on Commercial Arbitration of the Republic of Lithuania, which states that 'The court receiving a claim, the subject matter of which is subject to arbitration agreement made by the parties according to the provisions of Article 9 of this Law, at the request of a party, refuses to accept it'; and (3) Art. 137(2)(6) and Art. 296(1)(9) CCP, which state that 'the parties have concluded an agreement to hand the dispute over to arbitration'.

[22] "The ruling of the Vilnius Regional Court of 3 September 2012 (civil case No. 2-2884-302/2012), available on the Lithuanian Court Information System LITEKO, shows that the case concerning investigation of activities of a legal entity addressed the arbitrability of the dispute, and that the court dismissed the defendants' requests to suspend the proceedings and not to consider the claim on the ground that the dispute did not fall under arbitral jurisdiction.

[23] "Although the proceedings before the Vilnius Regional Court and the Arbitration Institute are not identical in terms of the parties and their procedural status, it is nonetheless evident that both institutions addressed the same question: whether the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, may bring certain claims before the Vilnius Regional Court.

[24] "The Panel of Judges of the Civil Division of the Supreme Court of Lithuania in the aforementioned civil case No. 3K-3-116/2010 (ruling of 16 March 2006) established that both an arbitral tribunal and the court are competent to decide whether the dispute is subject to arbitration, but there cannot be two proceedings (arbitration and court) on the same subject matter and the same basis ongoing at the same time.

[25] "This leads to the conclusion that the Arbitration Institute should not have examined the issue which had been raised at and considered by the Vilnius Regional Court, and by doing so, the Arbitration Institute failed to comply with the provision of Art. V[(2)](*a*) of the New York Convention, and this constitutes grounds to refuse to recognize the award in question.

[26] "In addition, there is another and more important aspect of the refusal to recognize the foreign arbitral award in the present case. As already mentioned above, the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, submitted a claim to the Vilnius Regional Court. The court, at the request of one of the parties, relying on the aforementioned procedural norms and principles, addressed the issue of its own jurisdiction and found that it had jurisdiction to resolve the case before it. If Gazprom disagrees with this procedural decision, it has the opportunity to review the lawfulness and validity of the decision by way of appeal and cassation (Chapters XVI-XVII of Part III of the Code of Civil Procedure).

[27] "Meanwhile the Arbitration Institute, in its award whose recognition is sought, ordered the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, to withdraw some of its claims brought before the Vilnius Regional Court, on the ground that the dispute arising from them must be settled by arbitration, in accordance with the arbitration clause concluded by the parties to the dispute. In this manner, the Arbitration Institute

not only decided on its own jurisdiction to resolve or refuse to resolve a particular dispute, but also limited the right of one of the parties to seek judicial remedies before the national court (Art. 5 CCP). Thus, the Arbitration Institute in its award not only limited the legal capacity of the Republic of Lithuania in the court proceeding before the court of the Republic of Lithuania (because an arbitration agreement does not mean an absolute prohibition to turn to the ordinary courts, or to raise a dispute in the ordinary courts on the scope of the agreement), but also denied the jurisdiction of the national court to rule on its own jurisdiction.

[28] "Such an award of the Arbitration Institute is inconsistent with the provisions of the New York Convention, and the principle of the independence of the courts, enshrined in the Constitution of the Republic of Lithuania (Art. 109(2)) and the Code of Civil Procedure (Art. 21). Since the violation of this principle would lead to a breach of a person's right to have his case examined by an objective, impartial and fair court (Art. 29(1) and Art. 109(2) of the Constitution of the Republic of Lithuania; Arts. 5, 6 and 21 CCP), in the case at hand it is necessary to examine the potential non-compliance of the award of the Arbitration Institute, whose recognition is sought, with the public policy of the Republic of Lithuania, as the recognizing state (Art. V(2)(*b*) of the New York Convention).

[29] "The concept of 'public policy' in the international arbitration doctrine and practice is interpreted as the international public policy encompassing the fundamental principles of fair proceedings, as well as imperative norms of the substantive law, which entrench basic and universally recognized principles of law (rulings of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania: ruling in civil case No. 3K-3-612/2004 of 17 November 2004; ruling in civil case No. 3K-7-179/2006 of 7 March 2006; etc.). In the international practice, it is recognized that the aim of public policy is to protect basic, vital interests of the state and society, i.e., public policy covers the basic underlying principles of the legal system of the state and of the functioning of state and society.

[30] "In the case at hand, recognition of the foreign arbitral award would mean that this award, which requires national courts to adopt a specific procedural decision in a particular case, would become mandatory in the territory of the Republic of Lithuania and would directly influence the legal capacity of legal entities participating in the proceedings and limit the jurisdiction of national courts. This would not only breach several constitutional principles related to the right of an individual to the hearing of his case in an objective, impartial and fair court, mentioned above in this ruling, but also affect the sovereignty of the state

(doctrine of sovereign immunity (rulings of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania: ruling in civil case No. 3K-1/1998 of 5 January 1998; ruling in civil case No. 3K-3-203/2001 of 25 June 2001)), which would undoubtedly be contrary to the public policy of the Republic of Lithuania, as well as to international public policy.

[31] "For these reasons, the request of Gazprom to recognize and enforce the award of 31 July 2012 of the Arbitration Institute in the Republic of Lithuania is dismissed (Art. 51 of the Law on Commercial Arbitration; Art. V(2)(*b*) of the New York Convention)."

III. DECISION

[32] "The Panel of Judges, pursuant to Art. V(2)(*a*)-(*b*) of the 1958 New York Convention and Art. 811(1)[4] and Art. 813 Lithuanian CCP,[5] rules:

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4. Art. 811(1) CCP reads:

"*Request for Recognition of a Judgment*
1. Any persons having a legal interest in the proceedings may apply to the Lithuanian Court of Appeals for recognition of a judgment of a foreign court (arbitral award) as well as for refusal to recognize the judgment of a foreign court (arbitral award). The petition to recognize a judgment of a foreign court (arbitral award) shall comply with the general requirements for procedural documents."

5. Art. 813 CCP reads:

"*Enforceability*
1. Judgments (arbitral awards) of foreign courts (arbitration tribunals) may be enforced if:
1) the judgment (arbitral award) is enforceable in the state the courts of which have passed the judgment (arbitral award);
2) the judgment (arbitral award) is recognized in the procedure specified in Part VII, Chapter LIX, Section IV of this Code.
2. Requirements of paragraph 1 of this Article shall also apply to judgments of a Justice of Peace passed in a foreign country.
3. Conditions for enforcement of foreign arbitral awards are defined by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
4. The creditor must submit, along with the request to permit enforcement of a judgment (arbitral award) of a foreign court (arbitration tribunal), the documents specified in Article 811, paragraph 2, of this Code as well as confirmation that the judgment (arbitral award) is enforceable in the state the court of which has passed the judgment (arbitral award)."

– To dismiss the request of Gazprom to recognize and enforce the award of 31 July 2012 of the Arbitration Institute of the Stockholm Chamber of Commerce of the Kingdom of Sweden in the Republic of Lithuania.

The ruling takes effect on the date of its adoption and may be appealed by filing a cassation appeal before the Supreme Court of Lithuania within thirty days after its adoption."

Supreme Court of Lithuania, 10 October 2013

I. BACKGROUND

[33] "A dispute has arisen in this case over the recognition and enforcement in the Republic of Lithuania of a foreign arbitral award. On 25 March 2011, the claimant, the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, filed a claim before the Vilnius Regional Court (civil case No. 2-5031-302/2011) against the respondents, [Lietuvos dujos], V.G., K.S. and V.V., for an investigation of a legal entity's activities.

[34] "On 29 August 2011, [Gazprom] filed a claim before the Arbitration Institute of the Stockholm Chamber of Commerce of the Kingdom of Sweden (the Arbitration Institute) against the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania. According to Gazprom, the filing of a claim before the Vilnius Regional Court by the Ministry of Energy of the Republic of Lithuania, which was acting on behalf of the Republic of Lithuania, breached clause 7.14 of the agreement concluded by the Lietuvos dujos's shareholders on 24 March 2004. Clause 7.14 establishes an arbitration clause according to which any disputes or disagreements related to the shareholders' agreement or its breach, validity, entry into force or termination shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Gazprom, in its claim, requested the Arbitration Institute to order the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, to terminate the proceedings before the Vilnius Regional Court, compensate the losses incurred by Gazprom as a result of the proceedings initiated before the Lithuanian court in breach of the arbitration agreement, and cover the costs of arbitration.

[35] "The Arbitration Institute found in its award of 31 July 2012 that the claim brought before the Lithuanian court by [the Republic of Lithuania] partially

breached the arbitration clause of the shareholders' agreement of 24 March 2004. The Arbitration Institute ordered the defendant (i) to withdraw certain requests of its revised claim of 9 December 2011 (i.e., to oblige Lietuvos dujos to enter into good faith negotiations with Gazprom for a fair and equitable price of the acquisition of natural gas, the terms of the provision of the service of transit of natural gas, and to submit the agreed terms for approval by the governing board of Lietuvos dujos); and (ii) to limit its request in para. 1.6 of the revised claim (i.e., to enforce other measures provided for in Art. 2.131(1) of the Civil Code of the Republic of Lithuania) to measures which would not violate the rights and obligations established in the shareholders' agreement of 24 March 2004, and which the defendant would not be able to request before an arbitral tribunal convened in accordance with the arbitration clause of the shareholders' agreement of 24 March 2004.

[36] "The appellant, Gazprom, seized the Court of Appeal of Lithuania with the request to recognize and to allow the enforcement in the Republic of Lithuania of the arbitral award of 31 July 2012 of the Arbitration Institute of the Stockholm Chamber of Commerce of the Kingdom of Sweden and to issue a writ of execution pursuant to the arbitral award."

II. THE RULING OF THE COURT OF APPEAL OF LITHUANIA

[37] "In its ruling of 17 December 2012, the Panel of Judges of the Civil Division of the Court of Appeal of Lithuania dismissed the request of the appellant, Gazprom, to recognize and to allow the enforcement in the Republic of Lithuania of the arbitral award of 31 July 2012 of the Arbitration Institute of the Stockholm Chamber of Commerce of the Kingdom of Sweden.

[38] "The Panel of Judges concluded that the Arbitration Institute should not have undertaken to decide a question already raised and under examination in the Vilnius Regional Court (a ruling of 3 September 2012 of the Panel of Judges of the Vilnius Regional Court (civil case No. 2-2884-302/2012)[. It] dismissed the defendants' requests to postpone the proceedings and not to examine the case on the ground that a dispute concerning the investigation of a legal entity's activities does not fall under arbitral jurisdiction); by doing so, the Arbitration Institute failed to comply with the provision of Art. V(1)(*a*) of the 1958 New York Convention, and this constitutes a ground to refuse to recognize the award.

[39] "The Panel noted that the Arbitration Institute, in its award whose recognition was sought, ordered [the Republic of Lithuania] to withdraw certain claims brought before the Vilnius Regional Court on the ground that the dispute

arising out of them must be settled by arbitration, in accordance with the arbitration clause concluded by the parties to the dispute. In the Panel's assessment, by so doing the Arbitration Institute not only decided on its own jurisdiction to resolve (or to refuse to resolve) a particular dispute in arbitration, but also restricted one of the parties from seeking judicial protection before a national court (Art. 5 of the Civil Procedure Code). Thus, in its award whose recognition is sought, the Arbitration Institute not only limited the legal capacity of the claimant, the Republic of Lithuania, in the court proceedings before the court of the Republic of Lithuania (because an arbitration agreement does not mean an absolute prohibition to of recourse to ordinary courts or raising a dispute [there] concerning the scope of the agreement), but also denied the jurisdiction of the national court to rule on its own jurisdiction. Such arbitral award is consistent neither with the provisions of the New York Convention, nor with the principle of independence of the courts (Art. 109(2) of the Constitution of the Republic of Lithuania, Art. 21 CCP of the Civil Procedure Code).

[40] "The Panel found that, in the doctrine and practice of international arbitration, the concept of 'public policy' is interpreted as the international public policy encompassing the fundamental principles of fair proceedings, as well as imperative norms of substantive law, which entrench basic and universally recognized principles of law (rulings of the Panel of Judges of the Civil Division of the Supreme Court of Lithuania of 17 November 2004, *A.V.I. v. K.C. firma 'Schwarz'*, case No. 3K-3-612/2004; and 7 March 2006, in the civil case instituted by claim of the applicant, *Duke Investment limited, an enterprise registered in Cyprus*, case No. 3K-7-179/2006). In the international practice, it is recognized that the aim of public policy is to protect basic, vital interests of the state and society; i.e., the concept of public policy covers the basic underlying principles of the legal system of the state and the functioning of the state and society.

[41] "In the present case, in the Panel's assessment, recognition of the foreign arbitral award would mean that this award, which requires a national court to make a specific procedural decision in a particular case, would become mandatory in the territory of the Republic of Lithuania; this would directly influence the legal capacity of legal entities participating in the proceedings and limit the jurisdiction of the national courts. This would not only breach the principle of an individual's right to a hearing in an objective, impartial and fair court, but would also affect the sovereignty of the state, which would undoubtedly be contrary to the public policy of the Republic of Lithuania, as well as to international public policy.

[42] "Since the arbitral award of the Arbitration Institute, whose recognition is sought, was contrary to the public policy of the Republic of Lithuania as the recognizing state, its recognition was refused on the ground in Art. V(2)(*b*) of the New York Convention."

III. THE PARTIES' POSITIONS IN THE CASSATION APPEAL

1. Appellant's Position

[43] "In its cassation appeal, the appellant, Gazprom, requests to reverse the ruling of 17 December 2012 of the Panel of Judges of the Civil Division of the Court of Appeal of Lithuania and to issue a new ruling, granting its request to recognize and to allow the enforcement of the foreign arbitral award, and, in the event that the Court decides not to issue a ruling granting the appellant's request, to refer the case back to the Court of Appeal of Lithuania."

2. Defendant's Position

[44] "In its response to the cassation appeal, [the Republic of Lithuania] requests to uphold the ruling of 17 December 2012 of the Panel of Judges of the Civil Division of the Court of Appeal of Lithuania.

[45] "The response to the cassation appeal claims, inter alia, that not only arbitral awards, but also foreign court judgments restraining a party from commencing or continuing proceedings before the courts of another Member State (henceforth, restraint from settling the dispute before a court) may not be recognized or enforced in the Republic of Lithuania. In its essence, the arbitral award establishes a restraint from settling the dispute before a court.

[46] "The legality of a restraint from settling the dispute before a court has been examined several times by the European Court of Justice (ECJ) (ECJ Judgment of 27 April 2004 in the *Turner* case No. C-159/2002; Judgment of 10 February 2009 in the *West Tankers* case No. C-185/2007). In the *West Tankers* case, the ECJ found that an order of a court of a Member State 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 is incompatible with the Council of the European Union Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The ECJ reasoned that, pursuant to the general principle, every court seized determines itself,

under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it; moreover, [the contrary] runs counter to the trust which the Member States accord to one another's legal systems and courts.

[47] "The ECJ does not allow a court of a Member State to restrain [a party] from settling a dispute in the courts of another Member State; analogical rules should be applied also with respect to arbitral awards. A contrary ruling would establish the supremacy of arbitration over courts; this would disturb the balance of justice between these two dispute settlement mechanisms.

[48] "Moreover, this ECJ jurisprudence is important in defining the contents of the international legal order in the European Union and in the Republic of Lithuania. A violation of constitutional principles and fundamental principles of the law of civil procedure also means a violation of the international legal order within the meaning of Art. V(2)(*b*) of the New York Convention.

[49] "Therefore, the Court of Appeal of Lithuania rightly indicated in its ruling that the arbitral award both infringes upon the procedural legal capacity of a party and violates the principles of the right to bring a case before a court and of the independence of the courts. The arbitral award also breaches procedural public policy, as it is understood in Art. V(2)(*b*) of the New York Convention."

IV. REFERRAL TO THE EUROPEAN COURT OF JUSTICE

[50] "The Expanded Panel of Judges of the Civil Division of the Supreme Court of Lithuania decides that it is necessary to refer to the ECJ for a preliminary ruling in accordance with Art. 267 of the Treaty on the Functioning of the European Union."

1. Introduction

[51] "On 25 March 2011, the claimant, the Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania, filed a claim before the Vilnius Regional Court against the respondents, [Lietuvos dujos], V.G., K.S. and V.V. The claimant requested to initiate an investigation of the activities of the legal entity Lietuvos dujos, and also made additional claims, which will be discussed below.

[52] "Pursuant to the Civil Code of the Republic of Lithuania, legal relationships related to an investigation of a legal entity's activities fall under the regulatory scope of the Code. These are civil legal relationships, and the norms in Book II, Part II, Chapter X 'Investigation of Legal Entity's Activities' (Arts. 2.124-2.131

CC)[6] are directly intended to regulate them. A court examines an application for an investigation of alegal entity's activities in a civil case brought before the court in accordance with the procedures established by the Code of Civil Procedure.
[53] "Art. 1(1) of [Council Regulation no. 44/2001] (henceforth, Brussels I Regulation) establishes that the Regulation shall apply in civil and commercial matters. In general, disputes between private persons fall within the scope of application of the Brussels I Regulation, unless it is clearly indicated that this Regulation is inapplicable to them. The ECJ has not pronounced in its jurisprudence on the assignment of cases concerning the investigation of a legal entity's activities to the category of either civil or commercial matters.
[54] "The civil case examined in the national court concerning the investigation of Lietuvos dujos's activities is related to more than one Member State, therefore the issued ruling may need to be recognized and allowed to be enforced in European Union Member States under the Brussels I Regulation. One of the main shareholders of the legal entity Lietuvos dujos is a German enterprise, [Ruhrgas], which owns 38.91 percent of the shares of Lietuvos dujos. Thus, having acknowledged this circumstance, the Panel of Judges decides that, in the context of the present case, it is important to resolve questions related to the application of the Brussels I Regulation, so that the Supreme Court of Lithuania, as a national court, by issuing a ruling in the present case, would not violate its duty to ensure the full effectiveness of EU law.
[55] "Having found that in the assessment of the Panel of Judges the civil case under examination concerning the investigation of Lietuvos dujos's activities is a civil case within the meaning of the Brussels I Regulation; that the arbitral award whose recognition is sought is related to a case concerning the investigation of a legal entity's activities; and since there is reasonable basis to consider that the necessity may arise to recognize the ruling of the Court in the case concerning the investigation of a legal entity's activities [in another EU state] under the Brussels I Regulation, the Panel of Judges finds that a preliminary ruling by the ECJ is required in order to reach a decision in the present case.
[56] "In its claim of 25 March 2011 the claimant, [the Republic of Lithuania], apart from requesting the commencement of a preliminary investigation of the activities of Lietuvos dujos, also requested the court, if it found that the activities of Lietuvos dujos and (or) its governing body members V.G., K.S. and/or V.V. were inappropriate, (i) to remove the aforementioned persons from the governing body of the enterprise; (ii) to put in place an interim management of

6. "E.g., A.Tikniūtė, The nature of investigation proceedings of legal entity under the Civil Code of Lithuania."

the enterprise; and (iii) to oblige Lietuvos dujos to perform certain actions (to enter into negotiations with Gazprom for the determination of a fair and equitable price of the acquisition of natural gas; to conduct the negotiations in good faith, pursuing the best terms of supply of natural gas and the lowest price of supply, as well as the highest price of the service of transit; to publish information concerning activities relating to the transit of natural gas in the enterprise's annual report; to have the terms of the acquisition of natural gas and of the provision of the service of transit, etc. approved annually by the managing board).

[57] "In its revised claim of 9 December 2011, the claimant requested the court to start an investigation of the activities of Lietuvos dujos and, if it determined that the activities of Lietuvos dujos and (or) its governing body members V.G., K.S. and/or V.V. were inappropriate, to oblige Lietuvos dujos to perform certain actions (to enter into negotiations with Gazprom for the determination of a fair and equitable price of the acquisition of natural gas; to conduct the negotiations in good faith, pursuing the best terms of supply of natural gas and the lowest price of supply, as well as the highest price for the service of transit; to publish information concerning activities relating to the transit of natural gas in the enterprise's annual report; to have the terms of the acquisition of natural gas and of the provision of the service of transit, etc. approved annually by the managing board); to take other measures indicated in Art. 2.131(1) CC, if these measures would ensure that Lietuvos dujos and its managing bodies (governing board and director) act properly.

[58] "More than five months after the claimant, [the Republic of Lithuania], filed a claim before the court concerning the investigation of Lietuvos dujos' activities, Gazprom, which was not a party to the proceedings in the aforementioned civil case, brought a claim before the Arbitration Institute of the Stockholm Chamber of Commerce of the Kingdom of Sweden. On 29 August 2011, Gazprom filed a claim before the Arbitration Institute against the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania. The claim asserted that the most important shareholders of Lietuvos dujos are [Ruhrgas], Gazprom and the State of Lithuania (the main shareholders of Lietuvos dujos are the following: the Republic of Lithuania, 17.70 percent, Gazprom, 37.10 percent; Ruhrgas, 38.91 percent; Gazprom is the sole supplier of natural gas to the enterprise). Gazprom, in its claim, contended that the filing of a claim before the Vilnius Regional Court by the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, breached clause 7.14 of the agreement concluded by Lietuvos dujos's shareholders on 24 March 2004. Clause 7.14 establishes that

> 'any disputes or disagreements related to the shareholders' agreement or its breach, validity, entry into force or termination shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; the place of arbitration is Stockholm, Sweden; the number of arbitrators is three (all arbitrators are appointed by the Institute of Arbitration); the language of arbitration is English'.

[59] "Relying on this arbitration agreement, Gazprom, in its claim, requested the Arbitration Institute to order the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, to terminate the proceedings before the Vilnius Regional Court, compensate the losses incurred by Gazprom as a result of the proceedings, which were initiated before the Lithuanian court in breach of the arbitration agreement, and cover the costs of arbitration.
[60] "The Arbitration Institute, in its award of 31 July 2012:

(i) found that the claim brought before the Lithuanian court by the defendant in the arbitration proceedings, the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, partially breached the arbitration clause of the shareholders' agreement of 24 March 2004;
(ii) ordered the defendant to withdraw the requests listed in paras. 1.1, 1.3 and 1.4 of the revised claim (i.e., [the requests] to oblige Lietuvos dujos to enter into good faith negotiations with Gazprom for a fair and equitable price of the acquisition of natural gas and the terms of the provision of the service of transit of natural gas, and to submit the agreed terms for approval to the governing board of Lietuvos dujos), and to limit its request in para. 1.6 of the revised claim (i.e., [the request] to take other measures provided in Art. 2.131(1) CC) to measures which would not breach the rights and obligations established in the shareholders' agreement of 24 March 2004 and which the defendant would not be able to request before an arbitral tribunal convened in accordance with the arbitration clause of the shareholders' agreement of 24 March 2004;
(iii) dismissed the claim for compensation of losses;
(iv) apportioned the arbitration costs between both parties in equal measure;
(v) decided, that each party shall pay its own legal expenses.

[61] "The appellant, Gazprom, brought a claim before the Court of Appeal of Lithuania, requesting to recognize and to allow the enforcement in the Republic of Lithuania of the arbitral award of 31 July 2012 of the Arbitration Institute of

the Stockholm Chamber of Commerce of the Kingdom of Sweden. The Court of Appeal of Lithuania, which, pursuant to Art. 811(1) CCP, has jurisdiction to examine such request, dismissed the request in its ruling of 17 December 2012. Gazprom, in its cassation appeal, requests the Supreme Court of Lithuania to review this ruling."

2. The Legal Questions for a Preliminary Ruling by the ECJ

[62] "The rules governing the recognition and enforcement of arbitral awards are enshrined in the [1958 New York Convention], which entered into force for Lithuania on 12 June 1995. Generally, the recognition and enforcement of decisions are regulated by the Brussels I Regulation, which, pursuant to its Art. 1(2)(d), is inapplicable to arbitration. Therefore, in recognizing and allowing the enforcement of foreign arbitral awards, recognition is carried out according to the provisions of the New York Convention, provided that the arbitral award whose recognition is sought meets the requirements of the New York Convention.

[63] "It follows from the principle of the supremacy of EU law that national courts must ensure the full effectiveness of EU Regulations, and they must refuse to apply all provisions of national law that are in conflict with this objective (in principle, including the rules in international treaties binding the Member State).[7]

[64] "First, thus, the Supreme Court of Lithuania, in examining this case, must ensure the full supremacy of EU law, as well as the supremacy of the Brussels I Regulation, which is relevant in this case, in national law. Since the recognition and enforcement of arbitral awards are regulated by the New York Convention, to which Lithuania and all the EU Member States are parties, but the EU is not a party to this Convention, it is important to ensure the effectiveness of the supremacy of the EU law when a concrete area is regulated by an international convention.

[65] "The ECJ has not pronounced in its jurisprudence on the relationship between the New York Convention and the Brussels I Regulation. Art. 71 of this Regulation defines its relationship with the Convention:

'*Article 71*

7. "ECJ jurisprudence on this question is abundant, but the question has been first decided in the Judgment of on 9 March 1978 in *Simmenthal* (106/77, compare p. 629, para. 21)."

> 1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.
> 2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:
>
> (a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;
> (b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognized and enforced in the other Member States in accordance with this Regulation.
> Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. *In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied*.'
> (Emphasis supplied.)

[66] "Interpreting the contents of this Article, the ECJ has indicated that the Brussels I Regulation principles of free movement of decisions and mutual trust in the administration of justice in the European Union (*favor executionis*) are important in relation to the recognition and enforcement of court judgments.[8] The rules for the recognition and enforcement of court judgments in the European Union, as enshrined in the special conventions referred to in Art. 71 of Regulation No. 44/2001, are applicable only to the extent that the aforementioned principles are upheld.[9] Therefore, based on this ECJ jurisprudence, a national court, seeking to ensure the full effectiveness of EU law, should be able not to rely on the provisions of the New York Convention

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8. "ECJ Judgment of 14 December 2006 in *ASML*, C-283/05, compare p. I-12041, para. 23; Judgment of 10 February 2009 in *Allianz v. Generali Assicurazioni Generali*, C-185/07 [reported in Yearbook XXXIV (2009) pp. 485-493 (European Union no. 2)], compare p. I-663, para. 24; Judgment of 28 April 2009 in *Apostolides*, C-420/07, compare p. I-0000, para. 73."
9. "Judgment of 10 February 2009 in the case No. C-185/2007 *Allianz SpA v. West Tankers Inc*, case No. C-185/07 [reported in Yearbook XXXIV (2009) pp. 485-493 (European Union no. 2)], compare p. I-663, 2009, para. 54."

concerning the recognition of an arbitral award, if their application violates the principle of the supremacy of EU law.

[67] "Moreover, it is recognized in ECJ jurisprudence that conventions concluded between Member States in their relations with third states cannot be applied in violation of the objectives of EU law.[10]

[68] "On the other hand, the New York Convention is a widely applied international convention, which has 149 states parties.[11] All the EU Member States are also states parties to this Convention. Therefore, it is worth considering whether a convention that regulates relations in an area where also the EU has competence to pass legislation (i.e., cooperation in civil and commercial matters), but where the EU does not pass such legislation precisely because of the existence of another instrument of international law that the EU considers to be effective, is not an instrument of such importance that the relation of this instrument with EU law must be special.

[69] "In the Panel's assessment, it is appropriate to determine the relationship between the New York Convention and EU law, in order to properly decide this case and ensure that the Supreme Court of Lithuania, in its interpretation and application of the law, will not violate its duty as a national court to ensure the full effectiveness of EU law, thus upholding the principle of the supremacy of EU law.

[70] "It its award of 31 July 2012, the Arbitration Institute:

(i) found that the claim brought before the Lithuanian court by the defendant in the arbitration proceedings, the Ministry of Energy of the Republic of Lithuania, acting on behalf of the Republic of Lithuania, partially breached the arbitration clause of the shareholders' agreement of 24 March 2004;

(ii) ordered the defendant to withdraw the requests listed in paras. 1.1, 1.3 and 1.4 of the revised claim (i.e., [the requests] to oblige Lietuvos dujos to enter into good faith negotiations with Gazprom for a fair and equitable price of the acquisition of natural gas and the terms of the provision of the service of transit of natural gas, and to submit the agreed terms for approval to the governing board of Lietuvos dujos), and to limit its request in para. 1.6 of the revised claim (i.e., [the request] to take other measures provided in Art. 2.131(1) CC) to measures which would not breach the rights and obligations established in the

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10. "Judgment of 22 September 1988 in the case *Deserbais*, 286/86, compare p. 4907, para. 18; Judgment of 6 April 1995 in the case *RTE & ITP v. Commission*, C-241/91 P and C-242/91 P, compare p. I-743, para. 84, and Judgment of 22 October 2009 in the case *Bogiatzi*, C-301/08, compare p. I-0000, para. 19."

11. "<www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>."

shareholders' agreement of 24 March 2004 and which the defendant would not be able to request before an arbitral tribunal convened in accordance with the arbitration clause of the shareholders' agreement of 24 March 2004.

[71] "In this Panel's assessment, it is important in the present case to determine the nature of the arbitral award whose recognition is sought. It is important to determine whether such arbitral award, which is the object of the request for recognition in the present case, may be deemed to be an *antisuit injunction*.
[72] "In the award whose recognition is sought the arbitral tribunal imposed several obligations on a party to the case before the Lithuanian court – the claimant ([the Republic of Lithuania]). As indicated in legal doctrine,[12] an *antisuit injunction* is issued by a court and restricts a party, but not a court, from commencing or continuing proceedings before the courts of a foreign state or parallel proceedings in the same jurisdiction. In order for an *antisuit injunction* to be effective, in common law countries, a party that ignores the requirements of an *antisuit injunction* may be fined or even arrested.[13] Although courts have the right to issue an *antisuit injunction*, also arbitral tribunals issue awards which, by their nature, meet the definition of an *antisuit injunction*.
[73] "Legal doctrine[14] indicates that the question whether an arbitral tribunal may issue such procedural orders must be decided by deciding the question of the jurisdiction and competence of the arbitral tribunal.[15] The cited author indicates that arbitrators, as private persons, do not represent state interests; thus, in deciding on a judge's jurisdiction to examine a case, they do not violate state sovereignty. Moreover, arbitrators are not required to ensure that their award will comply with the Lugano and Brussels Conventions. There is a fundamental conceptual split between common law and civil law countries regarding the evaluation of an *antisuit injunction*.[16]
[74] "In the assessment of the Panel of Judges, the arbitral award of 31 July 2012, by its nature, has the aforementioned characteristics of an *antisuit injunction*.
[75] "The ECJ has pronounced in its jurisprudence on the recognition of an *antisuit injunction* under the Brussels I Regulation, but the ECJ has never

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12. "Grace Gunah Kim, 'After the ECJ's *West Tankers*: The Clash of Civilizations on the Issue of an Anti-suit Injunction', 12 Cardozo J. Conflict Resol, 573 2010-2011, p. 575."
13. "*Id.*, p. 576."
14. "Laurent Levy, 'Anti-Suit Injunction Issued by Arbitrators', IAI International Arbitration Series No. 2, Anti-Suit Induction in International Arbitration, 2005 pp. 115-129."
15. "Ibid."
16. "Grace Gunah Kim, *op. cit.*, fn. 12, p. 576."

addressed such a situation as exists in the present case, and a problem of the type that exists in the present case. The peculiarity of this case is that the *antisuit injunction* was issued by an arbitral tribunal, and this *antisuit injunction* is sought to be recognized under the provisions of the New York Convention, but such recognition could possibly violate the effectiveness of EU law, because [the recognizing court] would not be able to ensure the effective operation of the provisions of the Brussels I Regulation.

[76] "The ECJ has examined the relation between an *antisuit injunction* and arbitration in two cases. In its judgment in the *Marc Rich* case,[17] interpreting provisions of the Brussels Convention, the Court indicated that a decision by an English court to appoint arbitrators does not fall within the scope of the Convention because the decision is related only to arbitration.

[77] "In another case, *Allianz SpA v. West Tankers Inc*[18] (case No. C-185/07), the ECJ has pronounced on whether the Brussels I Regulation may be applied in regards to an *antisuit injunction* by which a court restrains a person from commencing or continuing proceedings before the courts of another Member State based on the ground that such proceedings violate an arbitration agreement, although, pursuant to Art. 1(2)(d), arbitration does not fall within the scope of application of the Regulation. The ECJ indicated that the proceedings in that case, although they did not fall within the scope of application of the Brussels I Regulation, may nevertheless undermine the effectiveness of that Regulation, i.e. prevent 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 primarily where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by the Brussels I Regulation. The ECJ found that the fact that a Member State's court, which normally has jurisdiction to resolve a dispute under Art. 5(3) of the Brussels I Regulation, was prevented 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 amounted to stripping that court of the power to rule on its own jurisdiction under Brussels I.

[78] "The ECJ has indicated in its jurisprudence that, apart from a few limited exceptions … the Brussels I Regulation does not authorize a court in one Member State to review the jurisdiction of a court in another Member State

17. "ECJ Judgment of 25 July 1991 in the case *Marc Rich & Co. AG v Società Italiana Impianti PA*, case No. C-190/89 [reported in Yearbook XVII (1992) pp. 233-278], compare p. I-03855, 1991."
18. "ECJ Judgment of 9 February 2010 in the case *Allianz SpA v. West Tankers Inc*, case No. C-185/07, compare p. I-00663, 2009."

(Judgment of 27 June in the case *Overseas Union Insurance et al.*, C-351/89, ECR 1991 p. I-03317, paras. 24 and 26 of the aforementioned *Turner* Judgment).

[79] "In the assessment of the Panel of Judges, the jurisprudence of the ECJ clearly indicates that an *antisuit injunction* – i.e., an order of a court of a Member State 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 – is in violation of the provisions of the Brussels I Regulation.

[80] "Thus, relying on such ECJ jurisprudence, a court of a Member State should not recognize such a ruling by a court of another Member State, as the ruling violates the objective of the Brussels I Regulation and the effective functioning of EU law. Therefore, if arbitration is a mechanism of dispute settlement equivalent to a court, its awards that limit the right of a party to make certain requests before a court of a Member State or restrain a person from bringing a case before a court of a Member State based on the ground that, in the judgment of the arbitral tribunal, the dispute must be settled in arbitration, should also be subject to the same Regulation. A contrary interpretation would mean that dispute settlement in arbitration would gain an advantage over dispute settlement in national courts, because *antisuit injunctions* issued by courts may not be recognized according to the rules of the Brussels I Regulation, and *antisuit injunctions* issued by arbitral tribunals could limit the right of national courts to rule on their own jurisdiction to examine a concrete case.

[81] "In the opinion of the Panel of Judges, having assessed the factual situation of the case and the existing ECJ jurisprudence, it is necessary that the ECJ answer the following questions:

(1) *Whether, if an arbitral tribunal issues an antisuit injunction by which it restricts a party from bringing a case with certain claims before a court of a Member State, which, under the rules of jurisdiction in the Brussels I Regulation, has jurisdiction to rule on the merits of the civil case, the court of a Member State has the right to refuse to recognize such arbitral award, because the award restricts the court's right to determine itself whether it has jurisdiction in the case under the rules of jurisdiction in the Brussels I Regulation*;

(2) *In case the answer to the first question is in the affirmative, whether the same is true in the case where the antisuit injunction issued by the arbitral tribunal orders a party to the proceedings to restrict its claims in a case that is being examined in another Member State, and the court of that Member State has jurisdiction to examine that case under the rules of jurisdiction in the Brussels I Regulation.*

[82] "A question has also arisen in this case regarding the possibility for an arbitral tribunal to issue an *antisuit injunction* to limit the right of a national court examining a civil case falling into the category of civil cases within the meaning of the Brussels I Regulation, to issue a ruling in a particular case, and the possibility of the subsequent recognition of such ruling under the Brussels I Regulation.
[83] "As previously mentioned, Lithuanian courts are already examining a civil case concerning the merits of the dispute, i.e., an investigation into the activities of Lietuvos dujos has already been started. The aforementioned case has at this point reached the Supreme Court of Lithuania.
[84] "As it was mentioned, in national law, investigations of a legal entity's activities are regulated by the norms in Book II, Part II, Chapter X, Arts. 2.124 to 2.131 of the Civil Code (addendum 1). In national law, the question of investigation of a legal entity's activities is not arbitrable (Panel of Judges of the Civil Division of the Supreme Court of Lithuania, ruling of 26 June 2012 in civil case *N. v. K. et al. v. UAB, 'Luksora' et al.*, case No. 3K-3-353/2012; ruling of 7 November 2012 in civil case *A.Z. v. Amplico Life Pierwsze Amerykansko-Polskie Towarzystwo Ubezpieczen Na Zycie i Reasekuraciji Spolka Akcyjna*, case No. 3K-3-470/2012) (addendum 2).
[85] "Moreover, in national law, a Court decides ex officio on its own initiative what measures may be applied to a legal entity. This is enshrined in the applicable national law. Art. 2.124 CC states that

> 'Persons listed in Art. 2.125 of this Code *shall enjoy the right to request the court* to appoint experts who have to investigate whether a legal entity or legal entity's managing bodies or their members acted in a proper way, and in the event that improper actions are established *to apply measures specified in Art. 2.131 of this Code*.'

Thus, persons who have the right to bring before the court a case concerning the appointment of experts, also have the right to request the court to apply measures specified in law; however, such request does not bind the court, i.e., the court does not need to limit itself to applying the measures requested by the person bringing the case before the court.
[86] "Moreover, it is not mandatory for the court to apply those measures that experts recommend in their report: Art. 2.127(1) CC states:

> 'The court may appoint as experts any independent persons, who have the necessary qualifications to investigate the legal entity's activities and make

a report, in writing, on inappropriate activities, *as well as draw up guidelines for the application of the measures* specified in Art. 2.131 of this Code.'

Art. 2.131 CC states:

'*Article 2.131. Measures Applied by the Court*
1. In the event that the experts' report points out that the activities of the legal entity (the legal entity's managing bodies or their members) are inappropriate and the court approves the said conclusion, the court may, upon receipt of opinions by the parties and public institutions mentioned in Art. 2.130 of this Code, apply one of the following measures:

(1) revoke the decisions taken by the legal entity's managing bodies;
(2) suspend temporarily the powers of the members of the legal entity's managing bodies or exclude a person from the legal entity's managing body;
(3) appoint provisional members of the legal entity's managing bodies;
(4) authorize non-implementation of certain provisions of the incorporation documents;
(5) order amendments to certain provisions of the incorporation documents;
(6) transfer the legal entity's right to vote to another person;
(7) oblige the legal entity (not) to take certain actions;
(8) liquidate the legal entity and appoint a liquidator.

2. Upon the appointment of a member of the managing body the court may fix his salary.
3. A decision to liquidate a legal entity may not be taken where such decision would contravene the interests of other legal entity's members or employees or public interest. A decision to revoke decisions of the legal entity's managing bodies may not be taken where the period of limitation of actions prescribed by this Code or other laws has expired.
4. The court shall notify, without delay, the Register of legal entities of the judgment and its becoming res judicata. In such case, Art. 2.66(5) of this Code shall not apply.'

[87] "Since an investigation of the legal entity Lietuvos dujos's activities is pending, the Lithuanian courts, there being a basis, will ex officio apply measures

listed in Art. 2.131(1) CC, independent of whether the parties to the case will request the application of such measures or object to such application.
[88] "The ECJ has pronounced in its jurisprudence on antisuit injunctions which are issued by a court of a Member State and which limit the right of a party to the proceedings to bring a case before a court, which, under the rules enshrined in the Brussels I Regulation, would have jurisdiction in that case. There is a situation in the present case, in which an arbitral tribunal issued an antisuit injunction by which it limited the right of [the Republic of Lithuania] to protect its rights by bringing a case before a Member State's court that, mutatis mutandis, has jurisdiction to examine such civil case pursuant to Art. 6(2) of the Brussels I Regulation. In the assessment of the Panel of Judges, such antisuit injunction as has been issued in the present case limits the right of the national (Lithuanian) court to rule on its jurisdiction in a civil case, because the antisuit injunction prescribes the type of rulings the court may issue. Since a case concerning an investigation of the activities of a legal entity is a civil case, such an award by an arbitral tribunal generally restricts the jurisdiction of a national court to issue a ruling, which falls within the scope of the Brussels I Regulation.
[89] "In the assessment of the Panel of Judges, in order to reach a decision in the present case, it is required that the ECJ answer the following question:

(3) *Whether a national court seeking to ensure the supremacy of EU law and the full effectiveness of the Brussels I Regulation may refuse to recognize an award by an arbitral tribunal, if such award by the arbitral tribunal restricts the right of the national court to rule on its jurisdiction and competence in a case that falls under the jurisdiction of the Brussels I Regulation.*

[90] "Having summarized the aforementioned factual circumstances, the existing duty of a EU Member State to ensure the full effectiveness of EU law, as well as having acknowledged that this duty binds all EU Member State courts, and that the specific circumstances of the present case do not allow the national court to solve the current questions by independently applying the doctrine of *acte clair*, the Supreme Court of Lithuania, as a court whose decision, according to national law, cannot be judicially appealed (Art. 362 CCP), refers to the European Court of Justice and requests the Court to issue a preliminary ruling with respect to the previously outlined questions."

V. DECISION

[91] "The Panel of Judges of the Civil Division of the Supreme Court of Lithuania, pursuant to Art. 267(3) of the Treaty on the Functioning of the European Union, and Art. 3(5), Art. 163(9) and Art. 356(5) CC, decides:

(i) To refer to the European Court of Justice with the request to issue a preliminary ruling with respect to these questions:

(1) Whether, if an arbitral tribunal issues an antisuit injunction by which it restricts a party from bringing a case with certain claims before a court of a Member State, which, under the rules of jurisdiction in the Brussels I Regulation, has jurisdiction to rule on the merits of the civil case, the court of a Member State has the right to refuse to recognize such arbitral award, because the award restricts the court's right to determine itself whether it has jurisdiction in the case under the rules of jurisdiction in the Brussels I Regulation;
(2) In case the answer to the first question is in the affirmative, whether the same is true in the case when the antisuit injunction issued by the arbitral tribunal orders a party to the proceedings to restrict its claims in a case that is being examined in another Member State, and the court of that Member State has jurisdiction to examine that case under the rules of jurisdiction in the Brussels I Regulation;
(3) Whether a national court seeking to ensure the supremacy of EU law and the full effectiveness of the Brussels I Regulation may refuse to recognize an award by an arbitral tribunal, if such award by the arbitral tribunal restricts the right of the national court to rule on its jurisdiction and competence in a case that falls under the jurisdiction of the Brussels I Regulation.

(ii) To postpone the proceedings in the civil case until the receipt of the ruling of the European Court of Justice.

[92] "This ruling of the Supreme Court of Lithuania is final, not subject to appeal, and effective from the day of its adoption."

NETHERLANDS

Ratification: 24 April 1964
1st Reservation

44. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Amsterdam, 30 December 2010, Case No. 467145 / KG RK 10-3271[1]

Parties:	Claimants: (1) Publicitaria S.A. (Chile); (2) Inversiones Limitada (Chile) Defendants: (1) Publicis Groupe Investments B.V. (Netherlands); (2) Publicis Groupe Holdings B.V. (Netherlands)
Published in:	Available online at <www.rechtspraak.nl> (LJN: BX9833)
Articles:	V(1)(*b*); V(2)(*b*)
Subject matters:	– due process and expert evidence – public policy and information obtained by expert in the absence of defendants – international public policy
Topics:	[8] = ¶ 518; [9]-[13] = ¶ 511 (opportunity to deal with expert report); [14]-[15] = ¶ 524 (expert obtained information in the absence of defendants)

1. *Note General Editor*. The President of the *Rechtbank* (Court of First Instance) 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 Court of First Instance", this terminology has been retained.

Summary

The court granted leave to enforce a Chilean award. There was no violation of due process because the facts of the case showed that defendants were given sufficient opportunity to contest the expert report ordered by the arbitrator; there was no violation of public policy because the expert report was based on information that was not publicly available and had been accessed through a database subscription of a person related to claimants, in the absence of defendants. Though this behavior was incorrect, it did not meet the standard of a violation of international public policy.

On 27 March 2000, Ms. A, Publicitaria S.A. (Publicitaria) and Inversiones Limitada (Inversiones) concluded a Network Membership Agreement with B Holdings B.V. in respect of the membership in a network of advertising agencies. B Holdings B.V. later became Publicis Groupe Investments B.V. (PGI). Art. 12 of the contract was an arbitration clause reading (English original):

> "Arbitration
> 12.1 Submission to Arbitration. All of the differences, difficulties or conflicts arising between any of the parties, for any reason or under any circumstances, related directly or indirectly to this Network Membership Agreement, or to any of the provisions and consequences thereof, including, by a way of example, and without limiting in any manner the generality of the foregoing, its existence, validity, invalidity, performance, non-performance, interpretation, arbitration jurisdiction, etc; shall be submitted to an arbitrator who shall settle the controversy (to the exclusion of all other remedies which may be available to the parties hereto, including, without limitation, proceedings in any court) in accordance with the Summary Proceeding contemplated in Sections 680 and thereafter of the Civil Procedure Code and in strict compliance with applicable Chilean law. The parties hereby agree to accept and to refrain from pursuing any remedies that they could otherwise pursue to challenge any decisions or orders, including the award, rendered by the arbitrator.…"

A dispute arose between Publicitaria and Inversiones on the one hand and PGI and Publicis Groupe Holdings B.V. (PGH) on the other hand in respect of the performance of the Agreement. On 14 April 2005, Publicitaria and Inversiones (collectively, Claimants) and Ms. A commenced arbitration in Chile against PGI. PGH appeared in the arbitration as a third-party intervenor.

By an award of 11 October 2007, a sole arbitrator found in favor of Claimants, directing PGI and PGH (collectively, Publicis) to comply with their obligations under the Network Membership Agreement and to pay Publicitaria damages in the amount of US$ 745,889,030 in Chilean pesos.

Publicis sought annulment of the award in Chile. On 4 August 2009, the Santiago Court of Appeal denied the annulment request. No means of appeal were available against this decision at the time of the present decision. In turn, Claimants sought leave for enforcement of the Chilean award in the Netherlands.

The president of the Amsterdam Court of First Instance, M.W. van der Veen, granted Claimants' application for leave for enforcement.

The president noted at the outset that Claimants supplied the necessary documents for seeking enforcement under the 1958 New York Convention, which undisputedly applied.

Defendants claimed that enforcement of the Chilean award should be refused because Defendants' right to due process had been violated in the arbitration; Defendants alleged that they were not given sufficient opportunity to state their objections to the contents and manner of establishment of an expert report ordered by the sole arbitrator. The court disagreed, holding that it appeared from the facts of the case that Defendants were given sufficient opportunity to state their objections to the expert report, both before and after it was completed.

Nor was Defendants' argument that enforcement should be denied on grounds of public policy successful. The expert obtained the information for the report in part by consulting two by-subscription databases from Ms. A's office, without Defendants being present. This, reasoned the court, was done to save costs and although it was not correct it did not constitute a violation of public policy, that is, a violation of mandatory international law of a fundamental nature.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345052-n>.

Excerpt

[1] "Claimants seek leave for enforcement of the award pursuant to Art. 1075 of the Code of Civil Procedure [*Wetboek van Burgerlijke Rechtsvordering* – Rv] together with Art. III of the [1958 New York Convention], with provisional enforceability and no obligation to post security, and that Defendants be ordered to bear the costs of this proceeding.
[2] "Defendants oppose the granting of the application and claim that the arbitral award came into existence in violation of public policy. They argue that the arbitral award is based on an expert report written on the basis of information that was not publicly available and confidential, and that Claimants paid to obtain it. For this purpose, the expert visited the office of Ms. A and talked to employees there without the knowledge of Defendants. The expert should have based [the report] on the documents and witness statements that had already been supplied in the proceeding. Defendants also argue that they were not given sufficient opportunity, both when the expert report was drafted and subsequently, to state their objections to the report; this is at odds with the principle of adversary proceedings [*hoor en wederhoor*]. The arbitrator incorrectly based the compensation for damages awarded to Claimants solely on the expert report. Hence, the arbitral award is fundamentally tainted and defective, so argue Defendants.
[3] "Defendants request the court to deny the provisional enforceability sought [by Claimants], and to decide that Claimants must post sufficient security pursuant to Art. 233(3) Rv and must bear the costs of this proceeding.
[4] "The arguments of the parties are dealt with below, insofar as relevant, in the context of the decision."

I. ANALYSIS

[5] "The president first notes that pursuant to Art. 1075 Rv, in connection with Art. 985 Rv, she has jurisdiction to hear the present application.
[6] "The president agrees with the parties' opinion that the Convention, to which the Netherlands and Chile are parties, applies to the arbitral award. The applicable and relevant provisions of the Convention are Arts. II, III, IV and V, whose (authentic) English text is reproduced below for the sake of completeness. [Quotation of Arts. II(1)-(2), Art. III first sentence, Art. IV and Art. V(1)(*a*), (*c*)-(*d*) and (2)(*b*) omitted.]

[7] "The president notes that Claimants complied with the provisions of Art. IV of the Convention….
[8] "A request for recognition and/or enforcement of a foreign arbitral award can be refused only if the opposing party argues and where necessary proves that there is one of the grounds for refusal of recognition en enforcement exhaustively listed in Art. V of the Convention. There is a violation of international public policy within the meaning of Art. V(2)(*b*) only if the content or performance of the award is at odds with mandatory international law of such a fundamental nature that compliance therewith may not be hindered by limitations of a procedural nature."

1. Due Process

[9] "Defendants argue that the arbitral award was rendered in violation of the principle of adversary proceedings to their detriment, because they were not given sufficient opportunity to state their objections to the expert's enquiry.
[10] "At the oral hearing the following facts were established. On 11 December 2006, after all the evidence in the arbitration had been supplied and all witnesses had been heard, Claimants filed an additional document in the arbitration, in which they discussed the arbitrator's intention to appoint an expert who would examine also the C and Megatime databases. On 15 December 2006, Defendants filed a written reaction to the said document, arguing that the expert should base any enquiry and report solely on the evidence and witness statements already submitted in the proceeding. An expert was subsequently appointed who, on 23 January 2007, called a meeting in which both parties expressed their opinion in respect of the purpose and scope of the expert report. After the expert report was completed on 27 April 2007, both parties were given the opportunity to react thereto. Defendants submitted written statements on 3 May 2007 and 7 June 2007. It appears from the arbitral award that Defendants's objections to the (establishment of) the expert report were dismissed and that reasons were given [for this decision].
[11] "The above [considerations] lead to the conclusion that Defendants had sufficient opportunity to state their objections to the expert report. Defendants could react on several occasions, both before the appointment of an expert and after the expert report was completed, in respect of the manner in which the report was established and its contents. Moreover, it appears from the arbitral award that the arbitrator took these objections into consideration and subsequently rejected them.

[12] "The mere fact that the objections raised by Defendants did not to lead to the result Defendants had in mind does not imply that the principle of adversary proceedings or other guarantees named in Art. V of the Convention were violated. After all, the arbitrator is free to decide in what manner evidence is given, including the manner of enquiry by an expert, and how to evaluate that evidence.
[13] "Defendants also remarked in this respect that the arbitrator disregarded, without giving reasons, their request to supply counter-evidence through witness statements. However, Defendants have not given sufficient support for their argument that they have made this request. No document has been submitted from which this [request] appears. The quotation from an English procedural document at the oral hearing does not suffice, for the fact alone that it was unclear what procedural document this was."

2. Public Policy

[14] "Defendants have argued that there is a violation of public policy because the expert obtained the information on which he based his report from the non-publicly accessible database of Megatime; Publicitaria paid [for this access], which could be obtained by the expert only by visiting the office of Ms. A, during which visit [the expert] spoke with employees in the absence of Defendants.
[15] "This objection fails. It appears from the statements at the hearing that the information from the Megatime database could not be obtained by the expert free of charge. Ms. A had a subscription to the Megatime data and gave the expert the opportunity to make use of that subscription at her office. The mere fact that the expert made use of this offer does not constitute a violation of public policy lacking particular circumstances that neither are argued nor appeared here. Making use of Ms. A's subscription was done in this case to save costs. The fact that the expert visited the office of Ms. A for this purpose without Defendants being present would not win any beauty prizes, but does not constitute a violation of public policy. Further, [Defendants] argued – but failed to support with facts and circumstances – that the expert was influenced by this manner of proceeding and/or that this had an effect on the content of the report that was unfavorable to Defendants. [However,] it does not appear from the further arguments of the parties, nor from the documents supplied in the file, that the expert was influenced."

3. Conclusion

[16] "It follows from the above [remarks] that the president does not deem that there is one of the grounds for refusal of Art. V of the Convention. The request of Claimants shall be granted."
(….)

II. DECISION

[17] "The above [considerations] lead to the following decision. The president:

(i) determines that the arbitral award of 11 October 2007 rendered between Claimants and Defendants by Mr. Manuel José Vial Vial in Chile shall be recognized in the Netherlands, and grants Claimants leave to enforce it in the Netherlands;
(ii) directs Defendants to bear the costs of the proceedings, estimated by Claimants as of today in € 103 … and € 904 …;
(iii) declares that this decision is provisionally enforceable;
(iv) rejects all other or further claims."

45. Gerechtshof [Court of Appeal], Amsterdam, 18 September 2012, Case no. 200.100.508/01[1]

Parties:	Appellant: Nikolai Viktorovich Maximov (Russian Federation) Respondent: OJSC Novolipetsky Metallurgichesky Kombinat (Russian Federation)
Published in:	No information available
Articles:	V(1)(*e*)
Subject matters:	– award set aside – discretion to enforce set aside award
Topics:	¶ 516

Summary

The court ordered the parties to provide expert evidence on Russian law in respect of the enforcement of an ICAC award that had been set aside in the Russian Federation. While an annulled award should be denied enforcement in principle, the annulment decision may be disregarded where there are such strong indications that the annulment case was not heard fairly to overcome the presumption of the impartiality of the foreign court. In the present case, the facts before the court were insufficient for such finding and additional expert evidence was necessary.

The facts of this case are also reported in Yearbook XXXVII (2012) at pp. 274-276 (Netherlands no. 41). By a Purchase Agreement of 22 November 2007, Nikolai Viktorovich Maximov sold OJSC NLMK Metallurgichesky Kombinat (NLMK) 50 percent plus one of his shares in the capital of OJSC Maxi-Group; the price of the shares was to be calculated on the basis of a formula laid down in the Purchase Agreement. The Purchase Agreement contained a clause for arbitration of disputes at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC).

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1. The General Editor wishes to thank Marnix A. Leijten, The Hague, for his invaluable assistance in providing this decision and translating it from the Dutch original.

On 10 January 2008, NLMK made an advance payment of RUR 7,329,840,000.00. A dispute arose between the parties when Maximov claimed that NLMK still owed part of the purchase price. On 22 December 2009, Maximov commenced ICAC arbitration as provided for in the Purchase Agreement, seeking payment of the balance of the shares' purchase price. According to Maximov's calculation, which was based on information obtained from the Maxi-Group (Basic Data 1), the purchase price of the shares was approximately RUR 22.1 billion; hence, NLMK still owed approximately RUR 14.7 billion. NLMK filed a counterclaim, arguing that on the basis of its own calculation, based on data received from the financial statements of several group companies, including Maxi-Group (Basic Data 2), the purchase price was approximately RUR 1.4 billion; hence, NLMK was entitled to repayment of part of the advance payment for approximately RUR 5.9 billion. In the course of the arbitration, the ICAC arbitral tribunal requested the parties to finalize their calculation of the purchase price.

By an award of 31 March 2011, the arbitral tribunal held that as both parties failed to finalize their purchase price calculations, both should bear the consequences of this failure in equal parts. The tribunal therefore calculated the purchase price by adding the price calculated by Maximov on the basis of Basic Data 1 and the price calculated by NLMK on the basis of Basic Data 2, and dividing by two. As a result, NLMK was to pay Maximov RUR 8,928,001,875.70. Both annulment and enforcement proceedings followed.

In the Russian Federation, NLMK filed an action with the *Arbitrazh* (Commercial) Court in the City of Moscow on 7 April 2011, seeking annulment of the ICAC award. Following NLMK's submission of a new document in the proceedings putting forward additional grounds for annulment, Maximov repeatedly sought a postponement of the hearing, which was not granted. The hearing took place on 21 June 2011 as initially scheduled; after approximately five hours of deliberation, the court delivered an oral decision annulling the ICAC award. The court had no access to the arbitration file, because NLMK had not consented to providing it. On 28 June 2011, the court issued written reasons for its oral judgment of 21 June 2011, holding that: (1) two of the ICAC arbitrators failed to disclose that they were employed – in a lower position – by the same legal institutes that employed the three experts who assisted Maximov in the arbitration; as a result, the composition of the arbitral tribunal was not in accordance with the parties' agreement; (2) the dispute concerned the validity of a share transfer and was therefore not arbitrable under Russian law; (3) the method by which the arbitrators determined the purchase price was contrary to mandatory Russian law regarding purchases. On 26 September 2011, the Federal

Arbitrazh Court in Moscow affirmed the decision of the court below. On 30 January 2012, the Supreme *Arbitrazh* Court of the Russian Federation dismissed Maximov's appeal from the appellate decision.

In turn, Maximov sought leave to enforce the ICAC award in the Netherlands. He first obtained pre-judgment attachment of NLMK's shares in the capital of NLMK International B.V., a Dutch company, then filed a request for leave to enforce the award. On 17 November 2011, the president (*voorzieningenrechter*) of the Amsterdam Court of First Instance denied enforcement of the ICAC award on the ground that it had been annulled in the Russian Federation. The court held that although annulment decisions rendered in the country of origin may be disregarded under exceptional circumstances – and with utmost caution – there was no proof here of a violation of the principles of proper judicial procedure that would be unacceptable by Dutch public policy standards. Maximov's argument that Russian courts are corrupt and biased in cases involving the Russian state and its interests was not based on verifiable independent sources and did not prove that the judges had been corrupt and biased in the case at hand. Also, there was no evidence that state interests had been at stake. On 16 January 2012, Maximov appealed.

By the present decision, the Amsterdam Court of Appeal, before G.C.C. Lewin, R.H. de Bock and M.A.J.G. Janssen, in an opinion by G.C.C. Lewin, ordered the parties to provide expert evidence on issues of Russian law and referred the case to a later hearing.

The court first noted that the 1958 New York Convention undisputedly applied. Pursuant to Art. V(1)(*e*) of the Convention, Maximov's request for enforcement should be denied because the award was set aside by a competent Russian court – it was irrelevant whether the Russian annulment decision was res judicata, whether its enforcement was sought in the Netherlands and whether the court of appeal had enforcement jurisdiction. However, the court reasoned that there are exceptions to this principle, namely, where there are such strong indications that the annulment case was not heard fairly to overcome the presumption of the impartiality of the foreign court.

Noting that the court of a state should exercise restraint when assessing whether a foreign court was partial and dependent, the court of appeal referred to its own decision in the *Rosneft / Yukos case*, in which it cited sources indicating that the Russian courts are not impartial and independent where the dispute involves interests of the Russian state. In the present case, however, the court held that the facts before the court were insufficient for a finding that such interests affected the fairness of the Russian annulment proceedings.

The court of appeal therefore ordered the parties to supply expert evidence as to (1) the effect under Russian law of arbitrators and experts being employed by the same institutions; (2) the arbitrability of share purchase disputes under Russian law; (3) whether the method of determining the purchase price applied by the arbitrators was contrary to mandatory Russian law; and whether the denial of Maximov's requests for postponement, the fact that the court did not take into account the arbitration file and that it gave an oral judgment immediately after a five-hour hearing were in compliance with Russian law.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345053-n>.

Excerpt

I. BACKGROUND

[1] "The District Court established a number of facts in … the contested decision. These facts are not in dispute, so that the Court of Appeal will also start from those facts. The Court of Appeal will establish a number of additional facts, as asserted by one party and not contested or contested with insufficient substantiation by the other party, also having regard to the exhibits submitted in the proceedings.

[2] "The following facts have been established between the parties. NLMK is a legal entity, with registered office in Russia, incorporated under Russian law, which is the largest employer in the Russian region of Lipetsk and is internationally active as a steel producer. A part of the shares in the capital of NLMK is traded on the stock exchange in London. The other shares, the majority, are held by V.S. Lisin. Lisin is also the owner of trans-shipment ports in St. Petersburg and Tuapse. He also holds a high position in the Russian state-owned United Shipbuilding Corporation (shipbuilding) and holds an indirect interest in the Russian state-owned company Freight One (transport by railway). Maximov has the Russian nationality and resides in Russia. He is an internationally active businessman. Both Lisin and Maximov are included in a list of billionaires compiled by the American magazine Forbes.

[3] "On 22 November 2007, Maximov and NLMK entered into a written agreement with each other (the Purchase Agreement). Under this agreement, Maximov sold 50 percent plus one of his shares in the capital of the Russian steel company he incorporated, OJSC Maxi-Group (Maxi-Group), to NLMK for a purchase price to be determined according to a formula contained in the Purchase Agreement.

[4] "Art. 5 of the agreement provides, inter alia (in the English translation):

> 'N.V. Maximov and OJSC Maxi-Group herein confirm to OJSC NLMK that all guarantees and representations specified in Annex 3 are valid as per the date of the Agreement, unless otherwise stated.'

Attached to the agreement is Annex 3, entitled 'Representations and guarantees'.

[5] "On 4 December 2007, the shares referred to in the Purchase Agreement were transferred to NLMK. On 10 January 2008, NLMK paid Maximov an advance on the purchase price of approximately RUR 7.3 billion.

[6] "On 22 December 2009, Maximov instituted arbitration proceedings against NLMK before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the arbitration court), pursuant to the arbitration clause contained in the Purchase Agreement. In these proceedings, Maximov claimed that NLMK should be directed to pay approximately RUR 14.7 billion, according to him the remainder of the purchase price. NLMK has contested this claim, claiming in turn that Maximov should be directed to repay approximately RUR 5.9 billion, being the amount by which the advance paid exceeded the purchase price, according to NLMK. Maximov contested this claim. In the arbitration proceedings, the representatives of Maximov have taken the position that Maximov is not bound by Annex 3 of the agreement, because he never signed that Annex.

[7] "Since March 2011, Maximov has been prosecuted in Russia under criminal law on suspicion of fraud. On 28 March 2011, criminal proceedings were instituted against Maximov in Russia on suspicion of fraud in the context of the share transaction with NLMK, and by document of 17 June 2011 criminal proceedings were instituted against him in Russia on suspicion of misleading the arbitration court in the arbitration proceedings against NLMK. Maximov has lodged criminal complaints against Lisin and persons involved in Maxi-Group. These complaints have not led to any prosecution under criminal law.

[8] "By judgment of 31 March 2011 (the arbitral award), the arbitration court ordered NLMK to pay to Maximov a principal sum of approximately RUR 8.9 billion, dismissing all other or further claims brought by the parties. In support of its award, the arbitration court considered – in the majority opinion of arbitrators I.S. Zykin and V.S. Belykh and contrary to the minority opinion of arbitrator K.I. Devyatkin, freely translated from English and in summary – the following:

– According to the calculation by Maximov, the purchase price of the shares in Maxi-Group is approximately RUR 22.1 billion. Maximov based his calculation on information he requested from the Maxi-Group, referred to as Basic Data 1.
– According to the calculation by NLMK, the purchase price is approximately RUR 1.4 billion. NLMK based its calculation on data derived from the financial statements of a number of group companies, including Maxi-Group.
– Both parties have made insufficient efforts to finalize their calculations within the agreed period. The parties have thus taken risks, the consequences of which shall be borne by them in equal parts.

– The purchase price must therefore be calculated as half of the sum of the purchase price calculated on the basis of Basic Data 1 and the purchase price calculated on the basis of Basic Data 2.
– Taking into account the advance payment, this means that NLMK shall pay approximately RUR 8.9 billion to Maximov.

[9] "No appellate arbitration proceedings against the arbitral award are possible.
[10] "By case document of 7 April 2011, NLMK brought a claim for annulment of the arbitral award before the *Arbitrazh* Court of the City of Moscow (the *Arbitrazh* Court). In the case document of 7 April 2011, NLMK put forward the following – freely translated from English and in summary:

(a) Maximov deliberately misled NLMK about the value of the shares;
(b) The arbitration court refused to investigate the relevance of the 'warranties and representations' given by Maximov in the Purchase Agreement and the validity of Annex 3 to the Purchase Agreement. It ruled that NLMK's argument in this respect was irrelevant to the assessment of the claim;
(c) Based on the above, 'fraud' has occurred, which constitutes a breach of public policy and therefore a ground for annulment.

Maximov has submitted a statement of defence.
[11] 'On 27 April 2011 Maximov, by leave granted by the president[2] of the Amsterdam District Court, levied prejudgment attachment on the shares in the capital of NLMK International B.V. held by NLMK, at the expense of NLMK.
[12] "On 17 June 2011, NLMK submitted an additional document in the Russian annulment proceedings. The submitted English text consists of twenty-nine pages, excluding annexes. In this case document, NLMK put forward additional grounds for annulment. In response to this additional case document, Maximov repeatedly requested the *Arbitrazh* Court to postpone the hearing by a few days. This postponement was denied. The hearing took place on 21 June 2011 and lasted approximately five hours. At the end of the hearing, the *Arbitrazh* Court annulled the arbitral award by oral judgment. The *Arbitrazh* Court had no

2. *Note General Editor*. The President of the *Rechtbank* (Court of First Instance) 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 Court of First Instance", this terminology has been retained.

access to the arbitration file, because NLMK had not consented to providing that file to the *Arbitrazh* Court.
[13] "On 28 June 2011, the *Arbitrazh* Court issued written reasons for its oral judgment of 21 June 2011. In summary and freely translated from English, these reasons are as follows:

(a) The experts V.A. Bublik, S.S. Alekseev and S.A. Stepanov, who assisted Maximov in the arbitration proceedings, are employed by the Ural State Law Academy, which institution also employs arbitrator V.S. Belykh. Expert Bublik is rector of that institution and thus holds a higher position than arbitrator Belykh. Expert Yu.L. Shulzhenko is employed by the [Institute of] State and Law of the Russian Academy of Sciences, which institution also employs arbitrator I.S. Zykin. Expert Shulzhenko holds a higher position at the institution than arbitrator Zykin. The arbitrators have not informed the parties of these relations between the party experts and the arbitrators. The composition of the arbitration court is therefore not in line with what the parties had agreed. This constitutes the first ground for annulment of the arbitral award.
(b) The subject matter of the dispute is related to the validity of a share transfer. According to Russian law, the dispute can therefore not be submitted to arbitration. This constitutes the second ground for annulment.
(c) The method by which the arbitration court has determined the purchase price (half of the sum of the purchase price calculated on the basis of Basic Data 1 and the purchase price calculated on the basis of Basic Data 2), is contrary to mandatory Russian law regarding purchases. This constitutes the third ground for annulment.

[14] "The case was heard by the *Arbitrazh* Court and decided by N.V. Shumilina, judge of that Court. The same judge reversed the arbitral awards that were at issue in the *Yukos/Rosneft case* (Amsterdam Court of Appeal, 28 April 2009, case no. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5[3] and Supreme Court, 25 June 2010, case no. 09/02566, LJN BM1679, NJ 2012/55).[4]
[15] "By decision of 1 September 2011 of the *Arbitrazh* Court, the Maxi-Group was declared bankrupt at the request of NLMK.
[16] "Both Maximov and NLMK appealed against the judgment of the *Arbitrazh* Court to the Federal *Arbitrazh* Court for the Moscow District (the Federal Court). On 26 September 2011, the Federal Court confirmed the contested

3. Yearbook XXXIV (2009) pp. 703-714 (Netherlands no. 31).
4. Yearbook XXXV (2010) pp. 423-426 (Netherlands no. 34).

judgment. On 10 October 2011, the Federal Court issued written reasons for its judgment of 26 September 2011. These reasons show that the Federal Court agreed with the judgment of the *Arbitrazh* Court with respect to all three grounds for annulment.

[17] "On 10 November 2011, Maximov appealed from the decision of the Federal Court to the Supreme *Arbitrazh* Court of the Russian Federation in Moscow (the Supreme Court). By decision of 30 January 2012, the Supreme Court dismissed this appeal. In summary and freely translated from English, the reasons for this decision are as follows:

(a) The circumstances established by the *Arbitrazh* Court and the Federal Court indicate that the arbitration court failed to disclose information about the relations between arbitrators and persons who signed documents submitted on behalf of Maximov. This constitutes a ground for annulment.
(b) In addition, both the *Arbitrazh* Court and the Federal Court arrived at the correct conclusion that the arbitration court failed to investigate the nature of the transaction on which the claim was based. Based thereon, the arbitration court drew an incorrect conclusion regarding its jurisdiction.
(c) The complaints of Maximov are based on circumstances that were not established by the *Arbitrazh* Court or the Federal Court. They are aimed at a new establishment of facts. This is beyond the scope of the duties of the Supreme Court.

[18] "Maximov requested the Constitutional Court of the Russian Federation to investigate the constitutionality of Russian statutory provisions that were applied in the annulment proceedings. By decision of 21 December 2011, the Constitutional Court refused to hear Maximov's request and ruled that its decision on this request was 'final'.

[19] "In the present proceedings, Maximov requested the president – briefly stated – to recognize the arbitral award and grant leave for its enforcement, primarily in an unconditional manner and alternatively, if NLMK should not furnish the bank guarantee specified in the request, to direct NLMK to pay the costs of the proceedings and the costs of the attachment levied on 27 April 2011, all [decisions] enforceable regardless of any appeal. The District Court dismissed the claims.

[20] "The present appeal is directed against this decision. The grounds for appeal submit the dispute in its entirety to the judgment of the Court of Appeal and can be discussed jointly."

II. ANALYSIS

[21] "Maximov has based his request on Art. 1075 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering* – Rv). That statutory provision reads as follows:

> 'An arbitral award made in a foreign State to which a treaty concerning recognition and enforcement is applicable may be recognized 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.'

[22] "The parties agree with the Court of Appeal that the present case is subject to the 1958 New York Convention (Treaty Series 1958, 145). NLMK has invoked, inter alia, Art. V(1)(*e*) of that Convention. [Dutch and English text of Art. V(1)(*e*) omitted.]

[23] "The *Arbitrazh* Court may be regarded as a competent authority within the meaning of Art. V(1)(*e*) New York Convention. For NLMK's invocation of that provision to succeed, it is not necessary that the Court of Appeal in these proceedings has jurisdiction to order enforcement of the judgment of the *Arbitrazh* Court. Nor is it necessary that NLMK has requested or will request a Dutch court to recognize and/or enforce that judgment, within or outside the framework of the present proceedings. To the extent that the grounds for appeal are based on a different interpretation of the law, they fail.

[24] "It is also not necessary for NLMK's invocation of that provision to succeed that the judgment of 21 June 2011 of the *Arbitrazh* Court has acquired the force of res judicata. After all, the New York Convention does not set such a requirement (also not in Art. VI), nor is there any other rule of law stipulating such a requirement. If the judgment has not acquired the force of res judicata, that is also not a reason to suspend this case.

[25] "As the *Arbitrazh* Court has annulled the arbitral award, in principle Maximov's request must be dismissed pursuant to Art. V(1)(*e*) New York Convention. We must decide whether it must be deemed that there is an exception in this case.

[26] "There is an exception if there are sufficiently strong indications that there have been such essential shortcomings in the annulment proceedings before the

foreign state court in the case under consideration that it cannot be maintained that the case has been fairly heard. There is also an exception to this exception – in which case Art. V(1)(*e*) New York Convention applies anyway – namely if it is sufficiently plausible that even if the case had been heard fairly, the proceedings would have resulted in the annulment of the arbitral award.

[27] "The Court of Appeal derives the jurisdiction and obligation to review all this from general Dutch private international law, which protects Dutch public policy, as well as from Art. 6 European Convention on Human Rights (see European Court of Human Rights, 20 July 2001, no. 30882/96, (*Pellegrini/Italy*)).

[28] "Starting point is that a judge must be presumed to be impartial by virtue of his appointment, unless there are exceptional circumstances that constitute a serious indication for the view that a judge is biased against a party. In principle, this also applies to foreign judges. It is important that a judge of one state exercises restraint when assessing the question of whether the judge of another state is partial and/or allows himself to be influenced by a relationship of dependence with the executive of that other state.

[29] "In the *Rosneft/Yukos* case, the Court of Appeal cited sources … that partially relate to the degree of independence and impartiality of the Russian state court in general. Maximov has inter alia referred to those sources in this case. The picture emerging from these sources is very worrying, especially where it concerns disputes involving substantial interests that the Russian state regards as its own. In cases in which the Russian state court is involved and interests as referred to above are at issue, this prejudices the starting point described [at [28]] above. Nevertheless, assuming an exception as referred to [at [26]] above is only appropriate if the indications giving rise thereto relate to the case under consideration in a sufficiently specific manner.

[30] "The facts established [at [1]-[2]] above regarding Lisin and Maximov are insufficient – even if considered in conjunction with the facts established [at [7]] regarding criminal proceedings and the facts established [at [14]] regarding the judge – to justify the conclusion that the Russian state or interests of the Russian state have affected the fairness of the annulment proceedings at hand in such a manner that it can no longer be maintained that the case has been fairly heard. Hence, solely on the basis of those facts and circumstances it cannot be deemed that there is an exception as referred to [at [26]]. Further, the Court of Appeal currently has insufficient data from an objective source with regard to Lisin and Maximov, the actions of the Russian state in criminal cases and/or the judge who decided the annulment to justify the above-described conclusion.

[31] "The Court of Appeal must now examine whether the manner in which the Russian annulment proceedings were conducted indicates that the exception referred [at [26]] must be deemed to exist. The Court of Appeal deems it necessary that one or more independent expert(s) provide information to the Court of Appeal, in particular about the contents of Russian law. The Court of Appeal therefore intends to order an expert opinion. The case will be referred to the register of cases in order to give the parties an opportunity to express their views on the number and identity of the person(s) to be appointed as expert(s), the questions to be asked and the advance. First, Maximov will be given the opportunity to submit a statement, thereafter NLMK.
[32] "The parties are requested to seek unanimity with regard to the identity of the person(s) to be appointed as expert(s). The parties are also requested to express their views on the possibility of involving the International Law Institute at R.J. Schimmelpennincklaan 20-22 in The Hague.
[33] "The Court of Appeal proposes to ask the expert(s) the following questions:

(i) Were the arbitrators obliged under Russian law to inform the parties that they were employed by the same institutions as the persons involved in the arbitration proceedings as experts? If so, what is the legal effect under Russian law of a breach of this obligation? Does the circumstance that the arbitrators failed to report the relations have the legal effect under Russian law that the composition of the arbitration court was not in accordance with what had been agreed? If so, does that constitute a ground for annulment under Russian law?
(ii) (If the expert is also an expert in this field): To what extent does academic freedom or a similar independence exist between persons employed by the Ural State Law Academy? Is this institution similar to a university? The same questions apply with regard to the [Institute of] State and Law of the Russian Academy of Sciences.
(iii) Should a dispute on the amount of the purchase price of shares under Russian law be regarded as a dispute on the validity of a share transfer? Can a dispute on the amount of the purchase price of shares, in a case in which the share transfer may not be valid, be submitted to arbitration?
(iv) Is the method of determining the purchase price applied by the arbitration court contrary to mandatory Russian law regarding purchases? Can the method of determining the purchase price applied by the arbitration court be regarded as determining the agreed purchase price or as determining a reasonable purchase price? Does a violation of such mandatory law constitute a ground for annulment?

(v) Are the denials by the *Arbitrazh* Court of Maximov's requests for postponement in response to the additional case document of NLMK of 17 June 2011 contrary to Russian law? What is the relevance of the circumstance that Maximov was still given the opportunity to discuss the additional case document on appeal and the *Arbitrazh* Court's ruling thereon?
(vi) Is it in compliance with Russian law that the state court has not taken note of the arbitration file on the ground that one of the parties refused to consent thereto? Should the state court have attached consequences under Russian law to the refusal to consent?
(vii) Is it in compliance with Russian law that the *Arbitrazh* Court gave an oral judgment immediately after a five-hour hearing?
(viii) Do you have any further comments that may be relevant to the decision of the Court of Appeal?

The parties are requested to comment on these draft questions."

III. DECISION

[34] "The Court of Appeal (1) refers the case to the sitting of 16 October 2012 in order to give Maximov the opportunity to express his views on the subjects referred to [at [31]-[33]] above; (2) defers any further decision."

46. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Arnhem, 27 September 2012, Case no. 221871 I KV RK 11-999[1]

Parties:	Claimant: Bayeti Farm Enterprises Limited (Uganda) Defendant: (1) Cooperatie TGS U.A. (Netherlands); (2) Hatch Tech B.V. (Netherlands)
Published in:	No information available
Articles:	V; V(1); V(1)(*b*); V(2)(*b*)
Subject matters:	– due process – burden of proof – public policy and lack of reasons – review of merits of award (no)
Topics:	[8]-[12] = ¶ 508; [9]-[10] = ¶ 503; [13]-[15] = ¶ 522; [16]-[17] = ¶ 502

Summary

The court granted enforcement of a Ugandan award of the Centre of Arbitration and Dispute Resolution (CADER). It appeared from the documents in the file that respondents were aware of the arbitration proceedings. The lack of reasons in the final award did not violate Dutch public policy: reasons for the sole arbitrator's decision were given in the interim arbitral award on liability. Respondents did not challenge those reasons and could not challenge them in enforcement proceedings, where review on the merits of the award is not allowed.

Bayeti Farm Enterprises Limited (Bayeti) concluded a contract with Cooperatie TGS U.A. (TGS) and Hatch Tech B.V. (Hatch Tech). The contract provided for

1. *Note General Editor*. The President of the *Rechtbank* (Court of First Instance) 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 Court of First Instance", this terminology has been retained.

arbitration of disputes at the Centre of Arbitration and Dispute Resolution (CADER) in Uganda.

On 20 November 2008, Mr. Mugabi, Bayeti's lawyer, informed TGS that if certain sums under the contract were not transferred within three days Bayeti would commence CADER arbitration as provided for in the contract. Mr. Mugabi indicated the names of possible arbitrators and requested TGS's consent to agree on one of them as sole arbitrator. TGS forwarded the letter concerning the commencement of arbitration to its lawyer in Kampala. TGS and Hatch Tech (collectively, Respondents) took no part in the arbitration. A sole arbitrator, Ms. Rachel Kabala was appointed by CADER. On 30 July 2009, she rendered an Interim Arbitral Award holding that Bayeti should recover its investments from Respondents jointly and severally. The sole arbitrator noted that after an initial application to adjourn the proceedings, Respondents did not appear in the arbitration, either through counsel or in person, and the matter was heard ex parte. This decision was forwarded to TGS on 5 August 2009 and was read on the following day.

On 13 October 2009, the sole arbitrator rendered a final award quantifying the amounts to be paid by Respondents to Bayeti in UGX 186,208,440, interest and costs of the arbitration. The award was confirmed by the High Court of Uganda in Kampala on 29 January 2010. Bayeti sought enforcement of the Ugandan final award in the Netherlands.

The President of the Arnhem District Court granted enforcement of the CADER final award, dismissing Respondents' objection of violation of due process and public policy.

The court found that it appeared from the documents submitted by Bayeti that TGS, Hatch Tech and their joint attorney in Uganda were aware of the arbitration proceedings. Though the burden of proving that they had not been duly informed lay with Respondents, the court had allowed Bayeti, for practical reasons, to supply documents proving that Respondents were informed of the arbitration.

TGS argued that the final award did not contain reasons and therefore violated Dutch public policy. By an interim decision, the court had given Bayeti an opportunity to react to this objection, and Bayeti had submitted to the court the Interim Arbitral Award in which the sole arbitrator gave sufficient reasons for her decision. The court noted that TGS, if in disagreement with those reasons, could have challenged them, but could not do so in the present enforcement proceedings; a review on the merits of award and the reasons for it is not allowed. The same prohibition prevented the court from dealing with Respondents' argument that the award did not find expressly against

Respondents on the main claim and that the amount of the claim in Euros was incorrect.

The court declared its decision provisionally enforceable and denied Respondents' request for security.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345054-n>.

Excerpt

I. BACKGROUND

[1] "The following additions are made to the background of the case given in the [interim] decision of 1 March 2012.
[2] "On 20 November 2008, the attorney for Bayeti, Mr. Mugabi of Kampala (Uganda) sent a letter to TGS. That letter reads, inter alia, as follows:

> 'Please be placed on notice that in the event the sums above are not remitted to us for onwards transmission to our client within three (3) days of this letter, the matter shall be referred to Centre of Arbitration and Dispute Resolution-CADER, as hitherto agreed.
>
> Our client nominates the following persons affiliated to CADER to act as Arbitrators in the event that the matter of Arbitration….
> (….)
>
> We request that you notify us of your consent to either of the nominated persons within 30 days of the date of this letter.
>
> We also request your concession to referring the matter before a single arbitrator within the same indicated time.
>
> Should you fail to do so, our client shall move CADER to appoint an arbitrator pursuant to the provisions of the Arbitration and Conciliation Act (Chapter 4) of the Laws of Uganda and who shall subsequently proceed to lodge its claim for determination.'

[3] "The letter was collected from the office of Mr. Mugabi by a DHL employee on 25 November 2008 and was delivered on 28 November 2008 to Mr. Bergen for Hatch Tech and Mr. Hamoen for TGS. Hamoen reacted to [Mr. Mugabi's letter] by email on 15 December 2008. That email reads, inter alia, as follows:

> 'I herewith send you an answer on your letter. I am particular worried about your way of writing.
> (….)
>
> I sent your copy to Mr. Enos K Tumusiime our Lawyer in Kampala. You know him of course and advise you to be in contact with him as he is our Lawyer.'

[4] "In an email of 29 January 2009 Hamoen wrote the following to Mr. Mugabi:

> 'Did you send a copy of what you send to me of CADER number 02 2009 also to our lawyer Mr. Enos Tumusiime? Pls let me know. The invitation to come to Kampala on 2 February 2009 is impossible! Nobody can come in such a short period of time.
> (….)
> You have to set a meeting that is also convenient for me and not only for Mr. Muyeti. Here the arbitration is already not equal to everybody.
> (….)
> I can come to Kampala not earlier then the beginning of March 2009.'

[5] "On 30 July 2009, the arbitrator, Ms. Rachel Kabala, rendered an 'interim arbitral award'. The interim award reads, in relevant part:

> 'Proceedings:
> 5. The 1st and 2nd Preliminary proceedings were held on 25 May and 3 July 2009, respectively. An application by Counsel for the Respondents to adjourn the proceedings to October 2009 was dismissed to, inter alia, avoid delay. Counsel for the Respondents withdrew from the proceedings, and the Respondents never appointed another Lawyer to represent them. The personal attendance was sought but not obtained. The matter was heard ex parte on 6 and 20 July 2009 under Sect. 2[6](c) of the Arbitration and Conciliation Act (CAP4) Laws of Uganda, 2000.[2] (The Act) having confirmed that the Respondents had not instructed another Counsel. It should be noted that is in on record that the Tribunal proceeded under Sect. 25(c).
> (….)
> 33. (….)
> In the circumstances the Claimant therefore should recover his investments from the Respondents jointly and severally.

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2. Sect. 26(c) of the Arbitration and Conciliation Act (CAP4) Laws of Uganda, 2000 reads:

> "26. Unless agreed by the parties, if, without showing sufficient cause –
> ….
> (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it…."

(….)'

[6] "On 5 August 2009 Mr. Mugabi sent the decision of 30 July 2009 by email to TGS. The email was read by TGS on 6 August."

II. ANALYSIS

[7] "The president confirms the considerations and decisions in the interim decision of 1 March 2012. It is repeated and stressed that the request, as presently before the court, can be denied only on the grounds mentioned in Art. V of the [1958 New York Convention]. A review on the merits of the decision whose leave for enforcement is sought must be omitted."

1. Due Process

[8] "It follows from Art. V(1)(*b*) of the Convention that recognition and enforcement of the award can be refused only if the party against whom the request is made proves that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

[9] "Consideration 4.4. of the interim decision of 1 March 2012 states that under Art. V(1)(*b*) of the Convention TGS bears the burden of proving its objection that it was not (timely, at any rate not duly) informed of the commencement of the arbitration, but that for practical reasons Bayeti is given the opportunity to supply documents from which it appears that TGS was informed of the arbitration proceeding commenced by Bayeti. Bayeti supplied several documents, among which those mentioned and partly quoted above [at [1]-[6]]. It follows from the submitted documents that TGS or at any event Hatch Tech and their joint attorney in Uganda (Mr. Tumusiime) were aware of the arbitration proceedings.

[10] "Vis-à-vis the reasoned basis of [Bayeti's] positions, TGS did not further, or at least not sufficiently, prove its objection that it was not duly informed of the commencement of the arbitration. However, also taking into account the provision in Art. V(1)(*b*) of the Convention, they had the burden to do so. TGS also did not succeed in supplying the proof mentioned above, so that recognition and enforcement of the arbitral award of 13 October 2009, as confirmed by the High Court of Uganda in Kampala on 29 January 2010, cannot be refused on that ground.

[11] "The supplied documents, and in particular the text of the emails sent by Hamoen to Mugabi and Consideration 5 in the 'arbitral interim award' of 30 July 2009 make it sufficiently plausible that Tumusiime appeared in the arbitration on TGS's, or at least at any event on Hatch Tech's instructions. It follows from this not only that TGS could defend its case, but also that there was legal representation (initially) in this case, or at least that TGS was assisted by their lawyer.
[12] "Here too, therefore, no ground can be found to refuse recognition and enforcement of the arbitral award of 13 October 2009 under Art. V(1)(*b*) of the Convention."

2. Reasons for the Award

[13] "Consideration 4.6. of the interim decision of 1 March 2012 considered that recognition and enforcement of an arbitral award can also be refused under Art. V(2)(*b*) of the Convention when the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country (here, the Netherlands).
[14] "TGS argues that there is a violation of Dutch public policy because the arbitral award of 13 October 2009 does not contain (sufficient) reasons. The interim decision gave Bayeti an opportunity to react to this objection. Bayeti has submitted to this purpose the 'interim arbitral award' of 30 July 2009; in that 'interim arbitral award' the arbitrator, Rachel Kabala, gave detailed, or at least sufficient reasons for her decision and made reference to the underlying procedural documents. If TGS disagreed with those reasons or found them insufficient, it could have appealed against that decision. As already mentioned, in the present proceeding there is no room for a review on the merits of (the reasons for) the award.
[15] "To the extent that it was its duty to do so Bayeti made it sufficiently plausible that the arbitrator gave sufficient reasons for her award of 13 October 2009, read together with her award of 30 July 2009 – also according to Dutch legal standards. The president therefore does not conclude that recognition and enforcement of the arbitral award of 13 October 2009 violates public policy on the ground alleged by TGS."

3. No Review on the Merits

[16] "It appears from Considerations 4.7. and 4.8. of the interim decision of 28 February 2012 that TGS also argued that other than claimed, [the award] did not find [against Respondents] in respect of the main claim and that the claimed amount in Euros has been incorrectly determined.
[17] "These claims again concern the content of the award for which leave [for enforcement] is sought; we repeat that a review on the merits of the award in a proceeding such as the present one must precisely be omitted."

4. Provisional Enforceability and Security

[18] "TGS requested [the court] not to declare provisionally enforceable a possible decision granting [leave for enforcement], subsidiarily to require Bayeti to post security.
[19] "According to the provision in Art. 988(2) Rv [*Wetboek van Burgerlijke Rechtsvordering* – Code of Civil Procedure], a decision in favor of the claimant [*toewijzende beslissing*] such as the present one is in principle provisionally enforceable (without security). This follows, inter alia, from the Parliamentary History of (the predecessor of) this Article and is based on the interest of a party that has obtained a decision in its favor outside the Netherlands and the importance – for the promotion of international legal relations – that foreign decisions have full effect in the Netherlands as soon as possible.
[20] "The objections raised by TGS against the provisional enforceability of the present decision and the concerns behind the request for security are only of a general character and insufficiently substantial.
[21] "The decision shall be declared provisionally enforceable, without at the same time directing Bayeti to post security."
(….)

Attachment – CADER Final Award of 13 October 2009

"The Republic of Uganda
In The Centre for Arbitration and Dispute Resolution
CADER Arbitration No. 2 of 2009

Bayeti Farm Enterprises Limited: Applicant
v.
1. Transition Grant Services: Respondent
2. Hatch Tech Incubation Technologies: 2nd Respondent

3. Ark Chick Limited: 3rd Respondent

AWARD

Whereas I was appointed as Arbitrator by sequential Order of 12 May 2009 in the dispute between the Parties hereinabove mentioned, and duly notified of my appointment on 13 May 2009.
And whereas following the Respondents' request for adjournment that was declined on 3 July 2009, and this Arbitration thereafter proceeding under Sect. 25(c) of the Arbitration and Reconciliation Act Cap 4:

NOW I, RACHEL KABALA having duly considered the matters submitted to me do make an award as follows:
I award:
1. That the Respondents pay to the Claimant the sum of UGX 186,208,440.
2. That the Respondents pay the Claimant a 6 percent interest per annum on the sum of UGX 186,208,440 from 16 January 2009 – the time of filling the Arbitration matter – until payment in full.
3. That the Respondents pay the costs of Arbitration proceedings as follows:
(a) UGX 3,426,130 certified as costs under an application for appointment of an Arbitrator.
(b) UGX 50,931,120 certified as substantive Arbitration Costs.

Dated at Kampala this 13 October 2009."

47. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Amsterdam, 28 March 2013, Case no. 501999/KG RK 11-3186[1]

Parties:	Claimant: Sonera Holding B.V. (Netherlands) Defendant: Çukurova Holding A.S. (Turkey)
Published in:	Available online at <www.rechtspraak.nl>
Articles:	V; V(1)(*c*); V(2)(*b*)
Subject matters:	– excess of authority of arbitrators (no) – competence-competence and judicial review – review of merits of award (no) – review of evaluation of evidence (no) – due process as ground for violation of public policy – public policy and failure to hear witness
Topics:	[2]-[3] = ¶ 500; [3] + [14] + [17] = ¶ 502; [6]-[13] = ¶ 512; [14]-[17] = ¶ 524 (witness)

Summary

An ICC award rendered in Switzerland was granted enforcement. The court premised that the enforcement court must exercise restraint in the review of the substantive (and to a lesser extent formal) requirements for the validity of an award under the 1958 New York Convention. The arbitrators, who decide in first instance on their own jurisdiction, had held that the dispute fell within the scope of the arbitration clause in the agreement between the parties; their decision – with which the court at any event agreed – could not be reviewed as they had given clear reasons for it. This applied in particular to their finding that although the arbitration had commenced on the basis of the clause in an agreement, it could continue in respect of the parties' obligations under a further agreement which the arbitrators found had been concluded pursuant to the first agreement, because the arbitration clause in the first

1. *Note General Editor*. The President of the *Rechtbank* (Court of First Instance) 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 Court of First Instance", this terminology has been retained.

agreement was broadly worded. Further, there was no violation of due process because the arbitrators did not hear the oral testimony of a witness, as clear and convincing reasons were given for this decision; enforcement of the award would not therefore violate public policy.

On 25 March 2005, Sonera Holding B.V. (Sonera) and Çukurova Holding A.S. (Çukurova) signed a Letter Agreement under which they undertook to conclude a Final Purchase Agreement for the delivery of shares in Turkcell Holding AS – a joint stock corporation owning a controlling stake in Turkcell, the operator of the largest mobile telephone service in Turkey – by Çukurova to Sonera, provided the parties could reach an agreement on a Final Share Purchase Agreement. Sect. 5(4) of the Letter Agreement provided that disputes that could not be amicably resolved within two months would be referred to International Chamber of Commerce (ICC) arbitration in Switzerland; the parties agreed that the award would be final and binding and waived any means of recourse. A prospective share purchase agreement (the Draft Share Purchase Agreement – DSPA), detailing the terms of a future Final Share Purchase Agreement, was attached to the Letter Agreement; it also contained a similar clause for ICC arbitration of disputes in Switzerland.

It was disputed between the parties whether a Final Share Purchase Agreement came into existence on 9 May 2005. At any event, on 23 May 2005, Çukurova informed Sonera that it would not proceed with the transaction. On 27 May 2005, Sonera commenced ICC arbitration in Switzerland as provided for in the Letter Agreement. On 15 January 2007, the arbitral tribunal rendered a First Partial Award finding that it had jurisdiction and that a share purchase agreement had been validly reached between the parties on the basis of the DSPA; hence, Çukurova was required to deliver the Turkcell Holding AS shares to Sonera. When Çukurova failed to sell the shares to Sonera in compliance with the First Partial Award, the arbitration entered a second phase. On 29 July 2009, the ICC arbitral tribunal issued a Second Partial Award, ordering Çukurova to deliver the shares to Sonera and determining the shares' price.

By letter of 19 November 2009, Sonera informed the tribunal that it waived its claim for delivery of the shares and sought damages for non-delivery instead. On 1 September 2011, the arbitral tribunal issued a Final Award, directing Çukurova to pay Sonera US$ 932 million in damages for its failure to deliver the shares, with interest and costs. Enforcement proceedings ensued in several jurisdictions: in the Netherlands, the British Virgin Islands, Switzerland, the Netherlands Antilles and the United States. The decision of the United States District Court for the Southern District of New York, granting enforcement, is reported in this Yearbook XXXVIII (2013) at pp. 483-487 (US no. 780).

By the present decision, the president of the Amsterdam Court of First Instance, R.A. Dudok van Heel, granted enforcement of the ICC Final Award. The court first considered that requests for the recognition and enforcement of foreign arbitral awards under the 1958 New York Convention must be approached "with great favor" and that restraint must be exercised in the review of the substantive requirements for the validity of the award.

Çukurova argued that enforcement should be denied because the arbitral tribunal lacked jurisdiction as the dispute decided in arbitration did not fall within the scope of the arbitration clause in the Letter Agreement. The court noted that the arbitrators decide in first instance on the existence and validity of the arbitration agreement on which their jurisdiction is based; only if they give no reasons for their decision, or the reasons given are incomprehensible, can this issue be revisited. Here, the ICC arbitrators dealt with the issue of jurisdiction in the First Partial Award and concluded that they had jurisdiction, giving clear reasons for their decision, which the court also shared: the Letter Agreement containing the arbitration clause established the obligation of the parties to conclude a Final Purchase Agreement depending, inter alia, on their reaching an agreement on the terms of a Final Share Purchase Agreement; the dispute in the arbitration was whether such latter agreement had been reached; as a consequence, the dispute reached fell squarely within the scope of the arbitration clause in the Letter Agreement.

Çukurova's argument that there was no arbitral jurisdiction because Sonera failed to comply with the amicable settlement condition in the arbitration clause also failed. The court held that this was not a proper pre-condition and did not affect the jurisdiction of the arbitral tribunal. Further, it was undisputed that Sonera commenced arbitration a few days after Çukurova's announcement that it would not proceed with the transaction.

Having found that a valid agreement came into existence between the parties on 9 May 2005, the arbitral tribunal decided that it could continue the arbitration in respect of the parties' obligations under that agreement because the arbitration clause in the Letter Agreement was broadly formulated. Also, the detailed DSPA attached to the Letter Agreement, with which it formed a twofold whole, also contained an arbitration clause. The court agreed with the clear reasons given by the arbitrators on this point.

Çukurova further argued that there had been a violation of due process in the arbitration and, as a consequence, enforcement of the ICC award would violate Dutch public policy, because the arbitral tribunal did not hear a certain witness, reaching the conclusion that a Final Share Purchase Agreement was concluded partly on the basis of a telephone conversation between that witness and the

Chief Executive Officer of Sonera's parent company. The court held that this was a case of evaluation of evidence, which is by definition reserved to the arbitral tribunal and in respect of which the enforcement court must exercise great restraint. The arbitrators gave detailed and convincing reasons for their decision not to hear the witness's oral statement, nor did Çukurova show how such statement could have cast new light on the case.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345055-n>.

Excerpt

[1] "Çukurova summarizes the grounds for refusal in its statement in reply as follows:

(1) there is no (valid) arbitration agreement:
(i) the dispute decided by the arbitral tribunal did not fall within the scope of the applicable arbitration agreement;
(ii) the jurisdiction of the arbitral tribunal depended on a condition that was not complied with;
(iii) the arbitral tribunal exceeded its authority by modifying the agreement between the parties;
(2) violation of the principle of adversary proceedings [*hoor en wederhoor*]:
(i) the arbitral tribunal's refusal to hear Witness 1 is a violation of Çukurova's right to adversary proceedings;
(ii) the arbitral tribunal ignored important arguments and evidence of Çukurova;
(3) violation of Dutch public policy.

[2] "The president must examine these objections under Art. V of the 1958 New York Convention, which reads in relevant part, in the (authentic) English text.... [Quotation of Art. V(1)(*a*)-(*d*) and (2)(*b*) omitted.] The parts of Art. V(1) of the 1958 New York Convention quoted [above] concern the formal review of the arbitral award. Para. 2(*a*) and (*b*) add a – very marginal – substantive review. The word 'may' in both the introduction to para. 1 and the introduction to para. 2 gives the president some discretionary power.
[3] "The starting point is that requests such as the present one must be approached 'with great favor' (so Çukurova ...). This starting point leads to a restraint in the review of the arbitral award which applies first and foremost in respect of the substantive review, and less so in respect of the formal review, certainly where – as here – there are no arbitral appeal and no setting-aside or annulment proceedings. After all, by an arbitration agreement the parties waive their right to seize the courts established by the law. If [the fact that] a certain dispute is to be heard and decided by arbitrators is based on the intention, or at least the declaration, of the parties, then nothing else than restraint is called for.
[4] "Before dealing with the review, the president must – in addition to the facts determined in her interim decision [of 16 April 2012] – introduce three main actors:

(i) Mr. A, president of the board of Çukurova;

(ii) Mr. B, director and Chief Executive Officer of TeliaSonera AB, the indirect holder of all shares in Sonera's capital;
(iii) Witness 1, who presents himself as follows in the Witness Statement supplied to the arbitral tribunal (which Çukurova supplied to the president [in this court proceeding] by letter of its lawyer dated 27 January 2012): 'Until 2003, I was a board member of Çukurova Holding and I act now as advisor to Mr. A on a case-by-case basis. I am a board member of Turkcell Holding and its subsidiary Turkcell Iletişim, the leading mobile telecommunications operator in Turkey. I am also a board member of BMC (a vehicle manufacturer which is part of the Çukurova group). I retired from all my other positions within the Çukurova group.'

[5] "In addition to the facts indicated in the interim decision the president must note that a Prospective Share Purchase Agreement, also containing an arbitration clause, was attached to the Letter Agreement. That arbitration clause was practically the same as the arbitration clause in the Letter Agreement. A final Share Purchase Agreement was never signed.
[6] "Sonera commenced arbitration pursuant to Art. 5(4) of the Letter Agreement. Çukurova disputed the jurisdiction of the arbitral tribunal on the same grounds that it raises here, namely: (i) the dispute decided by the arbitral tribunal did not fall within the scope of the arbitration clause in the Letter Agreement and (ii) the condition in the arbitration clause was not complied with.
[7] "In chapter 6 ('Jurisdiction') of the First Partial Award the arbitral tribunal examined the question of jurisdiction in detail, with several in-depth and accurate considerations. The arbitral tribunal came to the conclusion that it 'has jurisdiction to award the claims made … in these proceedings'.
[8] "The president premises that the interpretation of the arbitration agreement on which the jurisdiction of the arbitrators is based is left in the first instance to the arbitrators themselves. Only when no reasons are given or they are incomprehensible can the enforcement of the arbitral award be refused on the ground that the arbitrators lacked or exceeded their jurisdiction.
[9] "In this case the reasons given by the arbitral tribunal are easy to follow and the president shares the conclusion of the arbitral tribunal that [the tribunal] had jurisdiction to hear the dispute. We add the following remarks on this point. Art. 3 of the Letter Agreement establishes the 'obligations of the Parties to cause the execution and delivery of the Final Purchase Agreement', depending, inter alia, on the reaching of an 'agreement … regarding the terms of the Final Share Purchase Agreement'. In the arbitration Sonera argued that that agreement had been reached, while Çukurova argued that that agreement had not been reached

and – taking into account Art. 5(1)(c) of the Letter Agreement – could no longer be reached. This is by definition a dispute which falls under the arbitration clause in the Letter Agreement, so that the arbitral tribunal correctly held that it had jurisdiction.

[10] "The condition contained in the arbitration clause in the Letter Agreement ('if not amicably resolved by the Parties within 60 days of notification thereof') does not change this conclusion. Rather than a condition in the true sense of the word, that condition is a non-arbitral step leading to (or actually aiming at preventing) arbitration. That step does not per se affect the jurisdiction of the arbitral tribunal, which already exists. Further, it is neither argued nor proved that complying with that condition would have led to a non-arbitral settlement. Çukurova has not disputed that Sonera commenced the arbitration proceeding on 27 May 2005 following Çukurova's announcement of 23 May 2005, quoted in the First Partial Award, that [Çukurova] 'would not proceed with the transaction'.

[11] "The arbitral tribunal recognized that its decision that a Final Purchase Agreement came into existence on 9 May 2005 raised the formal (see above [at [3]]) question of the possibility of a continuation of the pending arbitration, and discussed that question in detail (First Partial Award … ('Jurisdiction ratione materiae') …). The arbitral tribunal concluded that it could and should keep the case.

[12] "The reasons for that conclusion are easy to follow and are shared by the president. The arbitral tribunal rightly stressed that the arbitration clause in the Letter Agreement was broadly formulated ('Any dispute, controversy or claim arising out of or in connection with this Agreement'). Further, a detailed Prospective Share Purchase Agreement was attached to the Letter Agreement. The definitions used by Çukurova for the Letter Agreement – 'declaration of intent' and 'Memorandum of Understanding' – do not do sufficient justice to the advanced stage of the negotiations and the fact that the Letter Agreement and the Prospective Share Purchase Agreement were in fact a twofold whole.

[13] "The same is true for Çukurova's claim that the Letter Agreement and the Share Purchase Agreement regulated essentially different subject matters and therefore required arbitrators with essentially different knowledge and experience. After reaching the conclusion mentioned above [at [11]] (at the end), the arbitral tribunal gave the parties ample opportunity to revisit their position in the arbitration. Sonera undisputedly indicated that in cases such as the present one the decision of the arbitral tribunal has an internationally broad scope, also on grounds of procedural economy.

[14] "By its complaint that the arbitral tribunal did not hear Witness 1 Çukurova asks in fact for a substantive review of the decision of the arbitral tribunal in the First Partial Award that the 'Final Share Purchase Agreement was validly concluded on 9 May 2005 in the version communicated … on 19 April 2005'. That decision is based in part on the 'opinion of the arbitral tribunal over a telephone conversation between Mr. B and Witness 1 and over what was (not) said in that conversation' (so Çukurova …). Here is a case for the (need for) restraint mentioned above [at [3]] (at the end).

[15] "It should be noted that Çukurova does not claim that the arbitral tribunal did not give it (sufficient) opportunity to present its case. To this extent thus there is no question of a violation of the principle of adversary proceedings or of Art. V(1)(*b*) of the New York Convention.… This is a question of evaluation of evidence which is by definition reserved to the arbitral tribunal.

[16] "In chapter 7 ('The Merits of the Dispute') of the First Partial Award the arbitral tribunal examined in detail in its reasoning whether Witness 1 should (not) be heard, taking into account the positions and objections of both parties as well as the evidence before it (the written Witness Statement of Witness 1 mentioned above [at [4]], which also deals with the telephone conversation mentioned above [at [14]]). The arbitral tribunal then replied in the negative. These – per definition substantive – considerations and this – also by definition substantive – answer can easily withstand the limited review allowed to the president in this context. It is also relevant in this respect that it was not (sufficiently) argued or it has not (sufficiently) appeared that the oral statement of Witness 1 could have cast new light on the case and what consequences this would have had for the decision of the arbitral tribunal.

[17] "With its claims mentioned above [at [1]] under (1)(iii) and (2)(ii), Çukurova again asks for a substantive review of the manner in which the arbitral tribunal dealt with the dispute. However, Çukurova's arguments in this respect cannot lead to the conclusion that recognition and enforcement of the Final Award would be at odds with Dutch public policy.

[18] "The president finds support for her opinion that there is no obstacle to the enforcement of the Final Award in the decision of 10 September 2012 of the United States District Court, Southern District of New York[2] and the decision of 19 September 2012 of the Eastern Caribbean Supreme Court in the High Court of Justice, British Virgin Islands (Commercial Division), [both] supplied by Sonera."

(….)

2. Reported in this Yearbook XXXVIII (2013) pp. 483-487 (US no. 780).

PORTUGAL

Accession: 18 October 1994
1st Reservation

3. Tribunal da Relação [Court of Appeal], Lisbon, 8 June 2010, Case No. 243/10.9YRLSB-7[1]

Parties:	Appellant/Claimant: T SA (Portugal) Respondent/Defendant: S SA (nationality not indicated)
Published in:	Available online at <www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/61a959ef4a90175f802577760032d07d?OpenDocument&Highlight=0,Convenção,Nova,Iorque,1958>
Articles:	I(1); III
Subject matters:	– recognition/enforcement relationship – procedural aspects of enforcement under domestic law
Topics:	¶ 001 + ¶ 301

Summary

Foreign arbitral awards are not automatically enforceable in Portugal and must be first recognized by the competent Portuguese court – the court of first instance – in order to become an executory title on which enforcement may be sought from the execution court. Portugal's accession to the 1958 New York Convention does not change this conclusion, as the Convention distinguishes between recognition and enforcement and allows enforcement to take place according to the procedural rules of the forum. A Contracting State may refuse

1. The General Editor wishes to thank Duarte Gorjão Henriques, BCCHV Advogados, Lisbon, for his invaluable assistance in translating this decision from the Portuguese original.

recognition of any arbitral award and the defendant may also challenge such award before the state court competent to grant the recognition of foreign arbitral awards.

An ICC arbitral tribunal in Zurich rendered an award in favor of T SA and against S SA. In 2010, T SA filed an action in the Lisbon Execution Court (*Tribunal de Execução*), seeking enforcement of the ICC award. The court, however, denied the application, finding that the award could not be deemed an executory title without the prior review and confirmation (recognition) by a competent Portuguese court. Pursuant to Portuguese procedural law, this court is the court of first instance.

By the present decision, the Lisbon Court of Appeal, before Dina Maria Monteiro, Jorge Roque Nogueira and António Abrantes Geraldes, JJ, in an opinion by Dina Monteiro, affirmed the decision of the first instance court, holding that foreign arbitral awards are not automatically enforceable and must be granted recognition before being enforced as executory titles. The court also reasoned that recognition and enforcement are different proceedings and are heard by different courts: under Portuguese procedural law, these courts are the court of first instance and the execution court, respectively.

The fact that Portugal is a Contracting State to the 1958 New York Convention does not change this conclusion: the Convention expressly distinguishes between recognition and enforcement, and Portugal's undertaking under the Convention to enforce foreign arbitral awards does not mean that this process is automatic. Rather, enforcement must take place in compliance with the procedural provisions in the national legislation, as expressly provided in Art. III of the Convention. Further, although Portuguese domestic awards are not subject to recognition prior to enforcement, this does not prevent Portugal as a Contracting State to the New York Convention from subjecting the recognition of foreign arbitral awards to a special procedural regime or to the procedural regime applicable in general to the recognition of foreign judicial decisions. Since Portugal did not give any indication as to the applicable procedural regime when ratifying the Convention, recognition and enforcement are subject to the procedural regime of the Portuguese Code of Civil Procedure, which provides, in Art. 1094, that unless otherwise provided in "treaties, conventions, EU regulations and special laws", foreign court decisions and awards shall not be enforced in Portugal without prior confirmation by a Portuguese court.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345056-n>.

Excerpt

[1] "[These facts are proven:] (1) T SA commenced an enforcement action in the Execution Court [*Tribunal de Execução*] of Lisbon, submitting an international arbitral award rendered in Zurich, Switzerland, by [an ICC tribunal] as the executory title; (2) this arbitral award is final and binding; (3) the Lisbon Execution Court dismissed the enforcement action holding that the executory title was not enforceable because it had not been reviewed and confirmed by the competent Portuguese court.

[2] "The core issue to be decided is, in sum, whether in view of the [1958 New York Convention] a foreign arbitral award or decision is automatically enforceable in Portugal, that is, whether it becomes an executory title without the need of prior review and confirmation by another court.

[3] "While there is no obstacle in the present case to finding that the Lisbon Execution Court is competent for the enforcement of this title, the solution is not straightforward in respect of the question of its enforceability, which is the issue that concerns us in this appeal. In a suitably reasoned decision, the first instance court replied in the negative to this question.

[4] "For the solution to this question we must take into account the provisions in Art. 49(1) (Chapter concerning executory titles and, more concretely, the enforceability of decisions and titles rendered in a foreign country) and Art. 1094(1) (Chapter concerning the review of foreign decisions) of the Code of Civil Procedure (CCP), and Art. 30 of the Law on Voluntary Arbitration (Enforcement of the arbitral award) which, for a better understanding of the issue, we now reproduce.

[5] "Art. 49(1) CCP reads:

> 'Without prejudice to the provisions of treaties, conventions, EU regulations and special laws, the awards rendered by courts or arbitrators in a foreign country can be the basis for enforcement only after having been reviewed and confirmed by the competent Portuguese court.'

Art. 1094(1) CCP reads:

> 'Without prejudice to the provisions of treaties, conventions, EU regulations and special laws, no decision on private law rights rendered by a foreign court or arbitrators sitting abroad has effect in Portugal, whatever the nationality of the parties, without having been reviewed and confirmed.'

Art. 30 of the Law on Voluntary Arbitration reads:

> 'The proceedings for the enforcement of the arbitral award shall take place at the Court of First Instance and follow the conditions established by the law of civil procedure.'[2]

[6] "The interpretation of these Articles suffices in our opinion to hold that prior review of these decisions is necessary in order to guarantee their enforceability.
[7] "T SA believes, however, that this prior requirement is not justified following the adhesion of Portugal to the New York Convention (we must take into account that Portugal adhered to the [New York Convention] on 18 October 1994 by Resolution of the Assembly of the Republic no. 37/94, of 10 March [1994], published in the *Diário da República* [Official Gazette] no. 156 of 8 July 1994). The New York Convention provides.... [Quotation of Art. I(1) and Art. III omitted.]
[8] "The analysis of these Articles allows us directly to state that T SA is wrong. Indeed, as we can establish from [Art. I(1) and Art. III Convention], the competence of the court to enforce this kind of decision, and the necessity or not to review and confirm them in advance – the latter being envisaged by the Convention itself when it refers to the 'recognition and enforcement of arbitral awards' and to the 'recognition or enforcement of arbitral awards' – are different things.
[9] "The fact that domestic arbitral awards do not require prior recognition, as they have the same effect as the decisions rendered by the judicial courts, cannot be invoked against the statement above. Luís Lima Pinheiro, *Arbitragem Transnacional – A determinação do Estatuto de Arbitragem* (Almedina, 2005), who is followed by other authors, puts this well:

> 'A State that does not subject the recognition of domestic awards to a prior procedure is not prevented from subjecting the recognition of foreign arbitral awards to a special procedural regime or to the procedural regime applicable in general to the recognition of foreign judgments. Since when ratifying the New York Convention the Portuguese legislator did not give any indication as to the applicable procedural regime, recognition is subject to the procedural regime of Arts. 1094 et seq. CCP.'

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2. *Note General Editor.* The Law on Voluntary Arbitration (Law No. 31/86 of 29 August 1986) is no longer in force since the promulgation of Law No. 63/2011 of 14 December 2011.

[10] "We are therefore in the presence of the analysis of two different realities – recognition and enforcement – which pursuant to our Law on the Organization and Functioning of Judicial Courts [*Lei Orgânica do Funcionamento dos Tribunais Judiciais* – LOFTJ] must too be analyzed by different courts, in accordance with the rules of competence; in this case, in respect of the recognition of the foreign arbitral award, [competence] does not lie with the Lisbon Execution Court – Art. 102.A(1) LOFTJ.[3]

[11] "The fact that by signing this Convention Portugal undertook to guarantee the enforcement of foreign arbitral awards does not mean that this process is automatic. Enforcement must take place in compliance with the procedural provisions in the national legislation (in this sense, among others, José Lebre de Freitas, *A Acção Executiva, Depois da Reforma da Reforma*, 5th ed. (Coimbra) pp. 48-49).

[12] "Since this issue is clearly dealt with by Amâncio Ferreira, we now reproduce what this author says in this respect:

> 'Under this Convention (the New York Convention), 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; still, there shall not be imposed substantially more onerous conditions or higher fees or charges than are imposed on the recognition or enforcement of domestic arbitral awards (Art. III). Hence, in view of the provision in Arts. 24(2) and 30 of the Law on Voluntary Arbitration, the competent court for reviewing and confirming foreign arbitral awards is the court of first instance.'(*Curso de Processo de Execução*, 11th ed., 2009 (Almedina) p. 39).

[13] "Hence, the Contracting State is allowed to refuse recognition of the arbitral award, and the defendant may challenge it before the court having competence to recognize the title, in the present case, the foreign arbitral award.

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3. Art. 102.A(1) of the Law on the Organization and Functioning of Judicial Courts [*Lei Orgânica do Funcionamento dos Tribunais Judiciais* – LOFTJ], Law No. 3/99 of 13 January 1999, reads:

   "Art. 102.A (as amended by Law no. 42/2005 of 29 August 2005)
   Execution Courts
   1 - The Execution Courts are competent, within execution proceedings of a civil nature, to perform the tasks provided for in the Code of Civil Procedure."

[14] "Based on the above considerations, we deny the appeal and confirm the decision rendered by the first instance court."

4. Tribunal da Relação [Court of Appeal], Lisbon, 30 June 2011, Case No. 2004/08.6TVLSB-A-7[1]

Parties:	Claimant: A SA (nationality not indicated) Defendant: B (nationality not indicated)
Published in:	Available online at <www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/9fd83ed08f360c0c80257910003c767a?OpenDocument&Highlight=0,Conven%C3%A7%C3%A3o,Nova,Iorque,1958>
Articles:	III; VI
Subject matter:	– adjournment of enforcement decision and posting of security
Topics:	¶ 301 + ¶ 601

Summary

The court reversed a lower court's decision that refused to grant security after it had adjourned the proceedings for the recognition of a Brazilian award pending an annulment action in Brazil, on the ground that the claimant should have filed its application for security together with the statement in reply to the defendant's request for adjournment. The court of appeal held that neither the 1958 New York Convention nor Portuguese law provides for such requirement. Requiring a joint examination of these two applications would violate the state's obligations under Art. III not to impose more onerous conditions on the recognition and enforcement of foreign awards, as well as be at odds with the wide discretion granted to the courts in evaluating the factors in favor or against adjournment – which can actually arise or become noticeable at a later stage. Excessive reliance on formal aspects is to be avoided, particularly in the application of international legal instruments.

On 31 May 2007, A SA, a brewery, and B signed a submission agreement to refer a dispute between them – namely which party was in breach of a pre-contract they had concluded – to arbitration at the *Centro de Arbitragem e Mediação*

1. The General Editor wishes to thank Duarte Gorjão Henriques, BCCHV Advogados, Lisbon, for his invaluable assistance in translating this decision from the Portuguese original.

da Câmara de Comércio Brasil-Canadá – CCBC (Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce). By an award of 10 December 2007, a CCBC arbitral tribunal found in favor of A SA and directed B to pay US$ 25,000,000, together with interest, costs of the arbitration and legal costs.

B sought annulment of the award in Brazil. This case was still pending at the time of the present decision. A SA sought recognition of the award in Portugal; in the recognition proceeding, B argued that the action should be adjourned pending the annulment action in Brazil.

The court of first instance adjourned the proceedings until a final decision was rendered in the annulment action. Following the decision to adjourn, A SA filed an interlocutory application for security (*incidente de prestação de caução*). The court of first instance rejected the application, granting B's objection that the application was untimely as it should have been filed together with A SA's reply to B's opposition to the request for recognition, in which B sought the adjournment of the recognition proceedings. A SA appealed.

By the present decision, the Lisbon Court of Appeal, in an opinion by António Abrantes Geraldes, reversed the lower court's decision. The court first reasoned that foreign arbitral awards are not directly enforceable in Portugal and are subject to prior recognition. No review of the merits of the award is allowed in recognition proceedings, and recognition can be refused only on the grounds listed in Art. V of the 1958 New York Convention, which include the case in which the award has been set aside in the country of rendition.

The New York Convention balanced the conflict between the enforceability of a final and binding award and the possibility that the award is annulled by providing, in Art. VI, that the court where recognition and enforcement is sought may adjourn its decision, and that it may order the defendant to give suitable security. The court of appeal noted that these means are largely discretionary; the court's decision takes into account the likelihood of success of the annulment action, the seriousness of the request for adjournment and the possible prejudice to the claimant. The manner in which adjournment and security can be ordered is regulated only summarily in the New York Convention and is left to the Contracting States. In Portugal, adjournment can be ordered by a declaration of suspension of the proceedings (*suspensão da instância*); security can be sought through an interlocutory application for security (*incidente de prestação de caução*).

In respect of the case at issue, the court of appeal held that the interlocutory application for security could indeed be filed, as it was, after the proceedings in the main action had already been adjourned. Although a request for security can be examined together with an application for adjournment, neither the New

York Convention nor Portuguese law requires that they must be necessarily examined together, or sets a time limit for the application for security. The court noted that the need for security can arise from subsequent circumstances, such as the adjournment itself.

The court added that requiring that an interlocutory claim for security be filed at the same time as the statement in reply to the defendant's request for adjournment under the New York Convention would violate Portugal's obligations under Art. III, since the claimant seeking recognition of a foreign award pursuant to the Convention would find itself in a considerably more difficult position than that in which it would be if it sought recognition of a domestic award.

The court of appeal further noted that requiring the joint examination of the application for adjournment and the application for security would also be at odds with the clear choice in the New York Convention to grant courts a large degree of discretion in evaluating the factors in favor of or against adjournment, leaving aside the fact that these factors can arise or become noticeable at a later stage.

The court concluded by stressing that excessive reliance on formal aspects is to be avoided, particularly in the application of international legal instruments.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345057-n>.

Excerpt

(….)

[1] "Portugal is a party to the [1958 New York Convention], pursuant to which Petitioner seeks recognition of an arbitral award rendered in Brazil which directed Respondent to pay a large sum. Respondent opposed this request on the ground that an action for annulling the arbitral award had been commenced and was pending in a Brazilian state court. It also asked that the decision on the application for recognition at least be adjourned until a final decision in the annulment action. On this ground, the judge below suspended the recognition proceedings. Petitioner (Claimant in the main action) sought to file *an interlocutory claim for security* [*incidente de prestação de caução*] to guarantee payment of the sum which Respondent was directed to pay [under the award]. This claim was deemed untimely [by the court of first instance] because it was not raised when filing the statement in reply to the opposition to the recognition application.

[2] "Thus, the subject matter of the appeal is essentially the following question: Where the special proceedings action for the recognition of a foreign arbitral award has been suspended, pursuant to Art. VI of the New York Convention, on the ground that an annulment action is pending, is the claimant precluded from demanding payment of interlocutory security [*prestação de caução incidental*] from the defendant or, on the contrary, may [security] be requested while the action is suspended?

[3] "In order to reply to this question we must take particularly into account the provision of Art. VI of the Convention….[2] [Quotation of Art. VI omitted].[3]

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2. "André de Albuquerque Cavalcanti Abbud, in *Homologação de Sentenças Arbitrais Estrangeiras*, Atlas, p. 192, says that 'the jurisprudence on the application of Art. VI is practically non-existent', the reason being that 'the practitioners of the law do not yet grasp the potential significance of this requirement and therefore rarely invoke it to the benefit of the interests of the defendant in recognition proceedings'. This statement and explanation are also given by Hamid G. Gharavi, in 'Enforcing set aside awards', Journal of Transnational Law and Policy, vol. 6:1., p. 104; he also says that besides the small number of jurisprudential decisions on this matter, no uniform criterion for the application of Art. VI New York Convention has yet been achieved.

3. "Essentially, this provision corresponds with Art. 36(2) of the UNCITRAL Model Law on International Commercial Arbitration, of 21 June 1985 (whose application by each State is recommended by the UN), which reads:

   'If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.'

[4] "*Arbitral awards rendered abroad* are not directly enforceable in [Portugal]. Rather, the formation of an *executory title* is conditional upon prior recognition in special proceedings regulated in Art. 1094 et seq. Code of Civil Procedure (CCP).[4] Since an arbitral award settles disputes in a similar manner as a decision rendered by a state court, the need to obtain its recognition by the courts of other states does not imply interference with its merits; only the grounds provided for in Art. V of the New York Convention are grounds for refusal of recognition, among which stands out the declaration of annulment or suspension of the arbitral award 'by a competent authority of the country in which, or under the law of which, that award was made'.

[5] "The tension between the force of an arbitral award that has become final and binding and the commencement of a prejudicial action whose final outcome can take time was lightened by providing for interlocutory measures which can be adopted by the court of the state where recognition of the foreign arbitral award is sought:

(a) On the one hand (as a rule, at the request of the defendant), the '*moment of decision*' in the proceedings aiming at obtaining the recognition may be postponed;[5]

The suspension of the proceedings is also provided for in respect of the recognition of decisions falling within the scope of Regulation EC No. 44/2001, in Art. 37(1):

'A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.'

Likewise, Art. 6 of the Inter-American Convention [on International Commercial Arbitration]."

4. "See decision of the Lisbon Court of Appeal of 8 June 2010 (<www.dgsi.pt>)."
5. "As stated by André Abbud, *op. cit.* [2], p. 189:

'the aim of the provision is easy to assess: avoiding that an award whose validation is being questioned in the country a quo enter directly into the juridical system of the state of recognition. Thereby the risk is lessened that the defendant suffer unjust prejudice through the recognition of an award that is later struck down, or that jurisdictional activity for the recognition and enforcement of the award is carried out uselessly, without, on the other hand, rejecting the claimant's request for recognition.'

On the other hand, however, attention should be paid, as to the criterion to be used, to the words of Albert Jan van den Berg, in *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation*, Wolters Kluwer, p. 358: 'the discretionary power is to be exercised between the limits of the safeguarding of the right of a bona fide losing party to contest a validity of the award in the country of origin and of protecting a claimant against dilatory tactics of an obstructive respondent'."

b) On the other hand, at the initiative of the claimant seeking recognition, the defendant may be required to give security in respect of the right arising under the arbitral award.

[6] "Either means is subject to a large degree of *discretion*,[6] particularly in respect of the evaluation of the likelihood of success of the annulment action, the consideration of the seriousness of the request for suspension of the proceedings, or the verification of the possible prejudice to the claimant, taking into account, for instance, the length of the annulment proceedings or the possible risks – particularly those relating to the patrimonial guarantee of a credit – that the right [at issue] be affected.

[7] "The New York Convention thus sought to *reconcile opposite interests*: by admitting that the formation of the executory title may be postponed, it protected the defendant against the risk of the enforcement of an arbitral award whose annulment or suspension has been requested; by providing that security can be requested, it sought to protect the interest of the claimant with a final and binding arbitral award in its favor.[7] Naturally, the New York Convention regulated both these juridical instruments only summarily; carrying out this task was left to each national legal system. Hence, the transposition in our system of the adjournment of the decision on recognition finds an echo in the *suspension of proceedings* [*suspensão da instância*] on the ground of the pendency of a prejudicial action (Art. 279 CCP), while the giving of guarantees takes place through an *interlocutory claim for security*, regulated in Art. 990 CCP.

[8] "Having made these preliminary observations, we must now concentrate on the appealed decision, against which several *arguments* may be raised.

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6. "According to André Abbud, op. cit. [fn. 2], p. 190, 'the decision on the suspension of the recognition proceeding is subject to the discretion of the judicial body'; the criteria are the likelihood of the claim for annulment and, in parallel, the danger of harm, either irreparable or difficult to mend, to the defendant in the action for recognition, also considering 'the risk that the delay in the outcome of the recognition proceeding may entail for the claimant'(sic). The discretion of the judiciary is also stressed by Albert Jan van den Berg, in [*op. cit.*, fn. 5], p. 358, and in his work in *50 Years of the New York Convention* [ICCA Congress Series no. 14], Wolters Kluwer, p. 664. It is also stated in the text translated at p. 516 of the ICCA Yearbook Commercial Arbitration X (1985) [sic]."

7. "It is clear that in situations in which there is a '*periculum in mora*', either in respect of the patrimonial guarantee of the credit recognized in the award, or in respect of other risks, a recourse to specific interim measures of protection (e.g., attachment or deposit) or to unspecified measures will always be open to the interested party, in accordance with Art. 381 et seq. CCP."

[9] "The giving of incidental security can be examined at the same time as the suspension of the recognition action.[8] However, the text of the New York Convention does not require that these questions be necessarily examined together, the more so since the need for security can arise from subsequent circumstances, as the reaction of the claimant in order to reduce the risks ensuing from the suspension of the proceedings.[9] Further, as a matter of fact neither the New York Convention nor [Portuguese] law sets any *procedural time limit* for requesting a suspension of the proceedings; this can be done 'until a decision is taken in respect of the validity of the award in the country a quo',[10] which makes it natural that a request for security be allowed until that moment.

[10] "Pursuant to Art. III of the New York Convention, each state may regulate the manner in which the *recognition or enforcement* of foreign arbitral decisions is processed. The sole limit is that there shall not be imposed *substantially more onerous conditions* than are imposed on the recognition or enforcement of domestic arbitral awards.[11] No [Portuguese] procedural provision (especially Art. 1098 CCP) determines that the interlocutory claim for security must be raised together with the claimant's reply to the application to suspend proceedings formulated by the defendant.

(....)

[11] "In this context, the rejection of an interlocutory claim for security on the ground of a *preclusive factor* has no legal basis or rational justification and would

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8. "See André Abbud, *op. cit.* [fn. 2], p. 192, where he says: 'also because of the relative similarity it has with the proceedings for interim measures [*juízos cautelares*], Art. VI grants the judge the power to make the suspension of the recognition proceeding conditional upon the defendant giving a counter-protection [*contracautela*] ('suitable security'). This is a security that suffices to guarantee the future possible enforcement of the decision to be recognized in Brazil and aims at balancing the risks and interests in play.'"
9. "André Abbud, *op. cit.* [fn. 2], p. 191, deals with security only as a condition for the suspension of proceedings (thus stressing the protection aspect), but in the New York Convention there is no obstacle to its being seen in its reactive aspect."
10. "André Abbud, *op. cit.* [fn. 2], p. 190."
11. "Maria Cristina Pimentel Coelho, in "*Convenção de Nova Iorque Relativa ao Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras*", [Revista Jurídica, no. 20, Lisbon, 1996], p. 51, argues that the Contracting State may provide for a stricter procedure than is provided for domestic arbitral awards, and concludes that 'what there cannot be is a flagrant difference between these procedures, so that the recognition and enforcement of foreign arbitral awards is made more difficult.' On this subject matter see Albert Jan van den Berg, [*op. cit.*, fn. 5], p. 657; Lima Pinheiro, in *Arbitragem Transnacional*, p. 297; Sampaio Caramelo, '*Questões de arbitragem comercial*', RDES, XLVI, p. 373; Carla Gonçalves Borges, in the work titled '*O sistema de reconhecimento de decisões arbitrais entre Portugal e Angola*', Thémis, no. 16, p. 270; and the work of the Brazilian jurist José Emílio Nunes Pinto titled '*A arbitragem no Brasil e a Convenção de New York de 1958 – questões relevantes*', available online at <www.camarb.com.br/áreas/subáreas_conteúdo.aspx>."

result, in practice, in an *effective obstacle* to the right arising under the 'foreign' arbitral award,[12] since the claimant would find itself in a considerably more difficult position than the position in which it would be if by chance it sought to enforce a 'domestic' arbitral award.

[12] "The consequences of the appealed decision also appear to be excessive in light of the *concrete circumstances* surrounding it. In its grounds for opposition to the request for recognition of the arbitral award Defendant essentially relied on the groundlessness of the action because of the annulment of the arbitral award. The adjournment of the decision on recognition (or, in other words that better reflect the [Portuguese] reality, the *suspension of the proceedings* in the action for recognition) was sought as a claim of an interlocutory and subsidiary nature. Defendant argued that 'taking into account the provision in Art. 1096(b) CCP, the court must *at least adjourn its decision* on the recognition sought, until a decision having force of res judicata decides on the annulment sought by Defendant in the court in São Paulo'. It said that '*at the limit*, its examination' should be 'adjourned as argued', and concluded its grounds for opposition with the request that 'the recognition of the arbitral award at issue be rejected, because a judicial action in which its annulment is sought is pending'.

[13] "In these circumstances, the rejection of the interlocutory claim for security is based on procedural parameters whose existence is neither apparent in the law [*direito positivo*] nor clearly motivated by Defendant in its defense. Further, this conclusion finds no rational justification as part of a procedural sequence, the more so since the need for security does not interfere in or is at odds with the decision suspending the proceedings.

[14] "The *reasonableness* of granting the interlocutory claim for security only appeared more clearly after Claimant was faced with a decision resulting in the postponement for an indefinite period of time (until the decision to be rendered in the action pending in Brazil becomes res judicata) of the formation of the executory title it seeks, with which it will be able to commence an action for the forced performance of the arbitral award.

[15] "Still, the [Portuguese] courts shall not ignore the meaning commonly given to the provisions of International Conventions, as a fundamental step to reach a reasonable degree of uniformity in the different Contracting States.

[16] "A *large degree of discretion* in the evaluation of the objective or subjective factors that can justify the suspension of the proceedings is granted to the national

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12. "Which could be deemed an 'invisible barrier' (or 'barriers that are virtually invisible to outsiders') like those in certain proceedings for the recognition of foreign arbitral awards in the United States (see Sampaio Caramelo, *op. cit.* [fn. 11], pp. 376-377)."

court of each Contracting State.[13] It would be at odds with this choice to require the examination of the declaration of suspension of proceedings and the creditor's interlocutory claim for guarantees to coincide necessarily. In fact, the circumstances which could justify in theory the giving of guarantees by the defendant could be *subsequent* to the filing of the opposition to the request for recognition, resulting from an excessive delay in the final judgment in the annulment action or from actions with a dilatory tendency which only then become noticeable.[14]

[17] "Finally, to a higher degree than when the application of domestic provisions is at issue, it is important to avoid giving excessive relevance to aspects of a merely formal or instrumental character that are not clearly reflected in the legal texts, thus sharing in the effort of the national legislator to value substantive rights over aspects of an eminently formal nature.

[18] "In conclusion: The truly *procedural* aspects relating to the recognition of arbitral awards were not regulated by the New York Convention. Since [the Convention] was an international law instrument that could be applied in countries with very different legal systems, a choice was made to leave the regulation of the requirements of a procedural character, including those relating to the interlocutory claims [*incidentes*] that may be raised, to each Contracting State.

[19] "Since there is no provision in [Portuguese] law that expressly regulates the incidental security in connection with the suspension of recognition proceedings, it makes sense indeed that the applicable norms (Arts. 619-623 Civil Code) and

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13. "In '*O Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras na Convenção de Nova Iorque de 10-6-58 e nos Direitos Brasileiro e Português*', available online at <www.camarb.com.br/artigos/arquivo46pags.pdf>, Leonardo Gomes de Aquino argues that the decision of the judge to suspend the recognition or enforcement is 'discretionary'; the 'opposing party must demonstrate that enforcement of the decision will cause more harm to it than to the party seeking recognition and enforcement of the arbitral award'; and it must be avoided that 'the request for suspension … constitutes a dilatory means to delay the enforcement of the award'. If this risk can be avoided, ab initio, by refusing the suspension, it is not excluded that [this risk] can appear only at a subsequent moment, or that only at a subsequent moment it appears necessary to protect the interests of the party seeking recognition and enforcement of the award in its favor through an application for and the granting of the necessary guarantees."

14. "In respect of Art. VI of the New York Convention, Albert Jan van den Berg, [op. cit. fn. 5], p. 665, says: 'if the decision on enforcement is adjourned, the enforcement court may, at the request of the party seeking enforcement, order the party against whom enforcement is sought to provide suitable security for the event that the application for setting aside is rejected in the country of origin'. This is a clear sign, taken from the application of the principle in other systems that the interlocutory claim for security is not necessarily subject to the procedural means of the request for suspension."

Art. 981 et seq. CCP) be integrated with elements of a *rational character* or *systematic nature*, which clearly point to the admissibility of an interlocutory claim for security as raised by Claimant.

[20] "Hence, there is no basis for the solution espoused in the appealed decision which, invoking an alleged preclusion, refused to hear the merits of the interlocutory claim for security. This solution cannot stand unless a *clear intention* in this sense of the (international or national) legislator is discovered, since it is impossible – in light of the known doctrine and jurisprudence – to conceive of a refusal of the interlocutory claim on formal grounds that are based neither in the New York Convention nor in [Portuguese] law.

[21] "Based on the above, we grant the appeal, revoking the appealed decision and deciding that the interlocutory claim for security be further heard and that the acts relating to the examination of the merits of the claim be carried out. Costs of the appeal to be borne by Respondent…."

5. Tribunal da Relação [Court of Appeal], Lisbon, 12 July 2012, Case No. 7328/10.0TBOER.L1-1[1]

Parties:	Appellant/Defendant: B (Portugal) Respondent/Claimant: A (France)
Published in:	Available online at <www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/e0c75a93c64e629280257a69004f6256?OpenDocument&Highlight=0,Conven%C3%A7%C3%A3o,Nova,Iorque,1958>
Articles:	III; V(1)(*d*); V(2)(*b*)
Subject matters:	– time limit to file opposition to application for recognition – competent recognition and enforcement court under national law – enforcement of 1958 New York Convention awards no more onerous than enforcement of domestic awards – constitution of arbitral tribunal not in accordance with agreement of parties – public policy and contractual penalty
Topics:	[2]-[12] = ¶ 301; [13]-[17] = ¶ 513; [18]-[23] = ¶ 524 (contractual penalty)

Summary

The court affirmed the decision of the court below granting recognition of an award rendered in France according to the rules of the International Film & Television Alliance (IFTA), confirming that: (1) the time limit to file an opposition to recognition under the 1958 New York Convention is the general time limit of ten days, because the defendant may not contest the claim fully but rather merely supply proof of the grounds for refusal listed in the Convention; (2) the competent court for recognition and enforcement of foreign awards is the court of first instance, which is competent to recognize and enforce domestic awards. The

1. The General Editor wishes to thank Duarte Gorjão Henriques, BCCHV Advogados, Lisbon, for his invaluable assistance in translating this decision from the Portuguese original.

Convention supersedes the requirement that foreign awards first be recognized by a court of appeal, because this provision in the Portuguese CCP would be in violation of the not-more-onerous provision in Art. III of the Convention; (3) an award awarding a sum on the basis of a penalty clause is not in violation of Portuguese international public policy, because penalty clauses are known in Portuguese law.

On 31 January 2006, A, a maker and producer of animation films, and B, a distributor,[2] signed a "Distribution License 'G. W.' Contract – Specific Conditions of Contract" (the Contract) by which A granted B the exclusive distributorship rights to "G. W.", an animation feature film, in Portugal and other named countries. The Contract provided that it was governed by French law; it also contained a clause providing that the parties agreed on the jurisdiction of the courts of Paris. However, the licensor – A – could opt for submitting disputes to arbitration in Paris under the rules of the International Film & Television Alliance (IFTA), an organization with seat in California, the United States.

A dispute arose between the parties when A claimed that B failed to perform certain obligations under the Contract. On 24 February 2009, A filed a request for IFTA arbitration. IFTA appointed a sole arbitrator, a French national; arbitration proceedings were held in Paris. B filed statements in defense and a counterclaim, though objecting to the jurisdiction of the arbitrator; the arbitrator rejected this objection on the basis of the arbitration clause in the Contract. On 30 September 2009, the sole arbitrator rendered an award in favor of A.

A sought recognition of the IFTA award in Portugal before the Court of First Instance of Oeiras. On 19 November 2010, the court granted recognition rejecting, inter alia, B's argument that it should have been given a time limit of thirty days – rather than ten days – to file its opposition to A's application for recognition. The court held that because of the special procedural character of the opposition against an application for recognition of a foreign award under the 1958 New York Convention – in which the defendant cannot fully challenge the claim but can merely supply proof that there is one of the grounds listed in Art. V(1)(*a*)-(*e*) of the Convention – neither the formalities of the special proceeding for review of a foreign court decision, nor the formalities of forced execution proceedings, nor the formalities of summary proceedings apply. As a consequence, the court found that the general time limit of ten days provided for in Art. 153(1) of the Portuguese Code of Civil Procedure was applicable.

2. The parties were identified later in the decision as Xilam Animation and Lnk Videos.

The Court of Appeal of Lisbon, before João Ramos de Sousa, Manuel Ribeiro Marques and Pedro Brighton, JJ, in an opinion by João Ramos de Sousa, confirmed the decision of the court below. The court agreed with the lower court that the time limit given to the defendant to file an opposition to the application to recognize a foreign award under the Convention is not the time limit to file full opposition in the proper sense, but rather a time limit to satisfy the burden of proving the grounds in Art. V(1) Convention. Hence, the conclusion that the general time limit of ten days applies was correct.

The court of appeal also confirmed that the Portuguese court competent for both the recognition and the enforcement of foreign arbitral awards is the same as the court competent in respect of domestic arbitral awards, that is, the court of first instance. Although Portuguese civil procedure requires that court decisions be recognized by a court of appeal prior to being enforced by a court of first instance, this provision is made "without prejudice" to, inter alia, international treaties. Thus, the New York Convention prevails, which provides in Art. III that recognition and enforcement of foreign awards shall not be more onerous or more costly than recognition and enforcement of domestic awards. Requiring prior review and confirmation by the court of appeal would be both.

The court of appeal dismissed B's argument that the arbitral body was not constituted in accordance with the agreement of the parties, finding that it appeared from the text of the forum-choice and arbitration clause that A could elect to refer disputes to IFTA arbitration in Paris, France. IFTA appointed a French national with place of business in Paris as the sole arbitrator in accordance with its Rules, and both parties participated in the appointment procedure. Also, the arbitrator squarely rejected B's later objection of lack of jurisdiction, which the court ascribed to the "kind of quarrels that are habitual in legal disputes in Portugal".

Finally, the court of appeal held that the award did not violate Portuguese international public policy. B contended that the penalty clause in the Contract, on the basis of which the arbitrator had directed B to pay A a certain sum, was excessive and therefore in violation of public policy. The court noted that penalty clauses are known to and allowed by Portuguese law. Also, the penalty clause, which concerned the merits of the award, could not be reviewed by the court hearing an application for recognition.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345058-n>.

Excerpt

(….)
[1] "As known, the subject matter of an appeal is delimited by the conclusions of the appellant…. Thus we must examine here:

(1) the time limit of ten days granted [to B] for the purpose of Art. V(1) of the [1958 New York Convention];
(2) the [Portuguese] court that is competent for the recognition of a foreign arbitral award, and the [applicable] procedure;
(3) the conformity of the constitution of the arbitral tribunal with the agreement of the parties;
(4) [whether] the arbitral decision violates Portuguese public policy."

I. ANALYSIS

1. Time Limit

[2] "As decided by the court below, the time limit relating to Art. V of the [1958] New York Convention is not the time limit to file opposition (the Convention does not provide for opposition [*contestação*], which is a peculiarity of Portuguese civil procedure); rather it is only the time limit for the defendant to satisfy the burden of proving the negative procedural conditions set by Art. V(1) Convention.
[3] "Thus, pursuant to Art. 153(1) CCP,[3] since there is no special disposition on this matter this time limit is ten days. At any event, this time limit of less than thirty days did not hinder the party from submitting the proof it wished to, without asking for postponement of this time limit on the ground that it was insufficient.
[4] "Hence, the appellant's argument fails."

2. Competent Court and Applicable Procedure

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3. Art. 153(1) of the Portuguese Code of Civil Procedure (CCP) reads:

> "Lacking any special disposition, the time limit for the parties to request any act or enquiry, raise objections of nullity, raise accessory claims or exercise any other procedural power is ten days; the time limit for a party to reply to the other party's statements is also ten days."

[5] "The claimant sought the recognition by the Portuguese court of the arbitral decision rendered in Paris by the sole-arbitrator tribunal constituted under the rules of the Independent [Film & Television Alliance – IFTA]. To this aim, it commenced a 'special action for the recognition of a foreign arbitral award' before the Fifth Civil Court of Oeiras, which it deemed to be the competent [court].

[6] "In respect of this subject matter we must take into account the [1958 New York Convention], ratified and published in [*Diário da República*] I-A, No. 156 of 8 July 1994. This Convention, regularly ratified and published, is in force in the Portuguese domestic legal system and prevails over domestic law provisions, which cannot be at odds with it as it binds Portugal internationally – Art. 8(2) of the Constitution.

[7] "The [Portuguese] court competent for the enforcement of domestic arbitral awards is competent for the enforcement of a foreign arbitral award, since Art. III of the New York Convention does not allow 'substantially more onerous conditions than are imposed on the recognition or enforcement of domestic arbitral awards'. This court is the 'court of first instance, in accordance with civil procedure law' – Art. 30 of Law 31/86 of 29 August [1986].

[8] "Art. 1094(1) CCP does require the prior review and confirmation of private law decisions rendered 'by a foreign court or by arbitrators abroad'. However, this requirement for review and confirmation is set 'without prejudice to the provisions of treaties, conventions, EU regulations and special laws'. Thus, the provisions of the New York Convention, ratified by Portugal, prevail over Art. 1094 et seq. CCP.

[9] "Since the New York Convention does not allow 'substantially more onerous conditions or higher fees or charges than are imposed on the recognition or enforcement of domestic arbitral awards' (Art. III of the Convention), a necessary conclusion is that the review and confirmation of foreign arbitral awards is the task of the court of first instance, on which the Law on Voluntary Arbitration conferred the competence for the execution of domestic arbitral awards: otherwise, the enforcement of a foreign arbitral award would be submitted to a substantially stricter regime or substantially higher costs than those for the enforcement of a domestic arbitral award.

[10] "In fact, if the foreign arbitral decision were to be confirmed first by the court of appeal, the proceedings would be much slower ('substantially more onerous conditions') and costs would have to be paid first in the court of appeal for confirmation and then in the court of first instance for enforcement of the award ('substantially higher fees'), thereby squarely contradicting Art. III of the New York Convention.

[11] "This opinion does not violate Arts. 20 and 202 of the Constitution, because it does not deny the interested parties access to the courts to defend their interests, nor is the defense of those rights and interests of the citizens questioned. The parties always have access to the court of first instance for the recognition of the arbitral decision.
[12] "There is no 'special proceeding' for the recognition of [foreign] arbitral awards, because the procedure provided for in the New York Convention is followed, which prevails over the special proceeding for the review of foreign decisions in Art. 1094 et seq. CCP. And, at any event, appeal in general terms is always possible from the decision of the [court of] first instance – precisely to the court of appeal; thus, the defense of the rights of the interested parties is guaranteed, as proved by the present appeal."

3. Constitution of the Arbitral Tribunal

[13] "The arbitral tribunal was constituted in conformity with the Contract of the parties. Clause 12 of the Contract clearly stated that:

> 'The present contract shall be governed by and shall be interpreted in accordance with French law; both parties accept to submit to the Paris Courts. Notwithstanding any provision to the contrary in accordance with the present contract, the licensor may opt to refer the dispute to binding arbitration under the Rules of IFTA before the Courts of Paris, France, and the distributor accepts to submit to said arbitration in accordance with the Rules of IFTA.'

[14] "The parties accepted the jurisdiction of the Paris courts, but the licensor (Xilam Films) had the option to submit the dispute to binding arbitration in accordance with the rules of IFTA, before the Paris courts, and the distributor (Lnk-Video S.A.) accepted to submit to said arbitration in accordance with the rules of IFTA ('Licensor may choose to submit the dispute to binding arbitration under the Rules of IFTA before the courts of Paris, France, and Distributor hereby accepts arbitration in accordance with the IFTA Rules' [English original]).
[15] "Reference is made to Paris, France because the arbitral tribunal of IFTA has its seat in California and in the United States there are more than twenty cities called Paris (one of them is Paris, Texas). Licensor requested that the dispute be settled in France ('courts of Paris, France' [English original]). But this did not mean that the dispute was to be referred to the courts of the French state; on the contrary, it was to be referred to the arbitral tribunal constituted in

accordance with the IFTA Rules, but with seat in Paris, France. Distributor accepted this when signing the contract.
[16] "The IFTA 'Rules for International Arbitration' are [in the file]. IFTA appointed, according to these rules, an arbitrator having French nationality; the appellant also took part in this appointment, but then argued that the sole arbitrator lacked jurisdiction. The arbitrator, surely little accustomed to this kind of quarrel, the former that are habitual in legal disputes in Portugal, promptly rejected this argument, clarifying that 'the Agreement must be understood to mean that the arbitration must take place before an arbitrator appointed in accordance with the provisions of the IFTA Rules, with business address in the Forum of Paris'.
[17] "Thus, the allegation of lack of jurisdiction of the arbitral tribunal fails entirely."

4. Public Policy

[18] "As remarked by the court below, the penalty clause in the Contract is provided for in Arts. 810-812 of the [Portuguese] Civil Code (CC). A penalty clause determines by agreement the indemnification that can be claimed. Instead of awaiting the determination of the damages for failure to comply with the obligations in the contract [*incumprimento*], always slow and of uncertain result, the parties may directly determine by agreement the amount of the indemnification that can be claimed. If it is manifestly excessive, the court may reduce it equitably – Art. 812(1) CC.
[19] "The appellant argues that the [penalty] clause, contained in Art. 15-b of the Standard Terms of the Contract, is excessive. However, it is not the clause that must be examined here, because [our] decision concerns only the recognition of the arbitral award, according to the rules of Art. 1096 CCP (which applies to an arbitral decision, in accordance with Art. 1097 CCP, 'when compatible'). What we have to examine is whether the decision leads to a result that is incompatible with the principles of Portuguese international public policy.
[20] "The appellant argues in this respect that the arbitral decision allows the licensor to receive the totality of the agreed price, together with delay interest, but does not hand the film over to the appellant, [so that A] will be able to give it to another Portuguese distributor and earn the same remuneration again.
[21] "However, this happens only because the appellant did not perform under the contract as it should have done. The penalty clause that it signed served precisely to impose this performance [on B], with the highly penalizing consequence provided for therein. This is not excessive. The contracts are to be

performed in the United States precisely because there are clauses such as these; and the reason why the courts are clogged by civil liability actions is precisely because there are no such clauses in Portugal (where civil law is economically ineffective).

[22] "The decision [at issue] applies a civil penalty clause in the light of French law; the clause was accepted by the appellant when it signed the Contract; Portuguese law also allows for penalty clauses; the exact scope of the penalty clause cannot be examined here as we can only verify whether the decision violates any principle of international public policy.

[23] "By finding against [B] according to French law, pursuant to a clause which in fact is also allowed in Portuguese law, the decision of the arbitral tribunal is not incompatible with any principle of the international public policy of Portugal. Thus, this argument too fails."

II. CONCLUSION

[24] "The time limit for a defendant to supply the proofs provided for in Art. V(1) of the [New York Convention] is ten days, pursuant to Art. 153(1) CCP.

[25] "Recognition takes place before a competent court of first instance, not before a court of appeal; however, the requirements in Arts. 1096 and 1097 CCP are applicable, when compatible in light of the Convention.

[26] "An arbitral decision which finds against the defendant in accordance with a penalty clause, which is in fact also allowed by Art. 810 et seq. CC, is not incompatible with any principle of the international public policy of Portugal.

[27] "Thus, on the basis of the considerations above, we declare the appeal unjustified and decide to confirm the appealed decision in its entirety. Costs to be borne by the appellant…."

ROMANIA

Accession: 13 September 1961
1st and 2nd Reservations

3. Înalta Curte de Casaţie şi Justiţie a României [Supreme Court of Romania], Commercial Chamber, 23 May 2008, case no. 2415/118/2007[1]

Parties:	Petitioner: Private Company (Switzerland) Respondent: Private Company (Romania)
Published in:	No information available
Articles:	III; IV; V(1)(*d*); VII(1)
Subject matters:	– constitution of arbitral tribunal not in accordance with agreement of parties – European Convention of 1961 – acceptance of arbitral jurisdiction by filing counterclaim(s) – presumption of validity of award under 1958 New York Convention
Topics:	¶ 513; [3] = ¶ 301; [7] = ¶ 704

Summary

The Court affirmed the decision of the court of appeal granting enforcement of a VIAC award, holding that the constitution of the arbitral tribunal was fully in accordance with the parties' agreement as expressed in the arbitration clause in their contract. Also, the party opposing enforcement filed counterclaims in the VIAC arbitration.

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1. The General Editor wishes to thank Dr. Radu-Bogdan Bobei, attorney-at-law and arbitrator, lecturer, Faculty of Law, University of Bucharest, for his invaluable assistance in providing this decision and translating it from the Romanian original.

The Swiss Private Company (Petitioner) and the Romanian Private Company (Respondent) concluded a sale contract containing a clause for arbitration of disputes by three arbitrators at the Vienna International Arbitral Centre – VIAC.

On 20 July 2005, a VIAC arbitral tribunal rendered an award in favor of Petitioner. On 11 November 2005, Petitioner, through its Romanian subsidiary, filed a request for recognition and enforcement of the VIAC award in Romania. On 3 February 2006, the Bucharest Commercial Court granted recognition – but not enforcement. On 31 October 2006, the Bucharest Court of Appeal reversed this decision and referred the case to the Constanţa Commercial Court. Before that court, Respondent raised the objections that the Romanian subsidiary of Petitioner lacked standing and that the VIAC tribunal lacked jurisdiction.

On 25 April 2007, the Constanţa Commercial Court dismissed both objections, finding that the Romanian subsidiary had standing, that all requirements for seeking recognition were met and there were no grounds for refusal under the 1958 New York Convention. On 15 October 2007, the Constanţa Court of Appeal affirmed this decision, finding that the parties did conclude a valid arbitration agreement for VIAC arbitration. Also, Respondent filed counterclaim(s) in the arbitration, thus accepting the jurisdiction of VIAC.

The Supreme Court affirmed the decisions below. It noted at the outset that the 1958 New York Convention provides for a presumption of the validity of the arbitral award, requiring only that the party seeking recognition and enforcement supply the original award and the original arbitration agreement.

Recognition and enforcement may be denied under the Convention if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or the law of the seat of the arbitration. This objection need not be raised before the arbitrators and may be raised for the first time before the enforcement court. (Differently, under the 1961 European Convention the plea of lack of jurisdiction may not be raised in the enforcement court if it has not been raised before the arbitrators.)

In the present case the arbitral tribunal was constituted in full accordance with the agreement of the parties, as evidenced by the arbitration agreement in the contract. Respondent's contention that it never accepted the VIAC tribunal's jurisdiction and only filed counterclaims in order not to lose the reasonable opportunity to present its case in the arbitration was dismissed as a "sophism".

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345059-n>.

Excerpt

[1] "Preliminarily, some remarks are made with regard to the law applicable to the recognition and enforcement of the foreign arbitral award, in light of the principles of private international law.
[2] "The requirements for recognition and enforcement of a foreign arbitral award are regulated by [the 1958 New York Convention], as ratified by Romania and published in the Official Bulletin no. 19/24 July 1961.
[3] "Art. III of the New York Convention states 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. This legal provision provides for a presumption of the arbitral award's validity. The arbitral award is a proper title for the party applying for recognition and enforcement of such arbitral award. That party shall supply only the original award and the original arbitration agreement.
[4] "Pursuant to the New York Convention, recognition and enforcement of the arbitral award may be refused at the request of the party against whom it is invoked if that party furnishes the proof that (Art. V(1)(*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.
[5] "The jurisdiction of the arbitral tribunal is established by taking into account the meaning of the arbitration agreement. The arbitral tribunal is legally competent for solving the case if, on the one hand, the parties have concluded an arbitration agreement that is neither null nor void and, on the other hand, if the arbitral tribunal did not exceed the limits set by the parties in the arbitration agreement.
[6] "Pursuant to the New York Convention, the lack of validity of the arbitration agreement may be invoked before the state court competent for granting the exequatur, even if such lack was known to the parties and could have been invoked before the arbitral tribunal.
[7] "Pursuant to the [1961 European Convention], as ratified by Romania, whose breach is invoked by Respondent, the plea of the arbitral tribunal's lack of jurisdiction must be invoked, in principle, before the arbitral tribunal itself, during the arbitration proceedings. Such plea is not admissible if it was invoked for the first time before the state court competent for granting the exequatur.
[8] "In the present case, pursuant to the arbitration agreement stipulated in the sale agreement concluded by the parties, whose validity was not denied by Respondent before the state court competent for granting the exequatur, that all

the disputes arising out of the contract shall be finally settled not by the state court, but by three arbitrators, the seat of the arbitration being Vienna.

[9] "In accordance with the above mentioned arbitration agreement, Petitioner filed a request for arbitration with the Vienna International Arbitral Centre (VIAC); Respondent also filed counterclaim(s) with VIAC. The arbitral tribunal, composed of three arbitrators and constituted under the auspices of VIAC, rendered the arbitral award.

[10] "It results without doubt that in the present case the arbitral tribunal was composed in full accordance with the will of the parties expressed in the arbitration agreement. Such arbitration agreement is valid and is not denied by the signatory parties.

[11] "Respondent's contention that the counterclaim(s) were filed, even if Respondent did not agree that VIAC had jurisdiction, in order not to lose the reasonable opportunity to present its case in the arbitral proceedings, is a genuine sophism. Such contention is a genuine sophism because filing counterclaim(s) means not only providing a defence, but filing an independent request in order to state one's own claims. Nothing prevented Respondent from addressing another arbitral institution if it considered that the [VIAC] arbitral tribunal was in breach of the arbitration agreement.

[12] "In other words, both parties addressed requests to the same VIAC – in accordance with the arbitration agreement. There is no doubt as to the jurisdiction of the arbitral tribunal constituted under the auspices of VIAC for solving the case.

[13] "As a consequence, summarizing the above reasoning, the Court concludes, with regard to the issue of the composition of the arbitral tribunal and the issue of the breach of the arbitration agreement, that there is no reason for the invalidity of the arbitration agreement. Such legal reasoning is based on the arbitration agreement and the domestic legal provisions on the recognition of foreign arbitral awards, as regulated by Arts. 167-172 of Law no. 105/1992 [on the Settlement of Private International Law Relations].

[14] "The decision which granted recognition of the arbitral award rendered by the arbitral tribunal constituted under the auspices of VIAC is fully legal."

(….)

4. Înalta Curte de Casaţie şi Justiţie a României [Supreme Court of Romania], Commercial Chamber, 23 June 2011, case no. 6324/2/2010[1]

Parties:	Petitioner: Public Entity (Romania) Respondent: Leader of Joint Venture Y (nationality not indicated)
Published in:	No information available
Articles:	In general
Subject matters:	– waiver of right to recourse against award by adopting International Chamber of Commerce (ICC) Rules – law applicable to arbitration v. law applicable to merits – arbitration rules may be law applicable to arbitration under 1958 New York Convention
Topics:	¶ 001

Summary

The Court affirmed the lower court's decision denying a request to annul an ICC partial award rendered in Paris and suspend its execution pending a final decision on the annulment request. The Court found that by accepting ICC jurisdiction a party is bound by the obligation in the ICC Rules to waive any form of recourse. The provision of Romanian law that such waiver may be made only in respect of final awards did not apply, as the ICC Rules were the only rules applicable to the arbitration. The statement in the partial award that the arbitrators applied Romanian law referred to the law applicable to the merits of the dispute.

The Romanian Public Entity (the Employer) entered into a contract with the leader of Joint Venture X (the Contractor) for certain construction works in Romania. Most of the financial resources for the project were provided by the European Union. The contract provided that work be completed by 3 May 2006.

1. The General Editor wishes to thank Dr. Radu-Bogdan Bobei, attorney-at-law and arbitrator, lecturer, Faculty of Law, University of Bucharest, for his invaluable assistance in providing this decision and translating it from the Romanian original.

The Contractor's non-fulfillment of its contractual obligations entitled the Employer to terminate the contract. The contract contained a clause for International Chamber of Commerce (ICC) arbitration of disputes.

A dispute arose between the parties when the Contractor did not complete the construction work on schedule. The Employer stopped payments under the contract, called in the Performance Guarantee Security provided by the Contractor and filed a request for arbitration with the ICC in Paris, seeking damages and costs of technical assistance due to the delay. On 9 June 2010, an ICC arbitral tribunal rendered a partial award finding that (i) it had jurisdiction over the dispute; (ii) the Employer had no right to call in the Performance Guarantee Security and should return its amount; and (iii) the Employer should pay the amounts owed to the Contractor. All other issues, including the costs of the arbitration, would be decided in the final award. The award stated that the arbitrators applied Romanian law to the dispute.

On 14 July 2010, the Employer seized the Bucharest Court of Appeal, Sixth Commercial Chamber, with a request to annul the ICC partial award and to suspend its execution until the final decision on the annulment request. In a reply of 30 November 2010, the Contractor raised, inter alia, the objection that the Employer's request for annulment was inadmissible under the 1958 New York Convention and the ICC Rules of Arbitration (1998).

On 10 December 2010, the court of appeal dismissed the Employer's requests, holding that having accepted the jurisdiction of the ICC, the Employer was bound by Art. 28(6) of the 1998 ICC Rules, which provided that the award shall be binding on the parties and that the parties waive "their right to any form of recourse insofar as such waiver can validly be made".

The Supreme Court of Romania affirmed the lower court's decision. The Employer argued that the arbitral award was governed by Romanian law – as explicitly stated in the award itself – and that the obligation in Art. 28(6) of the ICC Rules (1998) applies only if the parties can validly waive their right to a recourse. This was not the case here as under the Romanian Code of Civil Procedure the parties may waive the action for setting aside the award only after the final award is rendered.

The Court disagreed, finding that the Employer confused the law applicable to the arbitration with the law applicable to the merits of the dispute. The statement in the award that the arbitrators applied Romanian law referred to the latter law.

Further, by ratifying the 1958 New York Convention Romania accepted that arbitration rules may be the law applicable to the arbitration proceedings. In the present case, the ICC Rules chosen by the parties applied. This included the issue of the admissibility of a recourse. No reference could be made to the provisions of the Romanian Code of Civil Procedure.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345060-n>.

Excerpt

[1] "[The Employer] errs when arguing that Romanian law is applicable to the arbitral proceedings: it confuses the law applicable to the arbitral proceedings with the law applicable to the merits of the dispute.
[2] "The Employer also errs when referring to the wording of the partial arbitral award in respect of the law applicable to the merits of the dispute. This wording does not refer to the law applicable to the arbitral proceedings, including any form of recourse with regard to the arbitral award.
[3] "By ratifying the 1958 New York Convention through Decree-law no. 186/1961, Romania has accepted that arbitration rules may be the law applicable to arbitral proceedings. As a consequence, any recourse against an arbitral award must be examined pursuant to the provisions of such rules.
[4] "Pursuant to Art. 28(6) of the [ICC] Rules of Arbitration, 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.
[5] "Furthermore, this arbitral award is a foreign award pursuant to Art. 165 of Law no. 105/1992.[2] As a consequence, the [applicable] arbitration rules, including their provisions regarding any form of recourse, are the arbitration rules issued by the arbitral institution chosen by the parties; in the present case, the International Court of Arbitration of the International Chamber of Commerce. The provisions of the Romanian Code of Civil Procedure may not be invoked.
[6] "Hence, the provisions of the Romanian Code of Civil Procedure are not applicable to the present dispute. According to these provisions, where an action for setting aside is admissible, its admissibility may be analyzed only by reference to the requirements provided by the legislation of the country where the arbitral award was rendered, specifically, the requirements of the ICC Rules of Arbitration.

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2. Art. 165 of Law No. 105 of 22 September 1992 "On the Settlement of Private International Law Relations" read:

   "According to the present law, the term foreign decision refers to the acts of jurisdiction of juridical instances, of notary offices or of any other competent authorities from another State."

   This Law is no longer in force.

[7] "Based on the reasoning above, pursuant to Art. 312(1) of the Code of Civil Procedure, it follows that the Supreme Court rejects the recourse as ungrounded."
(….)

RUSSIAN FEDERATION

Ratification: 24 August 1960
1st Reservation

35. Presidium, Supreme *Arbitrazh* Court of the Russian Federation, 12 June 2012, No. 1831/12[1]

Parties:	Petitioner: CJSC Russian Telephone Company (Russian Federation) Respondent: OOO Sony Ericsson Mobile Communications Rus (Russian Federation)
Published in:	Russian original and English translation available online at <www.arbitrations.ru>
Articles:	II(3)
Subject matters:	– arbitration agreement "null and void" for violation of parties' procedural equality – variable choice of forum only for one party
Topics:	¶ 220

Summary

The Presidium reversed the decisions of the lower courts, which found that a dispute should be referred to arbitration because of the arbitration clause in the contract between the parties. The Presidium held that the clause was null and void because in addition to providing for ICC arbitration it gave only one of the parties the right to refer some of the disputes to a state court. The clause therefore created an imbalance in the parties' rights in violation of the fundamental principle of the parties' procedural equality.

1. The General Editor wishes to thank Roman Zykov, Secretary General of the Russian Arbitration Association, Moscow, for his invaluable assistance in providing this decision and translating it from the Russian original.

On 15 May 2009, CJSC Russian Telephone Company (RTC) and OOO Sony Ericsson Mobile Communications Rus (Sony Ericsson) entered into a contract under which Sony Ericsson would supply mobile phones and accessories to RTC. The contract contained a clause providing that disputes be referred to ICC arbitration in London, but that Sony Ericsson could also "seek the collection of debt for the delivered goods through a competent state court".

A dispute arose between the parties in respect of allegedly defective goods supplied by Sony Ericsson. RTC commenced an action in the *Arbitrazh* (Commercial) Court of Moscow City seeking an order that Sony Ericsson replace the defective products. The court did not hear RTC's request, holding that the dispute should be referred to arbitration in London as provided for in the contract between the parties. On 14 September 2011, this decision was affirmed by the Ninth *Arbitrazh* Court of Appeal. On 5 December 2011, the Federal *Arbitrazh* Court for the Moscow District also affirmed.

The Presidium of the Supreme *Arbitrazh* Court of the Russian Federation reversed the lower courts' decisions and remanded the case to the *Arbitrazh* Court of Moscow City for revision, holding that the arbitration clause in the contract between the parties was null and void.

The Presidium held that the second part of the arbitration clause – which granted Sony Ericsson alone the choice to refer some of the disputes to a competent state court – gave Sony Ericsson an advantage over RTC and therefore created an imbalance in the parties' rights. As the parties' procedural equality is a fundamental principle in both court and arbitration proceedings that is enshrined in the European Convention on Human Rights and upheld by the European Court of Human Rights, the arbitration clause was null and void.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345061-n>.

Excerpt

[1] "In its submission to the Supreme *Arbitrazh* (Commercial) Court of the Russian Federation, RTC requested the Court to quash the decisions of the lower courts and return the case to the *Arbitrazh* Court of Moscow City for reconsideration. In its response, Sony Ericsson asked that the decisions of the lower courts be left undisturbed.

[2] "The Presidium of the Supreme *Arbitrazh* Court, after reviewing the facts of the case and hearing the representatives of the parties, holds that the petition of RTC shall be granted on the following grounds.

[3] "The lower instance courts established that the ground for RTC's claim was Sony Ericsson's breach of the contract for the delivery of mobile phones and accessories dated 15 May 2009. The parties included the following dispute resolution clause in their contract (Sect. 21.2):

> 'Any dispute arising out of this Contract which cannot be settled by negotiations will be finally resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the Rules. The place of arbitration is London; the language of arbitration is English. This arbitration clause remains in force after the termination of the Contract and does not preclude the parties from seeking interim measures of protection or injunctions in the competent courts in the events of violation or threat of violation of the sections of the contract "Sony Ericsson Trade Marks", "Software Licenses", "Export Control", "Fighting Counterfeit" or "Confidentiality". This arbitration clause shall not restrict Sony Ericsson to seek the collection of debt for the delivered goods through a competent state court.'

[4] "When the lower courts reviewed the case they started from a presumption that there was a valid and enforceable arbitration clause.

[5] "In particular, the *Arbitrazh* Court of Moscow City invoked Art. 148(1)(5) of the *Arbitrazh* Court Procedure Code of the Russian Federation [the *Arbitrazh* Procedure Code] because Sony Ericsson informed the court that the contract contained an arbitration clause and that the parties defined the arbitral institution and the applicable set of arbitration rules; therefore, the case does not fall within the jurisdiction of the state court. On that basis, the *Arbitrazh* Court of Moscow city decided that there is a valid arbitration clause.

[6] "Subsequently, the Ninth *Arbitrazh* Court of Appeal, upholding the decision of the lower court, also pointed out that there was no reason why the arbitration clause could be deemed void, unenforceable or expired. The court reasoned that the freedom of contract enabled the parties to agree on anything they deemed suitable to regulate their relations, including how to resolve possible disputes. The language of the arbitration clause made it possible to identify the true intentions of the parties in relation to the dispute resolution body; hence, the clause was enforceable. Besides, the question of validity and enforceability of the arbitration clause had been decided by the *Arbitrazh* Court of Moscow City. In addition, the *Arbitrazh* Court of Moscow City having already established the validity of this arbitration agreement, according to Art. 60(2) of *the Arbitrazh* Procedure Code there is no obligation to prove the same in the higher instance.
[7] "Finally, the Federal *Arbitrazh* Court for the Moscow District upheld the decisions of both the lower courts.
[8] "However, in their analysis the courts did not take into account the following.
[9] "According to Art. 148(1)(5) of the *Arbitrazh* Procedure Code, a court shall refrain from hearing a claim if it establishes that the parties agreed to refer this dispute to arbitration, provided that any party to the arbitration agreement opposes the court's jurisdiction prior to its first written submission on the merits, and provided the court does not establish that the arbitration agreement is void, expired or unenforceable.
[10] "It follows from the dispute resolution clause [at issue] that it is comprised of two parts: an undertaking to arbitrate and an alternative possibility for only one party to refer some of the disputes to a competent state court. When the courts decided that there was a valid arbitration clause they failed to analyze the arbitration clause in conjunction with the extension part of the dispute resolution clause, which stipulates a unilateral right of Sony Ericsson to file a claim either in arbitration or with a competent state court. However, the dispute resolution clause puts Sony Ericsson in an advantageous position compared to RTC, because it is only Sony Ericsson that has an option in respect of where to resolve its disputes (by means of commercial arbitration or litigation). Hence, [this clause] disturbs the balance of the [parties'] rights.
[11] "It is worth noting that the parties' equality is a fundamental principle of civil law. The standards of justice of state courts shall also extend to alternative dispute resolution, including arbitration (Case *Suda v. Czech Republic* (1643/06) – Final Resolution RES (2012) 18, European Court of Human Rights).
[12] "Due process – that is, when a party is given an opportunity to present its case – is a guarantee provided by adjudication of disputes in the state courts,

because only then may a party receive the full, effective and fair treatment of its rights. The principles of equality of the parties and adversarial proceedings mean that the parties are treated equally in court (Rulings of the Constitutional Court of the Russian Federation, dated 20 July 2011, No. 20-P; 27 February 2009, No. 4-P; 8 December 2003, No. 18-P; 14 February 2000, No. 2-P; 14 April 1999, No. 6-P; 10 December 1998, No. 27-P; 2 July 1998, No. 20-P).

[13] "Also according to the opinion expressed by the European Court of Human Rights in the Resolution dated 26 May 2009 No. 3932/02 (*Batsanina v. Russian Federation*), the parties in any civil dispute resolution should be given equal procedural rights. The European Convention of Human Rights of 1950 guarantees the rights of the parties to be equally treated (Case *Sokur v. Russia*, 15 October 2009, No. 23243/03; *Steel and Morris v. The United Kingdom*, 15 February 2005, No. 68416/01; *Huzhin and others v. Russia*, 23 October 2008, No. 13470/02, European Court of Human Rights).

[14] "Therefore, pursuant to the fundamental principles of protection of civil rights, a dispute resolution agreement cannot endow only one party with the right to apply to a competent court and deprive the other of that right. In the event such an agreement is concluded it shall be considered as void because it violates the balance of the parties' rights. Consequently, a party whose rights are violated by such an agreement may also seek judicial protection on equal terms with the other party under the dispute resolution agreement.

[15] "With regard to the case at hand, the decisions of the lower courts must be quashed pursuant to Art. 304(1)(1) and 304(1)(2) of the *Arbitrazh* Procedure Code because they violate the uniformity of application of the laws by the Russian courts.

[16] "The case is returned to the *Arbitrazh* Court of Moscow City for revision."

36. Supreme *Arbitrazh* Court of the Russian Federation, 27 August 2012, No. VAS-17458/11[1]

Parties:	Petitioner: Ciments Français (France) Respondent: Holding Company Sibirskiy Cement OJSC (Russian Federation)
Published in:	Russian original and English translation available online at <www.arbitrations.ru>
Articles:	V(1)(*a*); V(2)(*b*)
Subject matters:	– domestic court decision on validity of contract containing arbitration agreement – public policy and lack of arbitration agreement
Topics:	¶ 507 (lack of arbitration agreement) + ¶ 524 (lack of arbitration agreement; danger of conflicting decisions)

Summary

The Court affirmed the decision of the appellate court, which had reversed a first instance decision granting recognition of an ICC award rendered in Turkey on the ground that the arbitration agreement on which the award was based was contained in a contract that had been invalidated by a Russian court. The Court held that recognition of an award based on an agreement found to be void by a Russian court decision would result in the existence of competing and mutually excluding judgments, in violation of public policy, specifically, the principle of the binding effect of judgments in the Russian Federation.

The facts of this case are also reported in Yearbook XXXVI (2011) at pp. 325-328 (Russian Federation no. 33). On 26 March 2008, Holding Company Sibirskiy Cement OJSC (Sibirskiy), Russia; Ciments Français, France; and Joint-Stock Company Stambulskiy Tsement (Tsement), Turkey, concluded a Shares Sale and Purchase Agreement (SSPA). The SSPA contained a clause referring all

1. The General Editor wishes to thank Mr. Roman Zykov, Secretary General of the Russian Arbitration Association, Moscow for his invaluable assistance in providing this decision and translating it from the Russian original.

disputes to International Chamber of Commerce (ICC) arbitration by three arbitrators in Turkey.

A dispute arose between the parties in respect of both Sibirskiy's and Ciments Français' performance under the SSPA, as well as Ciments Français' termination of the SSPA and its withholding of the initial payment made by Sibirskiy on the ground that it was entitled to it in case of lawful termination. Ciments Français commenced ICC arbitration in Turkey as provided for in the SSPA against Sibirskiy and Tsement. On 7 December 2010, the ICC arbitral tribunal rendered a partial award in Ciments Français' favor, finding that it had jurisdiction over all signatories to the SSPA and over the dispute; that the SSPA was valid and binding on all signatories; and that Ciments Français properly made use of its right to termination and was therefore entitled to withhold the initial payment amount. The arbitrators ordered the provisional enforcement of the partial award and they reserved a decision on the remaining aspects of the case – in particular damages, costs of the arbitration and legal costs – for a second stage of the proceeding.

Proceedings ensued in Turkey and the Russian Federation. In Turkey, Sibirskiy sought annulment of the ICC award. On 31 May 2011, a Turkish court of first instance granted the application and set aside the award.

In the Russian Federation, another entity involved in the relationship between Ciments Français and Sibirskiy, OOO FPS Sibkonkord, commenced proceedings in the *Arbitrazh* (Commercial) Court for the Kemerovskaya Region, seeking a declaration that the SSPA was invalid. On 13 August 2010, the court granted the declaration and as a consequence ordered Ciments Français to return the initial payment – € 50,000,000 – to Sibirskiy.

In turn, Ciments Français applied to the same *Arbitrazh* Court for the Kemerovskaya Region, seeking recognition of the ICC partial award. On 20 July 2011, the Kemerovskaya *Arbitrazh* Court granted enforcement of the ICC partial award. This decision is reported in Yearbook XXXVI (2011) pp. 325-328 (Russian Federation no. 33).

On 5 December 2012, the Federal *Arbitrazh* Court for the West-Siberian District reversed the lower court's decision, holding that recognition of the ICC award would violate public policy because of the existence of the 13 August 2010 decision invalidating the SSPA (and, as a consequence, the arbitration agreement contained therein).

By the present decision, the Supreme *Arbitrazh* Court of the Russian Federation refused to submit the case for review to the Presidium of the Supreme *Arbitrazh* Court. The Court held that the lower court correctly found that recognition of the ICC award would violate public policy in light of the 13 August 2010 decision, as this decision also invalidated the arbitration agreement on which the

award was based. This conclusion complied with Russian law and it was also in line with Art. V(2)(*b*) of the 1958 New York Convention. Recognition of an award based on an arbitration agreement invalidated by the Russian courts, reasoned the Supreme *Arbitrazh* Court, would result in the existence of competing and mutually excluding judgments, in violation of the principle of the binding effect of judgments in Russia.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345062-n>.

Excerpt

[1] "Ciments Français applies to the Supreme *Arbitrazh* Court to revoke a ruling of the [Federal *Arbitrazh* Court for the West-Siberian District], arguing that this ruling does not comply with the relevant laws of the Russian Federation … and Art. V of the 1958 New York Convention.
[2] "In Ciments Français' opinion, when the court of first instance granted enforcement of the ICC arbitral award in Russia, the court's decision in another case dated 13 August 2010 no. A27-4626/2009 invalidating the main agreement had not yet become binding. Ciments Français also notes that the ICC arbitral award is a so-called declaratory award which requires recognition but does not need enforcement and therefore simply cannot violate the public policy of the Russian Federation. In addition, the fact that the Russian state court invalidated the main agreement is not per se a ground for refusing to recognize and enforce the arbitral award based on an arbitration agreement contained in the invalidated main agreement.
[3] "Ciments Français also points out that the [Federal *Arbitrazh* Court for the West-Siberian District] incorrectly applied Art. V(1)(*e*) of the New York Convention; in particular, the reference to the nullity of the award is without merit. Ciments Français argues that the ICC arbitral award no. 1624/GZ dated 7 December 2010 was set aside by the Turkish state court on grounds found only in Turkish national law; [this annulment] therefore cannot constitute a ground for refusing recognition and enforcement of the arbitral award in Russia.
[4] "According to Art. 299(4) of the *Arbitrazh* Court Procedure Code of the Russian Federation [the *Arbitrazh* Procedure Code] , a case can be referred to the Presidium of the Supreme *Arbitrazh* Court if the criteria set out by Art. 304 of the *Arbitrazh* Procedure Code are met.
[5] "When annulling the first instance decision, the [Federal *Arbitrazh* Court for the West-Siberian District] ruled that the enforcement of an arbitral award based on a void agreement violates public policy (Arts. 244(2) and 244(1)(7) of the *Arbitrazh* Procedure Code). The Supreme *Arbitrazh* Court notes that this conclusion is in line with Art. V(2)(*b*) of the New York Convention.
[6] "Recognition of the ICC award dated 7 December 2010 made on the basis of the invalidated agreement would lead to the existence of several competing and mutually exclusive judgments in Russia; this violates the principle of the binding effect of judgments in Russia.
[7] "In such circumstance the Court does not find it possible to revisit the judgments of the lower courts. The Supreme *Arbitrazh* Court refuses to submit the case to the Presidium of the Supreme *Arbitrazh* Court."

SPAIN

Accession: 12 May 1977
No Reservations

73. Tribunal Superior de Justicia de Catalunya [Superior Court of Justice of Catalonia], Civil and Penal Chamber, 15 March 2012, No. 37/12

Parties:	Claimant: Starlio Shipping Company Limited (nationality not indicated) Defendants: (1) Eurocondal Shipping S.A. (a/k/a Eurochartering S.A.) (Spain) (2) Euromaq Aduanas S.A. (nationality not indicated)
Published in:	Available online at <www.poderjudicial.es/search/indexAN.jsp> (ATSJ CAT 100/2012)
Articles:	III; V(1)(*a*); V(1)(*b*); V(2)(*b*)
Subject matters:	– public policy and lack of arbitration agreement – arbitration agreement "in writing" – definition of "in writing" inclusive – UNCITRAL Recommendation 2006 – applicable law to existence, validity of arbitration agreement – arbitration clause in adhesion contract – proper notice
Topics:	[3] = ¶ 301; [4]-[5] = ¶ 500 + ¶ 503; [6] + [9]-[13] = ¶ 504 + ¶ 524 (lack of valid arbitration agreement); [8] + [14]-[20] = ¶ 507 (adhesion contract); [12] + [25]-[26] = ¶ 303; [15]-[17] = ¶ 506; [21]-[24] = ¶ 509

Summary

An LMAA award rendered by a sole arbitrator in London was granted enforcement. The argument that there was no valid arbitration agreement because the email modifying certain terms of earlier charterparties for the specific charterparty was not signed by an authorized representative failed: the email did not modify the arbitration clause and contained an express reference to arbitration. This sufficed in light of the non-formalistic interpretation of the written form requirement in the 1958 New York Convention; further, defendant did not raise this objection in the arbitration. Nor was it proved that the standard conditions used were invalid under the law chosen therein – English law – which applied pursuant to the conflict rule in Art. V(1)(a) of the Convention; Spanish and EU consumer protection law were therefore inapplicable. At any event, this was a matter for the arbitrator to decide in first instance; court intervention was not required to protect a consumer, since the present contract was between two enterprises. There was no violation of material and effective due process: defendant was notified of the arbitration, though only by fax, and did not raise any objection in this respect before the arbitrator.

Starlio Shipping Company Limited (Starlio) and Eurocondal Shipping S.A. (a/k/a Eurochartering SA) (Eurocondal) entered into a charterparty in respect of the vessel *MEKONG SPIRIT*. The charterparty was based on earlier charterparties concluded between the parties, some terms of which were modified by an email sent by Mr. Cesareo of Cesareo Eurochartering Management (Cesareo), a broker acting on behalf of Eurocondal, to Starlio's brokers. Clause 61 of the original charterparty, providing for the application of English law and referring disputes to arbitration at the London Maritime Arbitrators Association (LMAA), was not modified. The email also contained a reference to arbitration: "Arbitration/GA in London, English law shall apply. GA in accordance with rules Y/A 1994."

A dispute arose between the parties. On 19 October 2011, an LMAA sole arbitrator in London rendered an award in favor of Starlio. On 24 November 2011, Starlio sought enforcement of the award in Spain against Eurocondal and another company, Euromaq Aduanas S.A. (collectively, Eurocondal).

The Superior Court of Justice of Catalonia, before Miguel Ángel Gimeno Jubero, president, Maria Eugenia Alegret Burgués and Núria Bassols Muntada, JJ, in an opinion by Maria Eugenia Alegret Burgués, granted enforcement of the LMAA award.

The Court dismissed Eurocondal's objection that there was no valid arbitration agreement between the parties because the Cesareo email was not signed by an authorized Eurocondal representative, and that as a consequence enforcement would violate public policy, specifically the right to effective judicial protection established in the Spanish Constitution. The Court disagreed, reasoning that the arbitration law in the earlier charterparties had not been modified in the email

and that the email expressly mentioned arbitration. This sufficed for a valid arbitration agreement, as a non-formalistic approach prevails in respect of the written form requirement under the 1958 New York Convention, as confirmed by the 2006 UNCITRAL Recommendation: the purpose of this requirement is solely to have a record of the agreement. Also, Eurocondal raised no argument in respect of the arbitration clause before the sole arbitrator.

Eurocondal further argued that the standard conditions in the charterparty – including the arbitration clause – were inapplicable pursuant to European Union and Spanish law on consumer protection. The Court held that under the New York Convention, which prevails over national law and its reference to supranational norms, such as EU law, the validity of the arbitration agreement must be proved under the law determined in accordance with the connections indicated in Art. V(1)(*a*). Here, as the parties submitted to English law, invalidity should – and was not – proved pursuant to that law. At any event, according to the competence-competence principle, the existence and validity of the arbitration agreement was a matter for the LMAA arbitrator to decide in first instance. The court's intervention would be justified only in a consumer/enterprise relation violating public policy, but this was not the case here, where the contract was between two enterprises of the same maritime sector.

Eurocondal's due process ground for opposing enforcement – based on an alleged lack of proper notice – was equally unsuccessful. Eurocondal argued that Starlio should have notified the appointment of the arbitrator and the acts of the arbitration to Eurocondal personally or by registered mail with acknowledgment of receipt, rather than by fax. The Court held that Eurocondal did not meet its burden to prove that notification had not been proper under the applicable English law. Also, a violation of due process must be material and effective; Eurocondal did not deny that it received the communications sent by fax. Also, Eurocondal did not raise any objection in the course of the proceeding.[1]

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345063-n>.

1. On 29 March 2012, the Superior Court of Justice of Catalonia rendered a decision in a similar case brought against the same defendant, Eurocondal. This decision is reported in this Yearbook XXXVIII (2013) at pp. 459-461 (Spain no. 74).

SPAIN NO. 73

Excerpt

[1] "[Starlio] requests the homologation [*homologación*] under the [1958 New York Convention] of the arbitral award rendered on 19 October 2011 by the sole arbitrator Patrick O'Donovan against [Eurocondal]. [Eurocondal] duly opposes the recognition of the said award arguing, on the one hand, that granting exequatur would violate Spanish public policy – specifically, the principle of effective judicial protection embodied in Art. 24 of the Spanish Constitution – and, on the other hand, that it was not notified of the appointment of the arbitrator and of the arbitration proceedings."

I. THE 1958 NEW YORK CONVENTION AND THE COMPETENCE OF THE COURT

[2] "When deciding on the present exequatur we must follow, in accordance with the provision in Art. 46(2) of the Law on Arbitration no. 60/2003, the terms of [the 1958 New York Convention], to which Spain adhered without reservations by an instrument of 12 May 1977.

[3] "After the promulgation of Organizational Law no. 5/2011, of 20 May, complementary to Law no. 20/2011, of 20 May, reforming Law no. 60/2003, of 23 December, on Arbitration (Art. 8), the competence for hearing and deciding an exequatur lies with the Civil and Penal Chambers of the Superior Courts of Justice; the procedure established in the Spanish civil procedural system shall be followed."

II. FORMAL REQUIREMENTS FOR SEEKING ENFORCEMENT

[4] "The [New York Convention] requires that several requirements be met in order to obtain exequatur. First, some formal [requirements] – a prerequisite to the decision – consisting in the submission together with the application of the original arbitral decision or a certified copy thereof, as well as the original arbitration agreement referred to in Art. II or a certified copy thereof, in both cases accompanied by a translation (Art. IV). Other [requirements] concern the merits and must be ascertained ex officio under the law of the state where the award must be enforced: such as that the subject matter of the dispute settled by arbitration must be arbitrable (Art. V(2)(*a*)) and that the recognition or enforcement of the award are not contrary to the public policy of that country (Art. V(2)(*b*)). In contrast, the review on the merits of the case remains outside

the scope of the examination. Other grounds for refusal of recognition are limited and are contained in Art. V of the Convention. They can only be examined at the request of a party; the party invoking them bears the burden of proof.

[5] "This system sought to overcome the obstacles deriving from the requirement that the applicant prove many prerequisites to [the award's] homologation, by shifting the burden to prove the (non-)existence of the grounds for opposition that are relied on and are not to be ascertained by the court on its own initiative onto the other party (a fundamental point in the interpretation of the New York Convention), with the clear aim to create an effective instrument for the development of international commercial relations (Supreme Court [*Tribunal Supremo*], decision of 7 October 2003;[2] this Court, decision of 17 November 2011)."[3]

III. GROUNDS FOR REFUSAL

1. Lack of Valid Arbitration Agreement

[6] "Since the subject matter of the award – breach by Eurocondal of the terms of the charterparty concluded with Claimant – is arbitrable in our country, we must examine whether, as argued by [Eurocondal], recognition would violate Spanish public policy for violation of the constitutional principle of effective judicial protection established in Art. 24 Constitution – on the ground of the improper exclusion of the jurisdiction of the courts – because there is no arbitration agreement between the parties, as argued in its opposition by Eurocondal under Art. V(2)(*b*) and Art. V(1)(*a*) together with Art. II of the New York Convention.

[7] "Eurocondal alleges that there is no agreement in writing under which the parties undertake to refer the disputes that may arise between them to arbitration. It claims that there is no consent of any employee representing or authorized [by Eurocondal] to refer disputes to arbitration in document no. 6, containing an email of Mr. Cesareo of Eurochartering, addressed to the brokers of Claimant.

[8] "Further, in contradiction to this statement, [Eurocondal] says that in order to ascertain whether the consent given is (not) valid we must apply EC

2. Reported in Yearbook XXX (2005) pp. 617-622 (Spain no. 40).
3. Reported in Yearbook XXXVII (2012) pp. 297-299 (Spain no. 72).

Regulation no. 593/2008 and Art. 5 of Spanish Law no. 7/1998 on General Conditions of Contract, according to which the general conditions that Claimant seeks to apply are not valid when the party drafting the general conditions [*predisponente*] did not inform the party that adhered to the contract [*adherente*] expressly of their existence.

[9] "However, it appears from an examination of the documents filed by Claimant that the allegations of the opposing party are inconsistent. Jurisprudence has repeatedly held (Supreme Court [*Tribunal Supremo*], decisions of 17 April 1998; 31 July 2000;[4] 13 November 2001;[5] 26 February 2002;[6] and 7 October 2003,[7] among others) that a non-formalistic criterion prevails in respect of this subject matter; the New York Convention's requirement of the written form is for the purpose of having evidence of the existence of the agreement: the arbitration agreement can appear in an exchange of letters, telegrams, telexes, faxes or other more modern telecommunication means that leave a record of the agreement.

[10] "In this respect the Recommendation Regarding the Interpretation of Art. II(2) of the New York Convention approved by the United Nations Commission on International Trade Law (UNCITRAL), of 7 July 2006, is of interest as an interpretative criterion, according to which, considering the wide use of electronic commerce and electronic communications, Art. II must be interpreted recognizing that the means described therein are not exhaustive; rather, electronic communication must be included among the means that can evidence the agreement. Art. 9(3) of the Spanish Law on Arbitration already recognizes this.

[11] "In the email contained in document no. 6 supplied by Claimant, the parties … refer to conditions already agreed on in earlier commercial relations, modifying, adding to or deleting some of them; among the [conditions] that were not modified was clause 61, which [contains] the submission to arbitration at the London Maritime Arbitrators Association and the submission of the contract to English law. However, the said email, which contains the concrete conditions for chartering the vessel *MEKONG SPIRIT* accepted by Cesareo Eurochartering Management on behalf of the charterers, expressly states: 'Arbitration/GA in London, English law shall apply. GA in accordance with rules Y/A 1994.'

4. Reported in Yearbook XXXII (2007) pp. 532-539 (Spain no. 51).
5. Reported in Yearbook XXXI (2006) pp. 834-845 (Spain no. 45).
6. Reported in Yearbook XXXII (2007) pp. 550-554 (Spain no. 53).
7. Reported in Yearbook XXX (2005) pp. 617-622 (Spain no. 40).

Hence, it is not possible to allege the non-existence or lack of knowledge of the arbitration clause.

[12] "Also, once the dispute had arisen and the commencement of the arbitration proceedings had been notified to Eurocondal and Eurochartering, these enterprises raised no argument in respect of the non-existence or their lack of knowledge of the arbitration clause (Supreme Court, decision of 7 October 2003).

[13] "This means that the agreement existed and that the opposing party was aware of its terms, although it adopted a passive position of convenience in respect of the same.

[14] "Nor can [Eurocondal]'s allegations regarding the nullity of the arbitration agreement for violation of the Spanish Law on General Conditions of Contract of 1998 [*Ley de Condiciones Generales de la Contratación* – LCGC] be granted.

[15] "Art. V(1)(*a*) of the New York Convention contains a conflict rule of exequatur that implies that the alleged invalidity must be proved under the law determined by the connections indicated in that provision; it therefore forbids that recognition be deemed inadmissible on the basis of an automatic reliance on domestic provisions or other supranational norms, such as those which make up Community law, as long as they are not applicable under the said conflict rule provision.

[16] "The application of the New York Convention takes precedence in this subject matter as well, in accordance with the provision in Art. 3 LCGC.

[17] "As already mentioned, the parties submitted to English law. It was not proved that the agreement was not valid according to the law to which the parties subjected the contract, the burden to prove [this invalidity] being on the opposing party.

[18] "At any event, according to the principle which prevails in this matter, the so-called 'Kompetenz-Kompetenz', the arbitrators must decide on their own jurisdiction and on the existence and validity of the arbitration agreement (Art. 22 of the Law on Arbitration). Any defect of the agreement must be invoked in the arbitration proceeding, as long as we are not in the presence of legal relations between a consumer and an enterprise that could justify an intervention of the court at its own initiative to the extent that these [relations] are contrary to national provisions of public policy (European Court of Justice, 6 October 2009). However, this is not the case of a contract between enterprises of the same maritime sector, in which nullity would depend on the relevant factual and legal elements, as held by the decision above, under reference to the *Pannon* decision (European Court of Justice 2009, 155). Nor should we forget that the jurisprudence of the Supreme Court has admitted the validity of arbitration

clauses in adhesion contracts concluded between enterprises, because such clauses as well as their contents are usual in maritime commerce (Supreme Court, decisions of 28 March 2000[8] and 26 February 2002 and references therein).

[19] "Also, the decision of the Supreme Court of 31 May 2005[9] states in this respect that:

> 'The circumstance that the arbitration clause is contained in general conditions, to which the contract signed by the parties refers en bloc and which have become part of the contract as an annex thereto, does not suffice to consider that that clause is invalid based on a contractual imbalance [between the parties] and the necessity to avoid the alleged abuse by the claimant of its dominant position. We cannot deem that the defendant was in a situation of inferiority vis-à- vis the claimant, since the defendant cannot be considered a consumer … nor does it need protection on grounds of public policy to the extent that the interests [protected by that] public policy are part of international public policy. Here, we have two merchant companies whose only disparity as concerns their position in the marketplace and consequently their contractual position is the disparity alleged by the mere statement of the party opposing enforcement. Also, the use of general conditions, which facilitate negotiations and reflect the habitual usages and practices of a trade, is a commonly accepted practice in international trade.'

[20] "Consequently, this ground fails."

2. Due Process

[21] "The second ground for opposition to the recognition of the award dated 19 October 2011 is based on the argument that Eurocondal was not duly notified of the appointment of the arbitrator or of the arbitration proceedings, so that it was prevented from defending itself. [Eurocondal] maintains that [Starlio] should have notified the appointment of the arbitrator and the acts of the arbitration personally or by registered mail with acknowledgment of receipt at its domicile, rather than by fax sent to an address that Eurocondal had not previously designated for receiving notifications.

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8. Reported in Yearbook XXXII (2007) pp. 518-524 (Spain no. 49).
9. Reported in Yearbook XXXII (2007) pp. 608-615 (Spain no. 61).

[22] "These arguments must be denied. Considering that the burden of proving these facts is on the party relying on them, [Eurocondal] did not duly prove the circumstances from which it deduces the lack of compliance with the necessary formalities for the notification of the appointment of the arbitrator under English law, which governed the arbitration. A reference to certain Articles of the UNCITRAL Model Law cannot suffice for this purpose.

[23] "We cannot ignore in this respect that the ground for opposition to recognition invoked by [Eurcondal] – which aims at guaranteeing the regularity of the procedure for the appointment of the arbitrator(s) or the arbitral panel – is underlain by the clear aim of preventing a violation of the defendant's guarantees and rights of defense – which require the knowledge of the commencement of the arbitration and the possibility to appoint another arbitrator.

[24] "Nor can we forget, however, that the alleged lack of due process [*indefensión*] must be material or effective. [Eurocondal] does not deny that it received the letters communicating the appointment of the arbitrator and the subsequent acts of the proceeding … and that they were sent by fax to two telephone numbers in Barcelona. Nor does it deny that these numbers are those of the [defendant] enterprises. Since faxes are a usual means of sending and receiving documents, which is also allowed under Art. 155(5) of the Law on Civil Procedure [*Ley de Enjuiciamiento Civil* – LEC] no. 1/2000 for the communications between judicial bodies and the parties, we cannot endorse (independent of what procedure was required for making these notifications – which does not appear to have been different) allegations based on mere formalisms, which also cannot be reconciled with the rapidity and flexibility that commerce requires (Supreme Court, decisions of 13 March 2001 and 3 February 2004).[10]

[25] "Also, [Eurocondal] did not raise any objection to the communication of the appointment of the arbitrator nor, in the course of the proceeding, did it bring to the attention of the arbitrator any possible violation of the formalities established for the conduct of the arbitration proceeding pursuant to the applicable law.

[26] "As stated by the Supreme Court in its decision of 13 March 2001:

> 'Hence, we cannot find that there was a violation of the principles of being heard [*audiencia*], adversary proceeding [*contradicción*] and equality that could lead to a lack of due process [*indefensión*]; nor that the rights to

10. Reported in Yearbook XXXII (2007) pp. 603-607 (Spain no. 60).

> defense of the defendant were violated [in the arbitration] because of a lack of knowledge of the existence of the arbitration and the appointment of the arbitrator or the various time limits for the [statements of] claim and defense. Since it was proved that notice was given [of all the above] and there is no proof that the arbitration deviated from the applicable law, we must conclude that the defendant could rely on the appropriate grounds and means of defense, both formal and substantive, during the arbitration. In sum, its voluntary lack of participation therein precludes finding that the necessary guarantees were not safeguarded, within the concept of public policy in its international sense, in light of its clearly constitutional contents (Supreme Court, decisions no. 112/93, no. 153/93, no. 364/93, no. 158/94, no. 262/94, no. 178/95, no. 18/96, no. 137/96, no. 99/97, no. 140/97 and no. 44/98, among many others).'

[27] "Based on the above considerations, also the second ground for opposition must be denied."
(....)

74. Tribunal Superior de Justicia de Catalunya [Superior Court of Justice of Catalonia], Civil and Penal Chamber, 29 March 2012, No. 51/12

Parties:	Claimant: *MS AMAZON RIVER I CV* (nationality not indicated) Defendant: Eurocondal Shipping S.A. (Spain)
Published in:	Available online at <www.poderjudicial.es/search/indexAN.jsp> (ATSJ CAT 103/2012)
Articles:	III; V(1)(*a*); V(1)(*b*); V(2)(*b*)
Subject matters:	– public policy and lack of arbitration agreement – arbitration agreement "in writing" – definition of "in writing" inclusive – UNCITRAL Recommendation 2006 – applicable law to existence, validity of arbitration agreement – arbitration clause in adhesion contract – proper notice
Topics:	[4] = ¶ 301; [5]-[6] = ¶ 500 + ¶ 503; [7]-[16] = ¶ 504 + ¶ 524 (lack of valid arbitration agreement); [9] + [17]-[23] = ¶ 507 (adhesion contract); [14]-[15] + [24]-[31] = ¶ 509; [18]-[20] = ¶ 506; [29]-[30] = ¶ 303

Summary

An LMAA award rendered by a sole arbitrator in London was granted enforcement. The argument that there was no valid arbitration agreement was dismissed on the facts of the case: defendant sent an offer to claimant and attached a standard charterparty providing for LMAA arbitration. This sufficed in light of the non-formalistic interpretation of the written form requirement in the 1958 New York Convention. Nor was it proved that the standard conditions used were invalid under the law chosen therein – English law – which applied pursuant to the conflict rule in Art. V(1)(a) of the Convention; Spanish and EU consumer protection law were therefore inapplicable. Also, this was a matter for the arbitrator to decide

in first instance; court intervention was not required to protect a consumer, since the present contract was between two enterprises. Nor was there a violation of due process: it appeared that defendant was duly notified of the arbitration and did not raise any objection in this respect before the arbitrator. Defendant's claim that notification should have been either in person or by registered mail with acknowledgment of receipt was "absurd".

Eurocondal Shipping SA (Eurocondal) time-chartered the *MS AMAZON RIVER I CV* (Claimant) from its owners. The charterparty was on the BALTIME 1939 (2001 revision) standard form, which provides for the application of English substantive law and the referral of disputes to arbitration at the London Maritime Arbitrators Association (LMAA).

A dispute arose between the parties. On 7 September 2011, an LMAA sole arbitrator in London rendered an award in favor of Claimant; on 24 November 2011, Claimant sought enforcement of the award in Spain.

The Superior Court of Justice of Catalonia, before Miguel Ángel Gimeno Jubero, president, Núria Bassols Muntada and Carlos Ramos Rubio, JJ, in an opinion by Núria Bassols Muntada, granted enforcement. The Court referred for its decision to its own reasoning and holding in a decision of 15 March 2012, by which it granted enforcement of another LMAA award also against Eurocondal. This decision is reported in this Yearbook XXXVIII (2013) at pp. 456-458 (Spain no. 73).

The Court dismissed Eurocondal's objection that there was no valid arbitration agreement between the parties and that as a consequence enforcement would violate public policy, specifically the right to effective judicial protection established in the Spanish Constitution. In fact, noted the Court, Eurocondal's brokers sent the contract offer to the owners' brokers and attached the standard charterparty containing the LMAA arbitration clause. This sufficed for a valid arbitration agreement, as a non-formalistic approach prevails in respect of the written form requirement under the 1958 New York Convention, as confirmed by the 2006 UNCITRAL Recommendation: the purpose of this requirement is solely to have a record of the agreement.

Eurocondal further argued that the standard conditions in the charterparty – including the arbitration clause – were inapplicable pursuant to European Union and Spanish law on consumer protection. The Court held that under the New York Convention, which prevails over national law and its reference to supranational norms, such as EU law the validity of the arbitration agreement must be proved under the law determined in accordance with Art. V(1)(*a*). Here, as the parties submitted to English law, invalidity should – and was not – proved pursuant to that law. At any event, according to the competence-competence principle, the existence and validity of the arbitration agreement was

a matter for the LMAA arbitrator to decide in first instance. The court's intervention would be justified only in a consumer/enterprise relation violating public policy, but this was not the case here, where the contract was between two enterprises of the same maritime sector.

Eurocondal's second ground for opposing enforcement – violation of due process – was equally unsuccessful, as it appeared from the documents in the file that Eurocondal was duly notified of the arbitration, and Eurocondal did not meet its burden to prove its contrary allegation. The Court found that Eurocondal's claim that Claimant should have notified the appointment of the arbitrator and the acts of the arbitration personally or by registered mail with acknowledgment of receipt at Eurocondal's domicile was "absurd". The Court also noted that Eurocondal did not raise any objection in this respect during the arbitration.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345064-n>.

SPAIN NO. 74

Excerpt

[1] "Before examining whether recognition should be granted for the subsequent enforcement of the arbitral award … this Chamber must note that on the same day of 24 November 2011, the same counsel Ms. Montserrat Llinás Vila, on behalf of [Starlio] Shipping Company Limited, filed an application practically identical to the one that originated the present proceeding, against the same charterers Eurocondal Shipping S.A., seeking recognition of a similar award to the one at hand, also rendered in London like the one in the present proceeding, though in that case by arbitrator Patrick O'Donovan on 19 October 2011. This application led to a decision (No. 37/12) of 15 March [2012][1] whose content must coincide almost in its totality with the present decision, because of the similarity of the issues. The dictum of the decision of 15 March stated:

> 'We grant the exequatur sought by Starlio Shipping Company Limited for the arbitral award, rendered in London on 19 October 2011 by arbitrator Patrick O'Donovan, which found against Eurocondal Shipping S.A. as indicated in the award; costs to be borne by [the defendant].'

[2] "In the case at hand, the party requesting exequatur is *MS AMAZON RIVER I CV*, which files, under the [1958 New York Convention], a request for homologation [*homologación*] of the award rendered on 7 September 2011 by arbitrator Christopher J.W. Moss. [Eurocondal] duly opposes the recognition of the said award, arguing that granting exequatur would violate Spanish public policy – specifically, the principle of effective judicial protection embodied in Art. 24 of the Spanish Constitution because of the lack of notification of the arbitral award (not the lack of notification of the arbitrator's appointment)…."

I. THE 1958 NEW YORK CONVENTION AND THE COMPETENCE OF THE COURT

[3] "When deciding on the present exequatur we must follow, in respect of the applicable legislation and the competence of this Superior Court of Justice, what we said in the decision of 15 March 2012. Consequently, in accordance with the provision in Art. 46(2) of the Law on Arbitration no. 60/2003, we must follow the guideline of the [1958 New York Convention], to which Spain adhered without reservations by an instrument of 12 May 1977.

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1. Reported in this Yearbook XXXVIII (2013) pp. 456-458 (Spain no. 73).

[4] "After the promulgation of Organizational Law no. 5/2011, of 20 May, complementary to Law no. 20/2011, of 20 May, reforming Law no. 60/2003, of 23 December, on Arbitration (Art. 8), the competence for hearing and deciding an exequatur lies with the Civil and Penal Chambers of the Superior Courts of Justice; the procedure established in the Spanish civil procedural system shall be followed.

[5] "The [New York Convention] requires that several requirements be met in order to obtain exequatur. First, some formal [requirements] – a prerequisite to the decision – consisting in the submission together with the application of the original arbitral decision or a certified copy thereof, as well as the original arbitration agreement referred to in Art. II or a certified copy thereof, in both cases accompanied by a translation (Art. IV). Other [requirements] concern the merits and must be ascertained ex officio under the law of the state where the award must be enforced: such as that the subject matter of the dispute settled by arbitration must be arbitrable (Art. V(2)(*a*)) and that the recognition or enforcement of the award are not contrary to the public policy of that country (Art. V(2)(*b*)). In contrast, the review on the merits of the case remains outside the scope of the examination. Other grounds for refusal of recognition are limited and are contained in Art. V of the Convention. They can only be examined at the request of a party; the party invoking them bears the burden of proof.

[6] "This system sought to overcome the obstacles deriving from the requirement that the applicant prove many prerequisites to [the award's] homologation, by shifting the burden to prove the (non-)existence of the grounds for opposition that are relied on and are not to be ascertained by the court on its own initiative onto the other party (a fundamental point in the interpretation of the New York Convention), with the clear aim to create an effective instrument for the development of international commercial relations (Supreme Court [*Tribunal Supremo*], decision of 7 October 2003;[2] this Court, decision of 17 November 2011)."[3]

II. GROUNDS FOR REFUSAL

1. Lack of Valid Arbitration Agreement

2. Reported in Yearbook XXX (2005) pp. 617-622 (Spain no. 40).
3. Reported in Yearbook XXXVII (2012) pp. 297-299 (Spain no. 72).

[7] "Since the subject matter of the award – breach by Eurocondal of the terms of the charterparty concluded with Claimant – is arbitrable in our country, we must examine the first ground for opposition, that is, whether, as alleged by [Eurocondal], recognition would be contrary to Spanish public policy for violation of the constitutional principle of effective judicial protection established in Art. 24 Constitution – on the ground of the improper exclusion of the jurisdiction of the courts – because there is no arbitration agreement between the parties, as argued in its opposition by Eurocondal under Art. V(2)(*b*) and Art. V(1)(*a*) together with Art. II of the New York Convention.

[8] "Eurocondal alleges that there is no agreement in writing under which the parties undertake to refer the disputes that may arise between them to arbitration. It ignores thus the emails submitted by Claimant in the file as document no. 2, from which it appears – as said in the initial statement – that in this case it was Eurocondal, with seat in Barcelona, that made the offer to charter [the vessel], including in its order the charterparty whose clause 61 referred to arbitration in the manner in which the owners commenced it when [Eurocondal] failed to perform under the charterparty.

[9] "Further, in contradiction to its earlier statements, [Eurocondal] says that in order to ascertain whether the consent given is (not) valid we must apply EC Regulation no. 593/2008 and Art. 5 of Spanish Law no. 7/1998 on General Conditions of Contract, according to which the general conditions that Claimant seeks to apply are not valid when the party drafting the general conditions [*predisponente*] did not inform the party that adhered to the contract [*adherente*] expressly of their existence.

[10] "However, it appears from an examination of the documents filed by Claimant that the allegations of the opposing party are inconsistent. Jurisprudence has repeatedly held (Supreme Court [*Tribunal Supremo*], decisions of 17 April 1998; 31 July 2000;[4] 13 November 2001;[5] 26 February 2002;[6] and 7 October 2003,[7] among others) that a non-formalistic criterion prevails in respect of this subject matter; the New York Convention's requirement of the written form is for the purpose of having evidence of the existence of the agreement: the arbitration agreement can appear from an exchange of letters, telegrams, telexes, faxes or other more modern telecommunication means that leave a record of the agreement.

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4. Reported in Yearbook XXXII (2007) pp. 532-539 (Spain no. 51).
5. Reported in Yearbook XXXI (2006) pp. 834-845 (Spain no. 45).
6. Reported in Yearbook XXXII (2007) pp. 550-554 (Spain no. 53).
7. Reported in Yearbook XXX (2005) pp. 617-622 (Spain no. 40).

[11] "In this respect the Recommendation Regarding the Interpretation of Art. II(2) of the New York Convention approved by the United Nations Commission on International Trade Law (UNCITRAL), of 7 July 2006, is of interest as an interpretative criterion, according to which, considering the wide use of electronic commerce and electronic communications, Art. II must be interpreted recognizing that the means described therein are not exhaustive; rather, electronic communication must be included among the means that can evidence the agreement. Art. 9(3) of the Spanish Law on Arbitration already recognizes this.

[12] "In the email contained in document no. 2 supplied by Claimant, the brokers for the charterer … contacted … the broker for the owners in order to arrange for the order that led to this exequatur application; this order was accompanied by the 'time' charterparty standard form BALTIME 1939 (2001 revision), which contains clause 61 for LMAA arbitration, which [the broker for the owners] accepted by email of 8 April.

[13] "As a consequence it is indisputable that both parties accepted the reference to [LMAA] arbitration and the submission of the contract to English law.

[14] "We must add to the above that in the case at hand there is no allegation of a lack of knowledge of the submission to arbitration; this lack would be squarely contradicted by the statements in the award rendered by Cristopher J.W. Moss.…

[15] "Hence, there is not indication at all that [Eurocondal] was not aware of the arbitration clause (Supreme Court [*Tribunal Supremo*], decision of 7 October 2003);[8] rather, the contrary can be affirmed.

[16] "This means that the agreement existed and that the opposing party was aware of its terms, although it adopted a passive position of convenience in respect of the same.

[17] "Nor can Defendant's allegations regarding the nullity of the arbitration agreement for violation of the Spanish Law on General Conditions of Contract of 1998 [*Ley de Condiciones Generales de la Contratación* – LCGC] be granted.

[18] "Art. V(1)(*a*) of the New York Convention contains a conflict rule of exequatur that implies that the alleged invalidity must be proved under the law determined by the connections indicated in that provision; it therefore forbids that recognition be deemed inadmissible on the basis of an automatic reliance on domestic provisions or other supranational norms, such as those that make up Community law, as long as they are not applicable under the said conflict rule provision.

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8. Reported in Yearbook XXX (2005) pp. 617-622 (Spain no. 40).

[19] "The application of the New York Convention takes precedence in this subject matter as well, in accordance with the provision in Art. 3 LCGC.
[20] "As already mentioned, the parties submitted to English law. It was not proved that the agreement was not valid according to the law to which the parties subjected the contract, the burden to prove [this invalidity] being on the opposing party.
[21] "At any event, according to the principle which prevails in this matter, the so-called 'Kompetenz-Kompetenz', the arbitrators must decide on their own jurisdiction and on the existence and validity of the arbitration agreement (Art. 22 of the Law on Arbitration). Any defect of the agreement must be invoked in the arbitration proceeding, as long as we are not in the presence of legal relations between a consumer and an enterprise that could justify an intervention of the court at its own initiative to the extent that these [relations] are contrary to national provisions of public policy (European Court of Justice, 6 October 2009). However, this is not the case of a contract between enterprises of the same maritime sector, in which nullity would depend on the relevant factual and legal elements, as held by the decision above, under reference to the *Pannon* decision (European Court of Justice 2009, 155). Nor should we forget that the jurisprudence of the Supreme Court has admitted the validity of arbitration clauses in adhesion contracts concluded between enterprises, because such clauses as well as their contents are usual in maritime commerce (Supreme Court, decisions of 28 March 2000[9] and 26 February 2002 and references therein).
[22] "Also, the decision of the Supreme Court of 31 May 2005[10] states in this respect that:

> 'The circumstance that the arbitration clause is contained in general conditions, to which the contract signed by the parties refers en bloc and which have become part of the contract as an annex thereto, does not suffice to consider that that clause is invalid based on a contractual imbalance [between the parties] and the necessity to avoid the alleged abuse by the claimant of its dominant position. We cannot deem that the defendant was in a situation of inferiority vis-à- vis the claimant, since the defendant cannot be considered a consumer … nor does it need protection on grounds of public policy to the extent that the interests [protected by that] public policy are part of international public policy. Here, we have

9. Reported in Yearbook XXXII (2007) pp. 518-524 (Spain no. 49).
10. Reported in Yearbook XXXII (2007) pp. 608-615 (Spain no. 61).

two merchant companies whose only disparity as concerns their position in the marketplace and consequently their contractual position is the disparity alleged by the mere statement of the party opposing enforcement. Also, the use of general conditions, which facilitate negotiations and reflect the habitual usages and practices of a trade, is a commonly accepted practice in international trade.'

[23] "Consequently, this ground fails."

2. Due Process

[24] "The second ground for opposition to the recognition of the award dated 19 October 2011 is based on the argument that [Eurocondal] was not duly notified of the arbitration proceedings, so that it was prevented from defending itself.

[25] "We have already said above that the documentation supplied by Claimant shows the contrary; hence, the allegation of Defendant that Claimant should have notified the appointment of the arbitrator and the acts of the arbitration personally or by registered mail with acknowledgment of receipt at its domicile is absurd.

[26] "These arguments must be denied. Considering that the burden of proving these facts is on the party relying on them, [Defendant] did not duly prove the circumstances from which it deduces the lack of compliance with the necessary formalities for the notification of the appointment of the arbitrator under English law, which governed the arbitration. A reference to certain Articles of the UNCITRAL Model Law cannot suffice for this purpose.

[27] "We cannot ignore in this respect that the ground for opposition to recognition invoked by Defendant – which aims at guaranteeing the regularity of the procedure for the appointment of the arbitrator(s) or the arbitral panel – is underlain by the clear aim of preventing a violation of the defendant's guarantees and rights of defense – which require the knowledge of the commencement of the arbitration and the possibility to appoint another arbitrator.

[28] "Nor can we forget, however, that the alleged lack of due process [*indefensión*] must be material or effective, independent of what procedure was required for making these notifications, which must take place with the rapidity and flexibility that commerce requires (Supreme Court, decisions of 13 March 2001 and 3 February 2004).[11]

11. Reported in Yearbook XXXII (2007) pp. 603-607 (Spain no. 60).

[29] "Also, [Defendant] did not raise any objection to the communication of the appointment of the arbitrator nor, in the course of the proceeding, did it bring to the attention of the arbitrator any possible violation of the formalities established for the conduct of the arbitration proceeding pursuant to the applicable law.

[30] "As stated by the Supreme Court in its decision of 13 March 2001:

> 'Hence, we cannot find that there was a violation of the principles of being heard [*audiencia*], adversary proceeding [*contradicción*] and equality that could lead to a lack of due process [*indefensión*]; nor that the rights to defense of the defendant were violated [in the arbitration] because of a lack of knowledge of the existence of the arbitration and the appointment of the arbitrator or the various time limits for the [statements of] claim and defense. Since it was proved that notice was given [of all the above] and there is no proof that the arbitration deviated from the applicable law, we must conclude that the defendant could rely on the appropriate grounds and means of defense, both formal and substantive, during the arbitration. In sum, its voluntary lack of participation therein precludes finding that the necessary guarantees were not safeguarded, within the concept of public policy in its international sense, in light of its clearly constitutional contents (Supreme Court, decisions no. 112/93, no. 153/93, no. 364/93, no. 158/94, no. 262/94, no. 178/95, no. 18/96, no. 137/96, no. 99/97, no. 140/97 and no. 44/98, among many others).'

[31] "Based on the above considerations, also the second ground for opposition must be denied."

(....)

75. Tribunal Superior de Justicia de Catalunya [Superior Court of Justice of Catalonia], Civil and Penal Chamber, 30 May 2012, No. 97/12

Parties:	Claimant: IMFC Licensing, B.V. (Netherlands) Defendant: R.C.D. Espanyol de Barcelona, S.A.D. (Spain)
Published in:	Available online at <www.poderjudicial.es/search/indexAN.jsp> (ATSJ CAT 272/2012)
Articles:	III; IV(1); V; V(2)(*a*); V(2)(*b*)
Subject matters:	– documents for requesting enforcement supplied (in general) – arbitrability of rights of which the parties may freely dispose (*de libre disposición*) – public policy and award extra petita – due process as ground for violation of public policy – review of merits of award (no)
Topics:	[1]-[2] = ¶ 401; [3]-[4] = ¶ 301; [5]-[10] = ¶ 519; [11]-[17] + [20]-[27] = ¶ 524 (extra petita award); [16]-[17] = ¶ 502; [18]-[19] = ¶ 303

Summary

Enforcement of a CAS award rendered in Switzerland was granted. Claimant supplied the necessary documents. The subject matter of the award – sums to be paid in respect of the purchase and sale of the federative and economic rights to a football player – was arbitrable. The award was not "extra petita" and did not violate public policy: the arbitrators modified neither the petitum nor the causa petendi of the claim. Such allegations must be treated with caution, as not all changes in the arbitrators' approach result in inconsistency. Also, the public policy review may not lead to a review on the merits. Defendant was not estopped from raising the public policy ground for refusal because it had not previously raised it in annulment proceedings in Switzerland.

On 29 July 2005, IMFC Licensing, B.V. (IMFC) and R.C.D. Espanyol de Barcelona, S.A.D (RCDE), a football club, entered into a contract under which IMFC undertook to contribute 50 percent of the purchase price of the economic and federative rights of the Argentinian football player Hilario; Hilario was to be hired by RCDE and could be later transferred to another club, in which case RCDE would pay IMFC 45 percent of any profit, while keeping 55 percent, in both cases minus the parties' initial investments. Payment to IMFC was to take place concomitantly with the payments by the purchasing club. In case of delay in payment, RCDE was to pay IMFC a yearly fee of 5 percent. Clause 18 provided that the contract was governed by Spanish law; it further referred disputes to arbitration at the Court of Arbitration for Sport (CAS) in Switzerland.

RCDE hired Hilario in August 2005. In August 2008, the player was transferred to Manchester City F.C. Ltd., an English club; the transaction generated a profit which was paid directly to RCDE. Disputes arose between the parties because RCDE deducted from the sum owed to IMFC not only IMFC's initial investment but also an extra amount that had been paid to the player and two football federations. Also, RCDE did not pay any sum to IMFC until 10 June 2010, when it had already collected the entire amount owed by the English club; IMFC therefore claimed delay interest. IMFC also alleged that there was a novation of the original contract in respect of RCDE's obligation to reimburse IMFC. All disputes – calculation of the sum owed to IMFC, delay interest, and coming into existence of the novation contract – were referred to CAS arbitration. On 12 July 2011, a CAS arbitral tribunal rendered an award in favor of IMFC. IMFC sought enforcement of the award in Spain.

The Superior Court of Justice of Catalonia, before Miguel Ángel Gimeno Jubero, president, José Francisco Valls Gombau and Carlos Ramos Rubio, JJ, in an opinion by Carlos Ramos Rubio, granted enforcement of the CAS award.

The Court first noted that IMFC complied with the requirements in Art. IV of the 1958 New York Convention by supplying the original award, together with a CAS certification that no recourse was pending in the Swiss courts, and a certified copy of the contract containing the arbitration clause. Further, the subject matter of the award, which concerned rights of which the parties could freely dispose (*de libre disposición*) was arbitrable.

RCDE resisted enforcement on the ground that the award was vitiated by "extra petita inconsistency" because the CAS arbitrators awarded IMFC an amount on the basis of the original contract between the parties while IMFC had sought payment under the novated contract, thereby altering the basis for the claim (causa petendi). RCDE argued that "extra petita inconsistency" – awarding

more or other than what is claimed – affects the defendant's constitutional right to due process and is therefore in violation of public policy.

The Court agreed that Spanish public policy covers the guarantees embodied in the Spanish Constitution, which include the right to due process. In respect of the inconsistency of the award, the jurisprudence of the Supreme Court distinguishes between two cases: (i) the award does not correspond with or is in excess of the terms of the arbitration agreement (this ground is specifically provided for in Art. V(1)(*c*) of the New York Convention) or (ii) the issues resolved in the award are not the same as those submitted to arbitration in the claim or counterclaim. This latter situation can lead to a violation of due process under Art. V(1)(*b*) or Art. V(2)(*b*) of the Convention.

The enforcement court must ascertain that these guarantees are complied with, though it must do so taking into account the specific nature of the enforcement proceedings, which prohibits any review on the merits. Also, caution must be exercised when examining allegations of inconsistency: not all changes of approach by the arbitral tribunal lead to inconsistency, if they are minimal and do not affect the legal debate between the parties.

After these general remarks, the Court concluded that in the present case there was no violation of due process as RCDE had knowledge of the arbitration and could and did present its case before the arbitrators. Nor was the award "extra petita": the arbitral tribunal expressly noted that while IMFC's request for arbitration mentioned more than one sum – depending on whether the tribunal would deem that the novation had taken place or not – the statements of claim did specify a sum. The CAS tribunal correctly considered not only IMFC's specific requests but also the general context of its claims. It did not modify the petitum (established by the statements and the request for arbitration) or the causa petendi (established by the recital of the facts in the statements of claim and in the request for the commencement of arbitration).

The Court denied IMFC's argument that RCDE should have raised the public policy exception first in annulment proceedings in Switzerland, reasoning that the grounds for refusal listed in the 1958 New York Convention, which are limited and must be interpreted strictly, do not set this requirement; also, it would be unreasonable to require that the public policy of the enforcement country be invoked previously before the courts of the country of origin.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345065-n>.

SPAIN NO. 75

Excerpt

I. DOCUMENTS SUPPLIED WITH THE APPLICATION

[1] "IMFC requests, under the [1958 New York Convention], ratified without reservations by Spain on 12 May 1977 (BOE [*Boletín Oficial de l'Estado* – Official Gazette] No. 164 of 11 July 1977), the recognition and homologation [*homologación*] of the arbitral award rendered on 12 July 2011 by a Court of Arbitration for Sport (CAS) tribunal (Switzerland) consisting of Mr. Camilo (president) and Mr. Darío and Mr. Eladio (arbitrators), which directed the Catalan sports club RCDE to pay Claimant € 234,998.09 and interest at 5 percent on this sum starting on 10 June 2010, as well as the costs of the arbitration.
[2] "IMFC supplies to this purpose, together with its application, the documents required mandatorily under Art. IV(1) of the New York Convention, that is:

(i) The certified copy, with a The Hague apostille, of the contract signed by the parties on 29 July 2005, originally written in Spanish, whose clause 18 contains the agreement to refer 'any dispute arising between them' in respect of [the contract's] interpretation or performance to CAS; and
(ii) the original arbitral award rendered by CAS on 12 July 2011, written directly in Spanish; as well as
(ii) the certification by CAS, in Spanish, that no recourse against the award at issue before the Swiss courts appears to have been filed, so that 'the decision rendered on 12 July 2011 shall be deemed to be final'.

Additionally, Claimant supplied further documentation:

(i) a statement contesting the request for arbitration, originally written in the Castilian language, filed by RCDE's counsel before CAS;
(ii) the summons timely sent to the parties in the arbitration by the CAS panel appointed in this case, for the holding of a hearing in Lausanne on 24 March 2011, also originally written in Spanish; and
(iii) the offer of evidence duly taken before CAS by RCDE's representatives."

II. COMPETENCE OF THE COURT

[3] "Since the competence of this Chamber over the recognition and homologation of the foreign award under the New York Convention has been disputed by Defendant, it is appropriate … to note here that [our competence] exists beyond doubt because, since Law no. 11/2011, of 20 May reformed Art. 8(6) of the Law on Arbitration (2003), Art. 955(3) of the Law on Civil Procedure [*Ley de Enjuiciamiento Civil* – LEC] (1881) and Art. 73(1)(c) of the Organizational Law on the Judiciary [*Ley Orgánica del Poder Judicial* – LOPJ] (1995), [this competence] belongs to the Civil and Penal Chamber of the Superior Court of Justice of the Autonomous Community of the domicile or residence of the party against which recognition is sought, or the domicile or residence of the person affected by it.

[4] "In the present case … Defendant (RCDE), against which recognition and homologation of the foreign award are sought, is domiciled in Cornellá de Llobregat, Barcelona."

III. SUBJECT MATTER OF THE ARBITRATION

[5] "The arbitration concerns the disputes arisen between the parties in connection with the interpretation and performance of the private contract concluded between them on 29 July 2005, whose Clause 18 contained the following arbitration agreement:

> 'The present contract shall be governed and interpreted in accordance with the laws of Spain. The parties will make all reasonable efforts to resolve any disputes that may arise under or in connection with the application of the present contract amicably. If the parties cannot solve any dispute arisen between them in this manner, they agree expressly to submit to the jurisdiction of the Court of Arbitration for Sport, with seat in Lausanne (Switzerland), for the settlement of all dispute that may arise in the interpretation and/or performance of the present contract by three arbitrators and in the Spanish language.'

[6] "Under the said contract, IMFC undertook to contribute a certain amount of money toward the purchase of the economic and federative rights of the Argentinian football player Hilario (the player) – who also participated in the conclusion of the contract – from his club of origin (Club Atlético San Lorenzo de Almagro [Argentina]) for his transfer to and hiring by RCDE and his possible

future transfer to a third club, with Claimant's participation in the possible profits of this operation. RCDE hired the player in August 2005.

[7] "IMFC's contribution, which did in fact take place in the contractually agreed instalments, was 50 percent of the price paid to the club of origin for the purchase of the player.... Claimant reserved for itself 45 percent of the profits of [the player's] further transfer to a third club, against 55 percent for RCDE; the respective initial investments in the price paid for the player to be deducted in both cases. Claimant's participation had to be satisfied proportionally and concomitantly (pari passu) with the payment plan established with the third club purchasing the federative right of the player. In case of delay in payment, Defendant was to pay Claimant a yearly fee of 5 percent.

[8] "In August 2008, the player was transferred to an English club (Manchester City F.C. Ltd.) for [a sum] which RCDE received at later dates; however, Defendant did not pay any amount to IMFC under the contract mentioned above until 10 June 2010, when it had already collected the entire amount owed by the English club....

[9] "The disputes between the parties arose, on the one hand, because when settling IMFC's participation in the profits of the operation, RCDE calculated as costs for the purchase of the player extra [sums] that had been paid either to the player or to third parties (AFA and FAA), in addition to the price paid to the club of origin; Claimant disagreed, as in its opinion only the latter price was to be considered. On the other hand, there were controversies between the parties as to the moment for paying to IMFC its initial investment and its participation in the profits of the transfer of the player to the English club and, as a consequence, as to the contractual delay interest, also taking into account the interaction with the many proposals for a novation of the obligation to settle Claimant's participation (whose acceptance and effect also gave rise to a dispute that was likewise referred to CAS arbitration).

[10] "As a consequence, in accordance with the provision in Art. 2(1) of the Law on Arbitration (2003) – which provides that 'All disputes relating to matters within the free disposition of the parties according to law are capable of arbitration' – together with Art. V(2)(*a*) of the New York Convention, it is proved that the disputes resolved in the CAS award may be settled by arbitration in Spain."

IV. PUBLIC POLICY

[11] "Within the time limit provided for in Art. 956 LEC (1881) together with Art. 46(2) of the Law on Arbitration (2003), RCDE's counsel opposed the recognition of the award pursuant to Art. V(2)(*b*) of the New York Convention together with Art. 24 of the Spanish Constitution, alleging that in the present case there are grounds deemed of public policy in [Spain] that require that recognition be refused, 'because (the award) is vitiated by an evident inconsistency and more concretely by an "extra petita" inconsistency that appears from a joint reading of the [arbitration] petition and the decision'.

[12] "Concretely, [RCDE's counsel] considers that the jurisprudence of the Supreme Court [*Tribunal Supremo*] holds that the concept of 'public policy of the forum' includes all that relates to the constitutional guarantees covered by the right to effective judicial protection (Art. 24(1) Constitution) and, especially, the prohibition of a violation of substantive due process [*indefensión material*] (Art. 24(2) Constitution); [counsel also considers] that the 'extra petita' inconsistency, which implies the awarding of more or other than what is claimed, directly affects [a party's] right to defend itself. [On this basis,] RCDE's counsel argues that in the face of IMFC's statements in its written documents for the commencement of the arbitration and its claim, submitted to CAS – in which it sought only payment of a certain amount (€ 486,628 and delay interest at 5 percent since 10 June 2010) on the sole basis of the alleged novation of the contract, which was expressly denied by the Swiss arbitrator – the CAS panel directed Defendant to pay a different (smaller) amount on the basis of the original contract, without IMFC having formulated an alternative claim; [by so doing, the tribunal] altered the causa petendi [*causa de pedir*] and thus incurred in inconsistency.

[13] "In support of its arguments, RCDE files various documents consisting in the written documents for the commencement of the arbitration and the claim submitted by IMFC before CAS.

[14] "Claimant argues [in reply] that the alleged inconsistency of the CAS award is not one of the possible grounds for opposition to its recognition and homologation in Art. V(2)(*b*) of the New York Convention and that [inconsistency] may not be argued if it has not been previously raised as a ground for challenge before the Swiss courts. It is therefore appropriate to deal with these objections first."

1. Inconsistency of the Award as Public Policy Ground for Refusal

[15] "The Supreme Court made the general declaration that when deciding on the homologation of foreign judicial decisions – and foreign awards – through the

mechanism of exequatur, the Spanish courts must decide on the constitutional validity [of these decisions] – considering that the extraterritorial activity of our national authorities is also foreseen by the European Union. After the promulgation of the Constitution, 'the public policy of the forum thus acquired in Spain a distinct content, pervaded in particular by the requirements of Art. 24 of the Constitution'. This implies that when deciding on the enforcement in Spain of a foreign judicial – or arbitral – decision, the Spanish courts shall take into account the guarantees contained in Art. 24 Constitution and shall ascertain whether, when rendering the decision whose enforcement is sought, those [guarantees] were (not) complied with (see, for all, Constitutional Court, decisions no. 43/1986 of 15 April, FJ4; no. 54/1989 of 14 March, FJ4; no. 132/1991 of 17 June, FJ4 and no. 91/2000 of 30 March, FJ6).

[16] "To this aim, the jurisprudence of the Supreme Court has developed a distinction between inconsistency because the award does not exactly correspond with or is in excess of the terms of the compromise agreement [*compromiso*] or arbitration clause – which is provided for as a specific ground for opposition in Art. V(1)(*c*) of the New York Convention (see Supreme Court, First Chamber, decision of 28 March 2000[1] and 4 March 2003)[2] – and [inconsistency] because the issues resolved in the award are not identical to those that were submitted to the arbitrator in the claim or counterclaim. This [latter occurrence] can fall, depending on the cases, either under the ground for opposition provided for in Art. V(1)(*b*) or under [the ground] provided for in Art. V(2)(*b*) of this Convention (see Supreme Court, First Chamber, decisions of 24 March 1982;[3] 20 June 2000 and 20 July 2004).[4] The difficulty of combining the ground for opposition referring to 'public policy' of the forum with the prohibition of reviewing the merits of the case must be acknowledged.

[17] "Thus, following the criterion applied by other Civil and Penal Chambers (see Superior Court of Justice of the Basque Country, decision of 19 April 2012, FD1) – which is, in sum, [the criterion] previously stated by the Supreme Court (for all, Supreme Court decisions of 20 June 2000 and 20 July 2004) – we must consider that the allegations of inconsistency of the award, impossibility to defend onself in the arbitration and, finally, [the award's] contrariety to public policy, must be examined in light of the nature and specific object of the exequatur proceeding, which prohibit any attempt to review the merits and to

1. Reported in Yearbook XXXII (2007) pp. 518-524 (Spain no. 49).
2. Reported in Yearbook XXXII (2007) pp. 571-581 (Spain no. 56).
3. Reported in Yearbook VIII (1983) pp. 408-409 (Spain no. 3).
4. Reported in Yearbook XXXI (2006) pp. 846-852 (Spain no. 46).

convert this means, which is strictly a homologation, into an occasion to review the arbitrator's 'factual and legal judgment' on which the decision is based. This does not prevent the review from extending to the grounds for the arbitration decision, that is, to the reasons for the award, for the purpose of ascertaining whether [the award] complies with the canon of reasonableness and whether it contains the elements of and grounds for the decision allowing an examination of the criteria on which the decision is based and of whether [the decision] is not manifestly unreasoned or unreasonable or incurs in a patent error."

2. Estoppel

[18] "Further, in respect of whether the party seeking to oppose the homologation of the award on the ground of the non-compliance by the foreign arbitrator with the guarantees provided for in Art. 24 Constitution must previously challenge [the award] before the judicial authorities of the country in which it was rendered, we must consider that the grounds for refusal appear to be listed in the New York Convention (Art. V) in a strict manner. [The Convention] distinguishes between the grounds in para. 1, in respect of which, depending on the cases, attention shall be paid to the national law of the parties, the law to which they have submitted or the law of the country in which the award was rendered, and those in para. 2, in respect of which only the law of the country where recognition and enforcement of the award are sought must be considered.

[19] "In these circumstances, and considering that the Convention does not require that in order to oppose exequatur [the defendant] must have exhausted the means of recourse in the courts of the country in which the award was rendered, it is unreasonable to require that the public policy of the country where the arbitral decision must produce its effects must be invoked previously before those [courts]."

3. No Violation of Public Policy in the Present Case

[20] "The following ensues from the exposition of the facts in the award whose recognition and homologation is at issue:

(i) In the CAS proceeding, Defendant could have knowledge of and contest both the request for arbitration filed by Claimant and the claim;

(ii) Defendant was present at the hearing called by CAS on 24 March 2011, where all its means of evidence were taken; it does not appear that any means was denied;
(iii) at this hearing, after the taking of evidence, the representatives of the parties 'submitted their conclusions and made their corresponding petitions to the Panel';
(iv) also, at that hearing, 'after the President of the Panel expressly asked them, the parties raised no objections concerning the respect by the Panel of the right to defend oneself and the right to be heard and treated equally'; and
(v) the foreign arbitral body expressly carried out 'an analysis of both Claimant's request for arbitration and arbitration claim. In the [request], more than one quantification assumption is made in respect of the sum owed (with or without the alleged novation). A specific sum is claimed in the statements of claim; in the second [statement], although no specific mention is made of the amount sought, the statements in the request for arbitration are fully confirmed.'

[21] "An examination of the documentation submitted by both parties in the present exequatur proceeding corroborates the considerations above. Hence, just as CAS did, we must consider not only the 'specific requests' in the statements of Claimant, but rather their general contents, as [the requests] 'must be analyzed as a whole in order to determine the amount to be paid here, without going beyond what is claimed'; this done, it is proved that 'they meet the specific requirements for deeming that a claim is established'.
[22] "Thus, when granting the claims of Claimant the CAS panel was fully correct in distinguishing between the claim based on the existence of a novation – which it quantified in … the equivalent of 50 percent of the profit plus the restitution of the initial investment, and interest – and [the claim] based on the original contract … being 45 percent of the profit plus the refund of the initial investment.
[23] "In these circumstances, it cannot be said that there is 'extra petita' inconsistency.
[24] "In fact, both the Constitutional Court and the Supreme Court continue to stress the caution with which the courts must examine the objection or defect of inconsistency – especially from the constitutional point of view in respect of the effective judicial protection and the prohibition of lack of due process [*indefensión*] (Art. 24(1) Constitution) – since 'not any change by the Tribunal of the juridical approach to the relation or legal situation under discussion can extend this far, when it is minimal and does not affect the discussion itself or the legal debate

between the parties' (see Supreme Court, First Chamber, decision no. 444/2005 of 3 June, FD2).

[25] "As we specified when explaining the consequences of the so-called 'substantiation theory' [*teoría de la sustanciación*] followed by the jurisprudence of the Supreme Court (see Supreme Court, First Chamber, decisions no. 1033/2004 of 3 November, FD2; no. 592/2010 of 8 October, FD3; no. 750/2010 of 15 November, FD2; and no. 717/2010 of 11 November, FD9), there is no alteration of the *causa petendi* and, therefore, no inconsistency when the factual substance of the claim – that is, 'the whole of the events on which the claim is based' – is not affected, because 'after all the claim is defined on the basis of the facts making up the assumption to which the norm links juridical consequence' (this Court, decision no. 3/2010 of 14 January, FD2). According to this jurisprudence, the *causa petendi* is modified only 'when the judicial decision is based on facts other than those giving form to the subject matter of the proceeding; [the latter] do not include all [the facts] of the history of the case, not even always all the constituent facts, but only those that are juridically relevant to define and identify the claim in the proceeding' (Supreme Court, First Chamber, decision no. 412/2007 of 29 March, FD3).

[26] "In the present case, the petitum is established by the request to direct [Defendant] to pay a certain amount, and the causa petendi by the recital of the facts in the claim and in the request for the commencement of arbitration, which [recital] is literally adopted in the CAS award.

[27] "The decision of the Swiss arbitrator not only respects the causa petendi and abides by the fundamental facts on which Claimant's claim is based, but it is also consistent with the petitum, since it directs [Defendant] to pay less than what was sought and argued by both parties; hence, it does not violate Art. 24 Constitution."

V. CONCLUSION

[28] "As a consequence, we grant the request and the exequatur sought."

(….)

76. Tribunal Superior de Justicia de Catalunya [Superior Court of Justice of Catalonia], Civil and Penal Chamber, 25 March 2013, No. 46/2013

Parties:	Claimant: Sierra-Affinity, LLC (nationality not indicated) Defendant: Wide Pictures, S.L. (nationality not indicated)
Published in:	Available online at <www.poderjudicial.es/search/indexAN.jsp> (ATSJ CAT 184/2013)
Articles:	III; V(1); V(1)(*a*); V(2)(*a*); V(2)(*b*)
Subject matters:	– arbitration agreement in adhesion contract – public policy and adhesion contract – applicable law to existence, validity of arbitration agreement – public policy and lack of impartiality by arbitral institution (no) – narrow concept of public policy
Topics:	[3] + [8]-[9] = ¶ 301; [4]-[7] = ¶ 500; [5] = ¶ 503; [10] = ¶ 519; [11]-[19] = ¶ 507 (adhesion contract) + ¶ 524 (adhesion contract); [12]-[14] = ¶ 506; [20]-[31] = ¶ 521; [22]-[24] = ¶ 518

Summary

Enforcement of an IFTA award rendered in California was granted. The allegation that there was a violation of public policy because the arbitration clause was contained in an adhesion contract was dismissed. Pursuant to the conflict rule of Art. V(1)(a) of the 1958 New York Convention, the law chosen by the parties applies to the issue of the validity of the arbitration agreement; defendant failed to prove that the clause was invalid under the contractually agreed California law. Spanish law on consumer protection did not apply. Defendant also failed to prove its second public policy ground for refusal, lack of impartiality by IFTA.

Sierra-Affinity, LLC (Sierra), the licensor, and Wide Pictures, S.L. (Wide Pictures), the licensee, entered into a licensing contract for the distribution of the film "Rabbit Hole" in Spain and Portugal. The contract was governed by California law and contained a clause providing for arbitration of disputes at the Independent Film & Television Alliance (IFTA) in Los Angeles.

A dispute arose between the parties when Wide Pictures did not make any of the agreed payments under the contract. Sierra commenced IFTA arbitration as provided for in the contract; Wide Pictures, though undisputedly duly informed, did not participate in the appointment of the sole arbitrator and the arbitration proceedings. By an award of 20 July 2012, the IFTA sole arbitrator in Los Angeles found in favor of Sierra. On 26 October 2012, Sierra sought enforcement of the award in Spain.

The Superior Court of Catalonia, before Miguel Ángel Gimeno Jubero, president, Enric Anglada i Fors and Maria Eugenia Alegret Burgués, JJ, in an opinion by Maria Eugenia Alegret Burgues, granted enforcement.

The Court noted at the outset that the 1958 New York Convention, under which Sierra sought enforcement of the IFTA award, shifts the burden of proving any grounds for refusal that are not to be ascertained by the court on its own initiative onto the party resisting enforcement; also, recognition and enforcement proceedings must start from the assumption of the effectiveness and validity of the arbitration agreement and of the enforceability of the arbitral award, because the Convention establishes a *favor* to recognition and enforcement.

Wide Pictures argued that the arbitration clause was invalid because it was contained in an adhesion contract that could not be negotiated, and because IFTA represents the interests of North-American film producers, among which Sierra. This required the application of Spanish law on consumer protection and resulted in a violation of public policy.

The Court disagreed, finding that Wide Pictures did not prove that an arbitration clause in a contract between two business entities of the same sector is null and void under the applicable law when the clause is contained in an adhesion contract. Here, the applicable law was California law: pursuant to Art. V(1)(*a*) of the New York Convention, which prevails over national law, the validity of the arbitration agreement must be proved, in primis, under the law to which the parties have subjected the agreement. Thus, Spanish law did not apply. The Court added that even if Spanish law were found to be applicable, the rule that clauses that are unfair to consumers (such as the submission to other forms of arbitration than consumer arbitration) are invalid does not apply automatically to relations between enterprises. Rather, Wide Pictures should have proved that it was not aware of the arbitration clause – in application of the general norms

of contractual nullity – and that there was a dominant position and serious imbalance in favor of Sierra, the party drafting the general conditions. Wide Pictures did not meet this burden.

The Court also dismissed Wide Pictures's second allegaton of a violation of public policy, namely that IFTA could not be deemed to be an impartial and independent arbitral institution by third parties contracting with its members such as Sierra. The Court noted in general that in the context of international arbitration public policy corresponds with the principles of mandatory international law and the fundamental values of the Spanish Constitution. Hence, only awards manifestly contradicting fundamental principles, both procedural and substantive, may be refused recognition. In the present case, the allegation of Wide Pictures failed because Wide Pictures did not meet its burden to prove partiality. IFTA is not constituted solely by American producers but has foreign members, among which at least two Soanish companies. Wide Pictures was given the opportunity to participate in the appointment of the sole arbitrator and to present its case in the arbitration, and voluntarily chose not to. Wide Pictures itself informed the arbitrator that it did not appear in the arbitration with the aim of resisting enforcement of the award in Spain. This, noted the Court, is at odds with the principle of good faith which must govern contractual relations.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345066-n>.

SPAIN NO. 76

Excerpt

[1] "[Sierra] requests the homologation [*homologación*] under the [1958 New York Convention] of the arbitral award rendered on 20 July 2012 by the sole arbitrator Marc R. Stein against [Wide Pictures]. [Wide Pictures] duly opposes the recognition of the said award, arguing, on the one hand, that the agreement is invalid and, on the other hand, that granting exequatur would violate Spanish public policy: specifically, the principle of effective judicial protection embodied in Art. 24 of the Spanish Constitution."

I. APPLICABLE LAW AND COMPETENCE OF THE COURT

[2] "When deciding on the present exequatur we must follow, in accordance with the provision in Art. 46(2) of the Law on Arbitration no. 60/2003, the terms of the [1958 New York Convention], to which Spain adhered without reservations by an instrument of 12 May 1977.

[3] "After the promulgation of Organizational Law no. 5/2011, of 20 May, complementary to Law no. 20/2011, of 20 May, reforming Law no. 60/2003, of 23 December, on Arbitration (Art. 8), the competence for hearing and deciding an exequatur lies with the Civil and Penal Chambers of the Superior Courts of Justice; the procedure established in the Spanish civil procedural system shall be followed."

II. ENFORCEMENT UNDER THE 1958 NEW YORK CONVENTION

[4] "The [New York Convention] requires that several requirements be met in order to obtain exequatur. First, some formal [requirements] – a prerequisite to the decision – consisting in the submission together with the application of the original arbitral decision or a certified copy thereof, as well as the original arbitration agreement referred to in Art. II or a certified copy thereof, in both cases accompanied by their translation (Art. IV). Other [requirements] concern the merits and must be ascertained ex officio under the law of the state where the award must be enforced: such as that the subject matter of the dispute settled by arbitration must be arbitrable (Art. V(2)(*a*)) and that the recognition or enforcement of the award are not contrary to the public policy of that country (Art. V(2)(*b*)). In contrast, the review on the merits of the case remains outside the scope of the examination. Other grounds for refusal of recognition are

limited and are contained in Art. V of the Convention. They can only be examined at the request of a party; the party invoking them bears the burden of proof.

[5] "This system sought to overcome the obstacles deriving from the requirement that the applicant prove many prerequisites to [the award's] homologation, by shifting the burden to prove the (non-)existence of the grounds for opposition that are relied on and are not to be ascertained by the court on its own initiative onto the other party (a fundamental point in the interpretation of the New York Convention), with the clear aim to create an effective instrument for the development of international commercial relations (Supreme Court [*Tribunal Supremo*], decision of 7 October 2003;[1] this Court, decision of 17 November 2011).[2]

[6] "Homologation under the New York Convention starts from the assumption of the effectiveness and validity of the arbitration clause and of the enforceability of the arbitral decision.

[7] "In fact, although the Convention does not establish an automatic recognition system, the starting point is a *favor* to recognition and enforcement; [the Convention] establishes a homologation system based on the assumption of the validity and effectiveness of the arbitration agreement, and also on the assumption of the regularity and effectiveness of the arbitral award, which gives way only when the existence of the limited grounds established for the refusal of recognition in the Convention is proved. The burden to prove the existence of the ground(s) which can prevent [recognition] is on the party against which the award is invoked (Supreme Court, decision of 5 May 1998).[3]

[8] "As to procedure, we must note that since this is a foreign award, rendered outside Spain, the manner for applying for recognition and enforcement of the award is [the manner] established in Art. 955 et seq. of the Law on Civil Procedure [*Ley de Enjuiciamiento Civil*] of 1881, declared to be in force by para. 1.3 of the Sole Derogatory Provision of the Law on Civil Procedure no. 1/2000.

[9] "Jurisprudence has held that the exequatur proceeding is essentially a homologation proceeding, as noted in the decision of the Supreme Court of 23 January 2007, even if the party against which recognition is sought can oppose it and supply evidence to prove the existence of any of the grounds in the New York Convention."

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1. Reported in Yearbook XXX (2005) pp. 617-622 (Spain no. 40).
2. Reported in Yearbook XXXVII (2012) pp. 297-299 (Spain no. 72).
3. Reported in Yearbook XXVII (2002) pp. 540-542 (Spain no. 35).

III. GROUNDS FOR REFUSAL

[10] "Since the formal requirements under the New York Convention have been met and the subject matter of the award – breach by Wide Pictures of the licensing contract for the distribution of the film 'Rabbit Hole' in Spain and Portugal because the Spanish licensee, as stated in the award, did not pay any sum to the licensor – is arbitrable in our country, we must examine whether, as argued by the party resisting recognition of the award, the arbitration agreement in the licensing contract, according to which the parties submit to arbitration at the Independent Film & Television Alliance (IFTA), can be deemed invalid and thus null and void."

1. Adhesion Contract

[11] "In its long and unfocused statement of its allegations, Wide Pictures seems to find a ground for invalidity in the fact that the agreement was contained in an adhesion contract that could not be negotiated, and that the administration of the arbitration was entrusted to an institution of which Claimant is an integral part and which represents the interests of North-American film producers. Defendant deems that this violates public policy and that the provisions of the Law on General Conditions of Contract no. 7/1998 of 13 April [*Ley de Condiciones Generales de la Contratación* – LCGC] must be applied.
[12] "According to Art. V(1) of the New York Convention.... [Quotation of Art. V(1)(*a*) Convention omitted.] The parties submitted by their agreement to the law of the State of California; Defendant brought no evidence that between two business entities of the same sector such as the enterprises here the submission of disputes to arbitration is null under [California] law when the clause is contained in an adhesion contract.
[13] "As we already held in our decisions of 15 March 2012[4] or 29 March 2012,[5] following the opinion of the Supreme Court in its decision of [31] May 2005,[6] the said provision of the New York Convention

> 'contains a conflict rule of exequatur that implies that the alleged invalidity must be proved under the law determined by the connections indicated in that provision; it therefore forbids that recognition be deemed inadmissible

4. Reported in this Yearbook XXXVIII (2013) pp. 456-458 (Spain no. 73).
5. Reported in this Yearbook XXXVIII (2013) pp. 459-461 (Spain no. 74).
6. Reported in Yearbook XXXII (2007) pp. 608-615 (Spain no. 61).

on the basis of an automatic reliance on domestic provisions or other supranational norms, such as those which make up Community law, as long as they are not applicable under the said conflict rule provision'.

[14] "The application of the New York Convention takes precedence in this subject matter as well, in accordance with the provision in Art. 3 LCGC. [Art. 3 LCGC] – after indicating that the LCGC applies also to contracts governed by foreign law when the party adhering to the contract made its contractual declaration in Spain (in our case, the allegation in the statement in opposition that the transaction actually took place in Santa Monica is not proved) and has its habitual residence there – adds *without prejudice to the provisions in treaties or international conventions* (emphasis in original). Hence, the Spanish LCGC cannot be applied here.

[15] "At any event, even if it were not so and we were – as is clearly the case here – in the presence of contracts concluded pursuant to general conditions and through consent by adhesion, this would not lead automatically to the nullity of the arbitration clause. The rule that clauses that are unfair to consumers (such as the submission to other forms of arbitration than consumer arbitration under Art. 8(2) LCGC in relation to Art. 8(b) and Art. 90 of the amended text of the 2007 General Law for the Protection of Consumers and Users) are null and void cannot be applied directly to relations between enterprises, such as here, and as a consequence cannot be part of [Spanish] public policy (this Court, decision of 17 November 2011).

[16] "In order to have a general condition be deemed null on this ground in Spanish law – which as said does not apply in the present case – [a party] should challenge either the circumstances of [the clauses's] incorporation in accordance with Arts. 5 and 7 LCGC – which apply precisely to all adhering parties and which aim to guarantee that [the adhering party] is aware of the general condition – or [the clause's] content, under reference to the general norms of contractual nullity according to the legal provisions on obligations and contracts (Art. 9(2) of the Law on Arbitration 2003, and Arts. 7, 1255, 1256, 1258, 1261 and corresponding [Articles] of the Civil Code), in order to prove the dominant position of the party drafting the general conditions [*predisponente*] and the serious imbalance in favor of the latter in the obligations and duties of the parties.

[17] "It is appropriate to remind how the Supreme Court stated in a case similar to the present one (Supreme Court, decision of 31 May 2005) that:

> 'The circumstance that the arbitration clause is contained in general conditions, to which the contract signed by the parties refers en bloc and which have become part of the contract as an annex thereto, does not suffice to consider that that clause is invalid based on a contractual imbalance [between the parties] and the necessity to avoid the alleged abuse by the claimant of its dominant position. We cannot deem that the defendant was in a situation of inferiority vis-à-vis the claimant, since the defendant cannot be considered a consumer … nor does it need protection on grounds of public policy to the extent that the interests [protected by that] public policy are part of international public policy. Here, we have two merchant companies whose only disparity as concerns their position in the marketplace and consequently their contractual position is the disparity alleged by the mere statement of the party opposing enforcement. Also, the use of general conditions, which facilitate negotiations and reflect the habitual usages and practices of a trade, is a commonly accepted practice in international trade.'

[18] "Wide Pictures does not allege that there was a defect in the consent [*vicio del consentimiento*] (fraud, violence or error [*dolo, violencia o error*]) in the transaction, not even in light of the Rules of the arbitral tribunal, on which it expands with lucubrations that are of no interest in the present case: the system of appointment of the arbitrators among those indicated by the arbitral institution is similar to [the system] of other administered arbitrations.

[19] "We cannot forget that international commerce requires certainty and rapidity in transactions and a speedy solution of conflicts by efficient means; it is for this reason and with the aim of avoiding the complication and slowness of state jurisdictions that enterprises in international transactions agree on arbitration."

2. Impartiality and Independence of Arbitral Institution

[20] "Defendant also argues that an arbitration agreement contained in an adhesion contract obligating a party to submit to institutional arbitration by an Association of which one of the contracting parties is a member violates the public policy of [Spain] from the point of view of the effective judicial protection of Art. 24 of the Constitution, because IFTA cannot be deemed to be an impartial and independent arbitral institution by third parties contracting with its members.

[21] "Wide Pictures states that independent American film producers – other than the majors – have organized the market in accordance with their own rules and usages; among these are the conclusion of contracts according to general conditions and the grouping in an Association – IFTA – which distributes contracts and administers arbitrations in case of dispute. For this reason, [IFTA] cannot be deemed a neutral arbitral organization by the foreigners who contract with members of the Association. This violates the constitutional right to be heard by an impartial judge or arbitrator.

[22] "In the Spanish system and in the context of international arbitration, public policy is understood by the best doctrine – both in the procedural and the substantive sense – as a minimum guarantee identified with the principles of mandatory international law and the fundamental values of our Constitution. As indicated by the Constitutional Court [*Tribunal Constitucional*] in its decision no. 43/1986, of 15 April (whose opinion was later reiterated in decisions no, 54/1989, of 23 February; no. 132/1991, of 17 June, and no. 91/2000, of 30 March) the new dimension that the concept of public policy has acquired since the 1978 Constitution came into force is defined by the constitutionally guaranteed fundamental rights and public freedoms.

[23] "The Supreme Court in its decision of 4 March 2003[7] also interprets this concept in a restrictive manner when it states that

> 'on an international level [public policy] essentially corresponds with the rights and guarantees enshrined in the Constitution in respect of the prohibition to violate due process (*indifensión*) provided for in Art. 24(2) Constitution. A violation must be material, concrete and real, not merely formal; thus, only a violation where a party is unjustifiedly deprived of the opportunity to present its case and where this irregularity effectively harms its rights and interests is relevant (Constitutional Court, decision no. 290 of 1993 [RTC 1993\290], no. 185 of 1994 [RTC 1994\185], no. 1 of 1996 [RTC 1996\1], no. 89 of 1994 [RTC 1994\89] and no. 44 of 1998 [RTC 1998\44], among others).'

[24] "In this sense, it is clear that the notion of public policy must be used only to avoid the recognition of an award that manifestly contradicts fundamental principles, not those other [principles] which, debatable as they may be, do not infringe the basic principles of our coexistence. Hence, it will have to be proved that the respect of autonomy and defense in international arbitration, which the

7. Reported in Yearbook XXXII (2007) pp. 571-581 (Spain no. 56).

law and our international agreements require, does not entail sacrificing the fundamental principles of the domestic legal systems.

[25] "This said, this ground for opposition cannot succeed, because Defendant did not meet its burden to prove its allegation of partiality of the arbitral institution to which it submitted.

[26] "In respect of the duty of impartiality, we must remember the Supreme Court decisions of 27 April 1999 and 7 October 2003, in which it is stated that though

> 'both subjective and objective impartiality are an inherent quality for carrying out a jurisdictional function and derive from the independence and pre-existence of [the bodies carrying out that function], thereby embodying international public policy, impartiality, both as a moral quality and a legal duty, is necessarily tempered in arbitration, where the autonomy of the parties' intention has paramount importance, and where impartiality concerns, or can concern, the designation of the members of the arbitral body, the form oftheir appointment and, finally, the procedure to be followed in the arbitration. Independent of the above considerations, there is a lack of impartiality and an underlying violation of public policy – as held, inter alia, in [the decision of the Supreme Court] no. 236/97 (RTC 1997, 236) – where the objective and subjective impartiality required of members of decision-making bodies in a democratic society is tainted or absent, as well as when there is no appearance of impartiality beyond mere suspicions or assumptions based on circumstantial evidence that may not overcome the assumption of the impartiality of decision-making bodies, be they of a jurisdictional nature, integrated in an arbitral institution or partaking of that nature.'

[27] "We must stress that Defendant is an enterprise of the audiovisual sector whose purpose according to the statement in opposition is the production, purchase, sale, renting, import, export, distribution and showing of cinematographic films, videotapes, DVD and other products for the reproduction of images; although it was established in 2006, the person who signs the opposition to the request for recognition as manager of Wide Pictures has been active in this business sector for many years, so that he knows the commercial – usages and customs – and juridical context in which he operates.

[28] "It is not a fact that IFTA is constituted solely by American producers; rather, as proved by the list submitted …, American and foreign producers and distributors, among which at least two Spanish enterprises (Deaplaneta and

Filmax) are part of it. It is not illegal for professionals of the same sector to group in associations and to decide, in the exercise of their autonomy in respect of matters of which they may freely dispose [*de libre disposición*], to solve the disputes among themselves by arbitration. Things would be different if, because of one party being a member and the other not, the former influenced the administration of the specific arbitration or occupied directive positions in the association at the time of [the arbitration's] administration, or if the arbitrator appointed by IFTA had a relation with Claimant or the parties were given an unequal treatment. This is neither argued nor proved in any manner in this case.
[29] "The arbitrator gave Defendant the opportunity to participate in the appointment of the arbitrator according to the IFTA Rules and to challenge the claims of the other party; it does not appear that the arbitrator did not or sought not to give a non-equal treatment to the parties to the dispute. Wide Pictures was in voluntary default in the proceedings with the aim of resisting enforcement of the award in Spain, as it warned in its sole communication to the arbitrator, [sent] when the time limit for a statement had expired. This behavior does not reconcile with the principle of good faith which must govern contractual relations; hence, it cannot be relied on by the party that resists the agreement, under the pretext of a violation of procedural public policy, when the award turned out to be against it.
[30] "As already stated by the Supreme Court in its decision of 31 May 2005 in respect of the same arbitral institution:

> 'Further, it is not proved that institutional arbitration was agreed on by referring to an institution that would result in the arbitration clause being unfair, and therefore a public policy impediment to recognition, because it represents exclusively the interests of movie producers. Nor, from the same perspective though on a procedural level, is it proved that [the referral to ASMA arbitration] violated [the defendant's] right to have its legitimate interests effectively protected by obtaining a decision from an impartial body, since there is no solid basis to dismiss the presumption of [the arbitral institution's] impartiality.'

[31] "In the same sense the decision of Section 15 of the Barcelona Court of Appeal of 23 April 2008:

> 'Whether this association conducts arbitrations that are partial and generally in favor of North-American producers, is a central question that must be proved, overcoming the starting-point assumption of the New

> York Convention. In fact, as alleged by [Claimant], even the Supreme Court in its decision of 31 May 2005, where Laurenfilm argued that AFMA was partial, dismissed the argument for lack of proof. The same decision was reached by Commercial Court No. 3, which denied the argument raised by the present Defendant, in case no. 27/2005, exactly the same that it now raises as a proof of partiality.…'

This decision reminds that although there are certainly cases in which the arbitral institution is directly linked with counsel for the parties or the parties themselves, and in which arbitration is imposed on enterprises of different sectors as a part of a package of legal advice, arbitration and enforcement of the decision in favor of the party drafting the contract [*predisponente*], it is not sufficiently proved that this is one of those cases. This argument fails."
(….)

UKRAINE

Ratification: 10 October 1960
1st Reservation

2. Court of Appeal, Dnipropetrovsk Region, 28 March 2011[1]

Parties:	Claimant/Respondent: VA Intertrading Aktiengesellschaft (Austria) Defendant/Appellant: Hekro Pet Ltd. (Ukraine)
Published in:	Available online at <www.reyestr.court.gov.ua/Review/15874978>
Articles:	V(1)(*b*)
Subject matter:	– proper notice of arbitration and award
Topics:	¶ 509

Summary

The court of appeal reversed the decision of the district court granting enforcement of a VIAC award. It held that the courier's Tracking&Tracing reports – mere web page printouts – were not electronic documents within the meaning of Ukrainian law and therefore could not prove that the appointment of the sole arbitrator and the award had been duly communicated to the defendant.

On 15 December 2008 and 15 January 2009, VA Intertrading Aktiengesellschaft (Intertrading) and Hekro Pet Ltd. (Hekro) entered into two contracts for the sale of certain goods. Both contracts contained a clause providing for arbitration of disputes by a sole arbitrator under the Rules of Arbitration and Conciliation of

1. The General Editor wishes to thank Andrey Astapov and Anna Kombikova, AstapovLawyers International Law Group, Kiev, for their invaluable assistance in providing this decision and translating it from the Ukrainian original.

the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the Vienna International Arbitral Centre – VIAC).

A dispute arose between the parties and Intertrading commenced VIAC arbitration as provided for in the contracts. On 25 March 2010, a sole arbitrator rendered an award in favor of Intertrading.

In June 2010, Intertrading sought enforcement of the VIAC award in the Ukraine. On 11 January 2011, the Amur-Nyzhnodniprovskyi District Court of Dnipropetrovsk City granted enforcement.

The Court of Appeal for the Dnipropetrovsk Region (*Oblast*), before Presiding Judge O.P. Varenko and Judges E.I. Hryhorchenko and O.V. Lachenkova, in an opinion by O.P. Varenko, reversed the lower court's decision, finding that it was not proved that Hekro had been duly notified of the arbitrator's appointment and the award.

The Court noted that recognition and enforcement may be refused under Art. V(1)(*b*) of the 1958 New York Convention if the party opposing enforcement proves, inter alia, that it was not given proper notice of the appointment of the arbitrator or of the arbitration, or was otherwise unable to present its case. A 1999 Supreme Court Resolution specifies that the document proving that a party has been notified of a hearing must evidence how and when the notification was served. If it does not, the court must establish whether there was a valid notification in the actual circumstances, based on other evidence submitted by the parties.

The VIAC Rules, which applied to the present case, provide that communications can be validly served "by registered letter, courier service, telefax or by other means of communication that guarantee evidence of transmission … or if the document … has been demonstrably transmitted". The VIAC Rules also provide that the award is served on the parties by the VIAC Secretary General and that a copy of the award and the records of the serving are deposited with the Secretariat.

Intertrading sought to prove communication of the notice of appointment of the sole arbitrator to Hekro, and receipt by Hekro of a copy of the arbitral award, through letters of VIAC containing copies of the courier's Tracking&Tracing reports showing that the notice of appointment and the award were delivered to Hekro in Kiev in the hands of a Mrs. Kozlova.

The court held the Tracking&Tracing reports, being merely the printout of web pages and bearing no seals or signatures, etc., were not electronic

documents within the meaning of Ukrainian law and therefore could not prove that notification had indeed taken place. Also, it appeared that Mrs. Kozlova worked for Hekro in Khmelnytskyi City at the relevant time, and there was no information in the file of the case on Hekro's address in Kiev.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345067-n>.

Excerpt

(….)

[1] "In the appeal, [Hekro] submits that the court of first instance incorrectly applied the provisions of the substantive law and violated the provisions of the procedural law; it thus requests that the court judgment be set aside and a new one issued dismissing [Intertrading]'s application for the recognition and enforcement of the foreign arbitral award.

[2] "Having examined the legality and reasonableness of the court judgment within the scope of the appeal and the asserted claims, the panel of judges finds that the appeal of Hekro should be granted, the court order set aside and a new order issued pursuant to Art. 307 of the Ukrainian Code of Civil Procedure on the following grounds.

[3] "It can be implied from the order [of the court below] that in granting the application of Intertrading for the recognition and enforcement of the foreign arbitral award, the court of first instance presumed that the arbitral award No. SCH-5100 dated 25 March 2010 in *VA Intertrading Aktiengesellschaft (Austria) v. Hekro Pet Ltd., a limited liability company*, which granted payment of a debt, was final and binding; the parties concerned by the award were duly notified of the time and place of the case hearing; and the applicant submitted, along with the application, all the documents required by the procedural laws.

[4] "However, such court findings and the order issued in the case are unacceptable as they are inconsistent with the actual circumstances of the case and with the provisions of the substantive and procedural law.

[5] "The court has established that under the arbitral award dated 25 March 2010 issued by Dr. Jernej Sekolec, sole arbitrator with the International Arbitration Centre of the Austrian Federal Economic Chamber in case No. SCH-5100 in *VA Intertrading Aktiengesellschaft (Austria) against Hekro Pet Ltd., a limited liability company*, the latter was to pay the following amounts to Intertrading: US$ 1,706,880.00 as the price of the goods supplied under Contract No. 349.249 dated 15 December 2008 and Contract No. 349.294 dated 15 January 2009; US$ 5,277.50 as interest at the rate of 12 percent assessed at US$ 764,400.00 from 17 March 2009 until 6 April 2009; US$ 198,091.61 as interest at the rate of 12 percent assessed at US$ 1,706,880.00 from 7 April 2009 until 25 March 2010 and at US$ 1,706,880.00 from 26 March 2010 until the date of payment; and the arbitration costs of € 48,394.15.

[6] "Art. 35 of the Law of Ukraine on International Commercial Arbitration provides that an award, regardless of the country in which such award was made, shall be recognized as binding and, upon a written application filed with a

competent court, shall be enforced subject to this Article and Art. 36. Art. 36 of the said Law and Art. 396 of the Ukrainian Code of Civil Procedure set forth the grounds for refusal of recognition or enforcement of an arbitral award, in particular, [the ground that] 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 reasonably unable to present his case; or the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

[7] "Pursuant to Art. V(1)(*b*) of the [1958 New York Convention], which was ratified by Ukraine on 10 October 1960 and became effective for Ukraine on 8 January 1961 (hereinafter, the Convention), the 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 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.

[8] "Clause 15 of Resolution No. 12 of the Plenary Session of the Supreme Court of Ukraine on the Court Practice of Hearing Applications for the Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards and the Setting Aside of the Awards Issued in Ukraine in the Procedure of International Commercial Arbitration, dated 24 December 1999, explains that where a document submitted in confirmation of a party's summons to a court hearing does not evidence how and when such summons was served on such party and such party challenges the said fact, the court must establish the actual circumstances of such party's summons based on other evidence submitted by the parties and, where necessary, request from the court that issued the judgment and examine the documents relating to the party's summons as provided by the procedural law under which the case was heard.

[9] "Under the Convention, an application for the recognition and enforcement of a foreign arbitral award may be dismissed for the failure to notify the appointment of the arbitrator and the time of arbitration proceedings, provided that the debtor seeking such dismissal has furnished proof 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. In determining whether the said notice was duly made, the court must be guided by the relevant procedures determined by the parties in an arbitration agreement or an arbitration clause, or to the application of which they agreed thereby.

[10] "By executing Contracts No. 349.294 and No. 349.249, the parties agreed that all disputes arising from the Contracts or in connection with their violation,

termination or invalidity shall be finally resolved under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by a sole arbitrator appointed subject to the said rules.

[11] "Pursuant to Art. 13(2) of the Vienna Rules, 'communications shall be considered as having been validly served if they are forwarded by registered letter, courier service, telefax or by other means of communication that guarantee evidence of transmission to the address most recently notified in writing to the arbitration court or the sole arbitrator (arbitration tribunal) by the addressee as the address for service, or if the document to be served has been demonstrably transmitted'.

[12] "Pursuant to Art. 27(5) of the Vienna Rules, 'the award shall be served on the parties by the Secretary General. Awards become effective as against the parties on service of the copies. One copy of the award and the records of the serving shall be deposited with the Secretariat of the Centre.'

[13] "In order to confirm the delivery of the notice of appointment of the arbitrator to, and the receipt of a copy of the arbitral award by, Hekro, the applicant provided evidence in the form of letters of the International Arbitration Centre of the Austrian Federal Economic Chamber dated 29 April 2010 (with the … copies of the Tracking&Tracing reports) and 29 July 2010, stating that the letter whereby the parties were notified of the appointment of the arbitrator was sent to [Hekro] on 3 November 2009 by the DHL courier delivery service and was received by Mrs. Kozlova on 5 November 2009 at 5:48 pm in Kiev City, and that on 25 March 2010 the arbitrator, Dr Jernej Sekolec, issued the award in the case. The said award was sent to [Hekro] on 21 April 2010 by the DHL courier delivery service and was received by Mrs. Kozlova on 23 April 2009 at 2:16 pm in Kiev City.

[14] "The panel of judges believes that the said copies of the Tracking&Tracing reports, being the printouts of web pages and bearing no seals, signatures etc., cannot be treated as written evidence because they are not electronic documents within the meaning of the Law of Ukraine on Electronic Documents and Electronic Document Flow, Arts. 5 and 6 whereof provide that an electronic document must contain a number of obligatory details and an electronic signature which are absent from the copies of the Tracking&Tracing reports.

[15] "Apart from that, the above reports submit that the notice of appointment of the arbitrator and the award of the International Arbitration Centre had been received on [Hekro's] behalf by Mrs. Kozlova, who had not been working for Hekro in Kiev since 30 September 2009; rather, she worked at 20 Pilotska St., Khmelnytskyi City. The case files contain no information on the location of

Hekro in Kiev. Therefore, the said copies of the Tracking&Tracing reports do not in any way confirm the receipt by Hekro of the correspondence sent by the arbitration court.

[16] "Under these circumstances, the order of the court of first instance dated 11 January 2011 may not remain in force and should be set aside and a new order issued dismissing the application of Intertrading for the recognition and enforcement of the foreign arbitral award.

[17] "In reliance on Arts. 303, 307, 312 and 396 of the Ukrainian Code of Civil Procedure, the panel of judges orders that:

– the appeal of Hekro Pet Ltd., a limited liability company, be granted;
– the order of 11 January 2011 issued by the Amur-Nyzhnodniprovskyi District Court of Dnipropetrovsk City be set aside and a new order issued;
– the application of VA Intertrading Aktiengesellschaft (Austria) for the recognition and enforcement of the foreign arbitral award be dismissed.

[18] "This order becomes effective upon its announcement but may be challenged by way of cassation within twenty days of the date of this order."

3. Pechersky District Court, Kiev, 11 July 2012, Case No.2-к-8/12[1]

Parties:	Claimant: Remington Worldwide Limited (nationality not indicated) Defendant: The State of Ukraine
Published in:	Available online at <www.reyestr.court.gov.ua/Review/25171355>
Articles:	I; III; IV; V (all in general)
Subject matters:	– requirements for enforcement (in general) – grounds for refusal of enforcement (in general) (no) – period of limitation to request enforcement of foreign award
Topics:	¶ 306 + ¶ 401 + ¶ 500

Summary

The court granted permission to enforce an SCC award rendered in a dispute arising under the Energy Charter Treaty, holding that all formal and substantive requirements for enforcement were met.

On 28 April 2011, an arbitral tribunal of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) rendered an award in favor of Remington Worldwide Limited and against the State of Ukraine. Remington sought enforcement of the SCC award in the Ukraine.

The Pechersky District Court of Kiev, per Judge V.V. Bortnytska, granted permission for enforcement. The court noted that the representative of the Ministry of Justice, which represented the State of Ukraine as provided by Ukrainian law, did not oppose the motion.

The district court held that all formal and substantive requirements for granting permission for enforcement under the 1958 New York Convention and

1. The General Editor wishes to thank Andrey Astapov and Anna Kombikova, AstapovLawyers International Law Group, Kiev, for their invaluable assistance in providing this decision and translating it from the Ukrainian original.

the Ukrainian Code of Civil Procedure were met. In particular, the dispute underlying the award arose under the Energy Charter Treaty, and was therefore to be referred to SCC arbitration pursuant to the Treaty itself.

Also, the award was final and binding; there had been no violation of due process and enforcement would not be contrary to public policy; enforcement was sought within the prescribed time limit; and there was no Ukrainian court decision or pending proceeding in the Ukraine on the same dispute.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345068-n>.

Excerpt

[1] "Pursuant to Art. 390 of the Civil Procedure Code of Ukraine (the CPC), decisions of foreign courts (courts of a foreign country; other foreign competent state bodies having jurisdiction over civil or commercial disputes; foreign or international arbitrations) are recognized and enforced in Ukraine if their recognition and enforcement are provided for in an international treaty ratified by the Ukrainian Parliament (*Verkhovna Rada* of Ukraine), or on the basis of reciprocity.

[2] "The [1958 New York Convention], ratified by Ukraine on 10 October 1960 and entered into force on 10 January 1961, provides 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 recognition and enforcement of such awards are sought. The parties in the case are members of the New York Convention.

[3] "[Remington']s motion for recognition and permission for enforcement of the award of the foreign tribunal at issue meets the formal and substantive requirements of Art. IV of the New York Convention and Arts. 393 and 394 CCP.[2]

[4] "The award of the Arbitration Institute of the Stockholm Chamber of Commerce concerning Remington's claim against the State of Ukraine has come into force; the debtor was not deprived of the possibility to participate in the proceedings; the award is rendered in a dispute whose examination – as provided by the Energy Charter Treaty ratified by Ukraine on 6 February 1998 – is referred to the Arbitration Institute of the Stockholm Chamber of Commerce; the claimant did not exceed the time limit to commence enforcement proceedings of a foreign court decision in Ukraine; there is no decision of a Ukrainian court in the dispute between the same parties on the same subject matter and on the same grounds that has entered into force; there are no proceedings pending in the Ukrainian courts on the dispute between the same parties, on the same subject matter and on the same grounds; the dispute is not subject to court proceedings under Ukrainian law; enforcement does not contradict the public policy of Ukraine. Hence, there are no grounds to deny enforcement of the foreign court decision at issue. The claimant's motion shall be granted.

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2. Art. 393 of the Ukrainian Code of Civil Procedure defines the procedure for filing a petition for leave to enforce a judgment of a foreign court; Art. 394 CCP sets out the requirements for an application for leave to enforce a judgment of a foreign court.

[5] "Since the awarded amount is determined in foreign currency in the award of the Arbitration Institute of the Stockholm Chamber of Commerce dated 28 April 2011, pursuant to Art. 395(8) CCP the amount to be reimbursed to the claimant is determined in the national currency at the rate of the National Bank of Ukraine applicable on the date of rendering this order, or US$ 4,493,464.97 x UAH 7.9930; further, annual interest shall also be reimbursed, accrued on damages in the amount of US$ 196,010.95 x UAH 7.9930. The calculation of the mentioned amount is attached by the claimant.

[6] "According to Art. 88 CCP, the debtor shall reimburse the claimant for the court fees incurred and evidenced by documents, in the amount of UAH 107.30.

[7] "Based on the above, pursuant to Arts. 208-210 and 392-397 CCP, and Arts. I, IV and V of the New York Convention, [the Court]:

– grants permission for enforcement of the award of the Arbitration Institute of the Stockholm Chamber of Commerce dated 28 April 2011 in the case No. V (116/2008) regarding the claim of [Remington] against the State of Ukraine, [directing] the State of Ukraine to pay [Remington] the amount of UAH 35,916,265.51 as reimbursement of damages, and UAH 1,566,715.52 as interest accrued on the damages amount;
– directs the State of Ukraine to pay [Remington] UAH 107 and 30 kopecks in court fees.

[8] "Appeal from this court order may be filed within five days from the date of its declaration to the Kiev City Court of Appeal through the Pechersky District Court of Kiev, and within the same time limit from the date of receipt of its copy by a person who was not present during its announcement. In case of an appeal, this order comes into force after termination of the appellate proceeding."

4. Prymorskyi District Court, Odessa City, 16 August 2012, Case No. 1522/16182/12
High Court of Ukraine for Civil and Criminal Cases, 11 February 2013[1]

Parties:	Claimant/Appellant: Rangedale Limited (nationality not indicated) Defendant/Respondent: South Airlines Limited Liability Company (nationality not indicated)
Published in:	*Decision of 16 August 2012*: available online at <www.reyestr.court.gov.ua/Review/25657583>; *Decision of 11 February 2013*: available online at <www.reyestr.court.gov.ua/Review/29685676>
Articles:	III; V(1)(*b*)
Subject matter:	– proper notice
Topics:	¶ 509

Summary

An award of the Ukrainian ICAC was denied enforcement. The district court found that it was not proven that the defendant had been duly informed of the arbitration, since notices sent by regular mail were not sent to the defendant's address indicated in the contract, and the postal receipts did not specify the name and position of the person who received the notices. Also, it was proven that a signature was made by the postman. This decision was affirmed on appeal and was finally confirmed by the High Court.

On 29 November 2007, Rangedale Limited (Rangedale) and South Airlines Limited Liability Company (South Airlines) entered into a lease contract in respect of an aircraft. Art. 13 of the contract contained a clause referring disputes to arbitration at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

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1. The General Editor wishes to thank Andrey Astapov and Anna Kombikova, AstapovLawyers International Law Group, Kiev, for their invaluable assistance in providing this decision and translating it from the Ukrainian original.

A dispute arose between the parties, and Rangedale commenced ICAC arbitration as provided for in the lease contract. By an award of 22 May 2012, an ICAC arbitral tribunal found in favor of Rangedale. The arbitrators directed South Airlines to return the leased aircraft to Rangedale; they also directed South Airlines to pay Rangedale € 292,024 owed under the lease contract and € 16,583.46 as indemnification for the cost of the arbitration. Rangedale sought enforcement of the ICAC award.

By the first reported decision, rendered on 16 August 2012, the Prymorskyi District Court for Odessa City, per Judge A.V. Naumenko, denied enforcement of the ICAC arbitral award on grounds of due process, concluding that South Airlines had not been duly informed of the arbitration proceedings as communications had been sent to an incorrect address.

The district court first noted that the 1958 New York Convention, which is an international treaty approved by the Ukrainian Parliament, applied to the recognition and enforcement of the award at issue. It further reasoned that under the New York Convention, recognition and enforcement of an arbitral award may be refused on listed grounds, which are also reflected in Ukrainian law. One of these grounds for refusal of recognition and enforcement is that the party against whom the arbitral award is invoked proves to the court that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.

In the present case, the file showed that the notices sent by regular mail to South Airlines were not sent to the address indicated in the contract, and that the receipts did not indicate the name and position of the representative of South Airlines who received them. The court added that it was also proven that a signature was made by the postman. Hence, South Airlines was not duly informed of the arbitration and enforcement of the arbitral award should be denied under the New York Convention on grounds of a violation of due process. On 24 October 2012, this decision was affirmed by the Court of Appeal for the Odessa Region.

By the second reported decision, dated 11 February 2013, the High Court of Ukraine for Civil and Criminal Cases, before Judges M.A. Makarchuk, A.O. Levanchuk and T.O. Pysana, dismissed Rangedale's appeal.

The Court first noted that the grounds for a cassation appeal are the incorrect application by the lower court of the rules of substantive law or the violation of the procedural rules; the High Court may not establish or deem established any circumstances unless they have been established or rejected in the judgment below, or take any decision in respect of evidence.

In the case at hand, the courts below did not violate any rule of substantive or procedural law. The district court correctly concluded on the facts of the case – which could not be reviewed in a cassation appeal – that South Airlines was not given proper notice of the arbitration proceedings in the case and that, therefore, enforcement should be denied under the New York Convention.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345069-n>.

Excerpt

District Court, 16 August 2012

(….)
[1] "[Rangedale] applied to the Prymorskyi District Court for Odessa City seeking the recognition and enforcement of the Award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry [ICAC] delivered in the case based on the claim of Rangedale against [South Airlines]. According to the Award delivered in case No. AC 397y/2011 on 22 May 2012, [South Airlines] shall return the aircraft by delivering it to [Rangedale], being the owner, and shall repay € 292,024 owed under the lease agreement and pay € 16,583.46 as indemnification for the arbitration fees.
[2] "The representative of Rangedale maintained that the application should be granted. He emphasized that the debtor [South Airlines] tries to evade voluntary fulfillment of the Arbitral Award. He contended that the arbitral tribunal considered the case in full compliance with the applicable laws of Ukraine, and that the Award was sent to the debtor but the latter failed to comply with it.
[3] "The representative of South Airlines objected to the application in its entirety. In support of his position, he filed written objections before the court, supported by written evidence. He emphasized that the arbitration proceedings in this case were conducted in breach of the requirements of Art. 18 of the Law of Ukraine on International Commercial Arbitration,[2] Arts. 9 and 15 of the ICAC Rules[3] and the Rules on the Provision of Postal Services (paras. 89 and 106). He contended that no officer of [South Airlines] ever received any notices from the arbitration court, and thus [South Airlines] was not given proper notice of the arbitration proceedings and was deprived of the right to take part in the proceedings and present evidence in support of its position.

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2. Art. 18 of the Ukrainian Law on International Commercial Arbitration reads:

   "*Equal Treatment of Parties*
   The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

3. Art. 9 of the ICAC Rules of Arbitration provides that the parties shall be treated with equality and shall be given each a full opportunity of presenting its case. Art. 15 of the Rules deals with the submission and forwarding of the arbitration documents.

[4] "Upon consideration of the application and written evidence presented by the parties, and having heard their explanations, the court concludes that the application cannot be granted for the following reasons.

[5] "Pursuant to the provisions of Art. 389(7) of the Ukrainian Code of Civil Procedure, matters related to the issuance of a writ of execution for the enforcement of an arbitral award are considered by courts upon application of the person in whose favor such arbitral award was rendered. The application for a writ of execution for the enforcement of an arbitral award is to be filed with the competent court in the country where the arbitration took place, within three years [of rendition] of the arbitral award. The recognition and enforcement of the international arbitral award, if the arbitration takes place in Ukraine, shall be granted in the manner provided for in Arts. 391 to 398 of the Code [of Civil Procedure].

[6] "In accordance with Art. 390 of the Ukrainian Code of Civil Procedure, decisions of foreign courts (courts of a foreign country; other foreign competent authorities having jurisdiction over civil or commercial matters; foreign or international arbitrations) shall be recognized and enforced in Ukraine if their recognition and enforcement are provided for in an international treaty approved by the Ukrainian Parliament [*Verkhovna Rada*] or according to the principle of reciprocity. Where the recognition and enforcement of a foreign judgment is conditional on the principle of reciprocity, [reciprocity] is deemed to exist unless proven otherwise.

[7] "Pursuant to Art. 394(3)(3) of the Ukrainian Code of Civil Procedure, unless the international treaties approved as binding by the *Verkhovna Rada* list the documents to be attached to the application, or in the absence of such treaty, the following documents are to be attached to the application:

> '(3) a document that certifies that the party, which the judgment of the foreign court has been rendered against and that had not appeared in the proceedings, had been duly informed of a time and a place of the proceedings….'

[8] "In accordance with Art. 396(2) of the Ukrainian Code of Civil Procedure, should international treaties approved as binding by the *Verkhovna Rada* not provide for such options, the application may be refused:

> '(2) if the party, as to which there was issued a judgment of a foreign court, has been deprived of an opportunity to present his case due to the fact that he was not notified duly of the proceedings….'

[9] "The agreement of 29 November 2007, whose disputed performance gave rise to the grounds for the [ICAC] proceedings, contains an arbitration agreement (Art. 13) within the meaning of Art. 7 of the Ukrainian Law on International Commercial Arbitration.[4]

[10] "Pursuant to Art. V[(1)] of the [1958 New York Convention], ratified by Ukraine, 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 … (*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….

[11] "Examining the documents provided on behalf of Rangedale – namely, Agreement No. 0612/08 dated 29 November 2007 with annexes thereto; [ICAC] certificate No. 1402/14-6 dated 19 June 2012 together with the copies of four notices sent by regular mail with objections filed by South Airlines; and certificate 283-284/BX of Ukrposhta, Ukrainian State Enterprise of Postal Communication, dated 19 June 2012 – the court finds that [South Airlines] did not exercise its right to provide its explanations and available objections as it was not given proper notice of the arbitration proceedings for the following reasons.

[12] "Based on the available case materials, the court finds that the postal notices sent by [ICAC] to the address of [South Airline] were completed in violation of the requirements of the Rules on the Provision of Postal Services, because in the case of the two notices delivered by hand the notices did not specify the position and the name of the respondent's officer receiving the notices, and in the case of two other notices the name of the representative authorized by the respondent

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4. Art. 7 of the Ukrainian Law on International Commercial Arbitration reads:

> "*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.
> 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."

to receive them. The signature of 'Person 1', who is said to have received the above-mentioned postal notices on behalf of [South Airlines] is clearly different from the signature of the General Director appearing on the Agreement, schedules and other case materials as 'Person 1', and furthermore, it is proven that the said signature was made by a postman. There were four communications sent to the address of a privately owned house, but [ICAC] sent no correspondence to the address of South Airlines' actual location set out in the Contract, i.e. Civil Airport, Odessa, where its representatives can be found on a regular basis.

[13] "The court recognizes as legitimate the arguments advanced by the representative of South Airlines that violations were committed in considering the case in the absence of the debtor and in the de facto restriction of its access to court, i.e., violation of the parties' equality and deprivation of [South Airlines] of the opportunity to present its case.

[14] "For the above-mentioned reasons the application should be dismissed.

[15] "In view of the foregoing and in reliance on Art. 396(2) of the Ukrainian Code of Civil Procedure, it is ordered that:

– The application of Rangedale for the recognition and enforcement of the Award of [ICAC] delivered in the case based on the claim of Rangedale against South Airlines be dismissed.

[16] "This Order may be challenged before the Court of Appeal for the Odessa Region by filing an appeal via the Prymorskyi District Court for Odessa City, within five days of the date of announcement or, if this Order has been issued without the participation of the appellant, within five days following the date of receipt of this Order."

High Court of Ukraine, 11 February 2013

(….)

[17] "In July 2012, Rangedale Limited filed its application with the [district] court, submitting that pursuant to the [ICAC] Award rendered in case No. AC No. 397y/2011 dated 22 May 2012, South Airlines was bound to return to [Rangedale] the aircraft YaK-42 D, SN 4520423016269, manufacturer's serial number 0612, and pay to [Rangedale] the amount of € 292,024 owed under the lease agreement and the amount of € 16,583.46 for indemnification of the arbitration fees. The application of Rangedale was dismissed by the Order of the

Prymorskyi District Court for Odessa City dated 16 August 2012, upheld by the Order of the Court of Appeal for the Odessa Region dated 24 October 2012.
[18] "In the cassation appeal, the representative of Rangedale is seeking the setting aside of the said judgments, alleging that the courts incorrectly applied the rules of substantive law and violated of the rules of procedural law, and seeks satisfaction of [Rangedale]'s application.
[19] "According to Art. 324(2) of the Ukrainian Code of Civil Procedure, the grounds for a cassation appeal are the incorrect application by the court of the rules of substantive law or the violation of the procedural rules.
[20] "According to the requirements of Art. 335 of the Ukrainian Code of Civil Procedure, when considering a case in the cassation procedure, the Court should examine, within the scope of the cassation appeal, the correctness of the application of the rules of substantive law and the rules of procedural law by the courts of first or appellate instance, and may not establish or deem established any circumstances unless they have been established or rejected in the judgment [below], or take any decisions on any matters concerning the reliability or unreliability of any evidence, or priority of any evidence over another.
[21] "The arguments submitted in the cassation appeal by the representative of Rangedale provide no reason to conclude that the courts violated any rules of substantive or procedural law, which resulted or could have resulted in the delivery of an erroneous judgment in the case.
[22] "By dismissing the application of Rangedale, the court of the first instance, whose conclusion was upheld by the court of appeal, made a correct conclusion that South Airlines was not given proper notice of the arbitration proceedings in the case, and therefore, pursuant to Art. V of [the 1958 New York Convention], the recognition and enforcement of the arbitral award should be refused. The arguments set out in the cassation appeal do not refute the conclusion of the court.
[23] "Thus, the challenged judgments were delivered in compliance with the rules of substantive and procedural laws, and therefore, they should be upheld and the cassation appeal should be dismissed.
[24] "In reliance on Art. 332 of the Ukrainian Code of Civil Procedure, the panel of Civil Chamber judges of the High Court of Ukraine for Civil and Criminal Cases orders that:

– the cassation appeal of Rangedale … be dismissed;
– the Order of the Prymorskyi District Court for Odessa City, dated 16 August 2012, and the Order of the Court of Appeal for the Odessa Region, dated 24 October 2012, be upheld.

[25] "The Order is not subject to appeal."

5. Sribnyansky District Court, Chernihivska Region, 24 January 2013, Case No. 2521/930/2012
Court of Appeal, Chernihivska Region, 12 March 2013, Case No. 2521/930/2012[1]

Parties:	Claimant/Respondent: Nibulon SA (Switzerland) Defendant/Appellant: Nasinnia-Agrokhim, Limited Liability Company (Ukraine)
Published in:	*Decision of 24 January 2013*: available online at <www.reyestr.court.gov.ua/Review/28792573>; *Decision of 12 March 2013*: available online at <www.reyestr.court.gov.ua/Review/29985538>
Articles:	III; IV(1); V(1); V(1)(*a*); V(1)(*b*)
Subject matters:	– proper notice – incapacity of party – grounds for refusal of enforcement are exhaustive and strict – requirements for enforcement (in general)
Topics:	[9] = ¶ 301; [10] = ¶ 501; [11] = ¶ 503; [14] = ¶ 502; [14] + [27] = ¶ 401; [15]-[20] = ¶ 509; [21]-[26] = ¶ 505

Summary

The district court granted enforcement of a GAFTA award, holding that the claimant complied with the formal requirements for seeking enforcement and the defendant failed to prove one of the grounds exhaustively listed in the 1958 New York Convention and Ukrainian law. First, there had been proper notice of the arbitration as it appeared that the defendant was notified of the statement of claim and filed a statement in defense. Second, the allegation that the defendant's charter required prior approval of contracts exceeding a

1. The General Editor wishes to thank Andrey Astapov and Anna Kombikova, AstapovLawyers International Law Group, Kiev, for their invaluable assistance in providing this decision and translating it from the Ukrainian original.

certain sum (which was lacking here) – also refuted by the award – was irrelevant with respect to a party's capacity to enter into an arbitration agreement. The incapacity provided in Art. V(1)(a) of the Convention and in Ukrainian law as ground for refusal of enforcement refers to a party's incapacity to enter into an arbitration agreement, not to the incapacity to enter into a commercial contract. The court of appeal affirmed the district court's decision.

On 27 August 2009, Nasinnia-Agrokhim, Limited Liability Company (Nasinnia) and Nibulon SA (Nibulon) entered into a contract providing for arbitration of disputes at the Grain and Feed Trade Association (GAFTA).

A dispute arose between the parties with respect to Nasinnia's alleged lack of performance under the contract. On 23 December 2011, a GAFTA arbitral tribunal rendered an award in favor of Nibulon.

By the first reported decision, the Sribnyansky District Court for the Chernihivska Region, per Judge N.A. Tsyhura, granted enforcement of the GAFTA award. The court noted at the outset that the "basic principle" of the 1958 New York Convention is that the Contracting States shall recognize foreign arbitral awards as binding and enforce them. On the presumption that an arbitral award is binding, the Convention provides for an exhaustive list of grounds for refusal, to be interpreted narrowly, and puts the burden of proof on the party resisting enforcement.

In the case at hand, Nibulon complied with the formal requirements for seeking recognition and enforcement. Nasinnia in turn failed to prove any ground for refusal. The court first dismissed the contention that Nasinnia was not duly notified of the arbitration hearing and therefore unable to present its case, as it appeared from the file that Nasinnia was duly notified of Nibulon's statement of claim and filed a statement in defense.

Second, Nasinnia argued that its director had no authority to sign the contract containing the arbitration clause because Nasinnia's charter provides that contracts exceeding a certain sum – which was exceeded here – must be approved beforehand by Nasinnia's general meeting, and the contract with Nibulon had not been so approved. This invalidity equaled a force majeure reasons and Nasinnia could not perform under the contract. The court noted that the "incapacity" referred to in Art. 36 of the Ukrainian Law on Commercial Arbitration (which mirrors Art. V(1)(*a*) of the Convention) as a ground for denying enforcement refers to a party's incapacity to enter into an arbitration agreement, not to the incapacity to perform under a contract. Further, the objection that the contract was invalid for lack of prior approval by the general meeting was refuted by the GAFTA award, which found that the contract had been validly executed. This is the first decision reported.

By the second reported decision, the Court of Appeal for the Chernihivska Region, before Presiding Judge S.P. Zynchenko and Judges L.V. Ivanenko and V.M. Ishutko, affirmed the lower court's decision, holding that the grounds for the appeal did not prove that the findings of the court below were incorrect. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345070-n>.

Excerpt

District Court, 24 January 2013

[1] "The court received an application of the claimant, [Nibulon], seeking the recognition and enforcement of an award rendered in a foreign country against the debtor, [Nasinnia]; namely, requesting the recognition and enforcement of arbitral award No. 14-283A of the Grain and Feed Trade Association (GAFTA) dated 23 December 2011, which directed Nasinnia to pay Nibulon monies plus interest assessed quarterly at the rate of 5 percent per annum, for a total of US$ 3,664,946.90 [the GAFTA award].
[2] "At the hearing, counsel for Nibulon fully affirmed the application for the recognition and enforcement of [the GAFTA award], referring to the grounds for granting it as set out in the appeal.
[3] "At the hearing, counsel for Nasinnia objected to the granting of Nibulon's request for the recognition and enforcement of [the GAFTA award] and the issuance of a writ of execution, arguing that Nasinnia was not given proper notice of the [arbitration] hearing and, thus, had no opportunity to participate in the arbitration proceedings. [Nasinnia] referred to force majeure circumstances and submitted that it was incapable to act due to force majeure circumstances resulting from the actions of state authorities; that the executed contract was invalid because the contract price exceeded UAH 1,000,000 and no prior approval of its execution was granted by [Nasinnia]'s general meeting of members; [and] that the contents of the international arbitral award and other documents submitted to the court were not certified."

I. ANALYSIS

[4] "After having heard the parties and examined the case documents, the court believes that the application for the recognition and enforcement of the foreign award must be granted based on the following grounds.
[5] "The recognition and enforcement of a foreign judgment extends the effect of this judgment to the territory of Ukraine and makes the enforcement means under the Ukrainian Code of Civil Procedure available to it.
[6] "Pursuant to Art. 390(1) of the Ukrainian Code of Civil Procedure, foreign judgments (decisions of international arbitrations) shall be recognized and enforced in Ukraine if their recognition and enforcement are provided for in an

international treaty approved by the *Verkhovna Rada* [Parliament] of Ukraine or according to the principle of reciprocity.

[7] "Pursuant to Arts. 391 and 392 of the Ukrainian Code of Civil Procedure, the recognition and enforcement of a foreign judgment may be requested in Ukraine within three years of its entry into force, except for a judgment for collection of periodic payments, the recognition and enforcement of which may be requested throughout the entire contract term. The application for the recognition and enforcement of a foreign judgment shall be heard by the court at the debtor's place of residence or seat.

[8] "Considering that the place of business of Nasinnia is within the territory of Ukraine, the court deems it necessary to grant the application and allow the enforcement of [the GAFTA award] within the territory of Ukraine.

[9] "In particular, the basic principle of [the 1958 New York Convention], to which Ukraine has been a party since 8 January 1961, is that each Contracting State shall recognize foreign arbitral awards as binding and enforce them.

[10] "On the presumption that an arbitral award is binding, the New York Convention provides for an exhaustive list of grounds, not subject to broad interpretation, under which the competent court may refuse the recognition and enforcement of an arbitral award. This list is contained in Art. V of the New York Convention, and the grounds are also listed in Art. 396(2) of the Ukrainian Code of Civil Procedure.

[11] "Since the binding and enforceable nature of an arbitral award is presumed by international and national law, the burden of proof of the existence of such grounds is imposed upon the party objecting to the recognition and enforcement of an arbitral award (Art. V(1) of the New York Convention).

[12] "Subject to Art. 35 of the Ukrainian Law on International Commercial Arbitration, an arbitral award, regardless of the country in which it was made, shall be recognized as binding and, upon a written application filed with a competent court, shall be enforced subject to this article and Art. 36 of the said Law.[2]

[13] "The court has established that, based on [Nasinnia's] failure to perform its obligations under [the Contract], [the GAFTA award] directed Nasinnia to pay Nibulon monies plus interest assessed quarterly at the rate of 5 percent per

2. Art. 36 of the Ukrainian Law on Commercial Arbitration – which is based on the UNCITRAL Model Law on International Commercial Arbitration – lists the grounds for refusing recognition or enforcement of foreign arbitral awards and mirrors the grounds in Art. V of the 1958 New York Convention.

annum, for a total of US$ 3,664,946.90, which equals UAH 29,293,920.57 at the exchange rate of the National Bank of Ukraine.

[14] "Nibulon's application for the recognition and enforcement of [the GAFTA award] complies formally and substantively with the statutory requirements and gives reasons for the recognition and enforcement of the arbitral award. The court does not verify if the arbitral award is correct on the merits of the dispute, because that would violate the sovereignty of the country whose authority has rendered the award."

1. Lack of Notice (Art. V(1)(b))

[15] "The arguments of counsel for Nasinnia that [Nasinnia] was not duly notified of the hearing of the case and was therefore unable to participate in the proceedings are refuted by the proofs furnished by counsel for claimant, Nibulon. In particular, [the Contract] contained an arbitration clause according to which any dispute arising out of or under the Contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules No. 49, in the edition current at the date of this contract. These Rules are incorporated into and form part of this contract and the parties confirm that they are fully cognizant thereof. The seat of arbitration shall be London, England.

[16] "Pursuant to Clause 24 of the GAFTA Arbitration Rules No. 49 in the edition current at the date of the Contract, any and all disputes arising out of or under this contract shall be determined by arbitration in accordance with the GAFTA Arbitration Rules No. 125. In accordance with Clause 20.1 of GAFTA Rules No. 125, all notices to be served on the parties pursuant to these GAFTA Rules No. 125 shall be served by letter, fax or email or other electronic means. For the purposes of time limits, the date of despatch shall, unless otherwise stated, be deemed to be the date of service. The provisions of Clause 16 of GAFTA No. 49 provide that all notices required to be served on the parties pursuant to this contract shall be communicated rapidly in legible form. Methods of rapid communication for the purposes of this clause shall be: either telex, or letter if delivered by hand, or telefax or email.

[17] "On 7 October 2010, counsel for [Nibulon] sent a Notice of Arbitration to [Nasinnia]'s email address designated as the contractual [address] according to [the Contract]. On 26 October 2010, the Grain and Feed Trade Association (GAFTA) notified Nibulon and Nasinnia by a letter sent via email and regular mail stating that since Nasinnia failed to appoint an arbitrator within nine calendar days of receipt of the notice of appointment of T. Nels, G. Valentine was appointed the second arbitrator and that as a result the arbitration

proceedings were duly commenced. On 15 December 2010, counsel for [Nibulon] sent a statement of claim to Nasinnia's address, which is evidenced by air waybill No. 6291894195 received by the attorney for [Nasinnia] on 17 December 2010 as evidenced by the return receipt. The said statement of claim was also sent by email. On 7 January 2011, GAFTA sent a letter to Nasinnia by regular mail and email confirming [Nibulon]'s payment of the deposit and notifying the arbitral hearing schedule, whereby Nasinnia was notified of the opportunity to file its applications and documents refuting [Nibulon]'s case stated in the statement of claim within twenty-eight days.

[18] "Pursuant to Art. V(1)(*b*) of the New York Convention, the 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 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.

[19] "Pursuant to the Convention, the recognition and enforcement of a foreign arbitral award may be refused due to a lack of notification of the appointment of the arbitrator and the time of arbitration proceedings, provided that the debtor seeking such refusal has furnished proof that he was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case.

[20] "It follows from the explanations provided by counsel for Nasinnia that the statement of claim was received and Nasinnia served its formal defense submissions in response to the statement of claim."

2. Incapacity (Art. V(1)(a))

[21] "For the reasons given below, this court cannot accept the argument advanced by counsel for Nasinnia that there is a ground for refusal of recognition and enforcement of the arbitral award because one of the parties to the arbitration agreement was incapable to act and because the agreement was invalid under the law to which the parties submitted it.

[22] "Counsel for Nasinnia submits that at the time of execution of [the Contract] the Director of Nasinnia did not have sufficient authority to sign it because according to [Nasinnia's] Charter (Articles of Association), contracts exceeding UAH 1,000,000 are to be signed only upon their prior approval by the general meeting of Nasinnia.

[23] "However, Art. 36 of the Ukrainian Law on International Commercial Arbitration[3] refers to the parties' incapacity in respect of the execution of an arbitration agreement, not a foreign trade contract.
[24] "In accordance with Art. 7 of this Law, an arbitration agreement is an agreement between the parties to refer to arbitration all or certain disputes that have arisen or may arise between them in connection with any specific legal relations, whether of a contractual nature or not. An arbitration agreement may be executed either as an arbitration clause in a contract or as a separate agreement.
[25] "Therefore, this court finds that the argument advanced by counsel for Nasinnia as a ground for refusal of the recognition and enforcement of the arbitral award – that due to force majeure and following such force majeure there was inability to act in the performance under the Contract – is erroneous and is not based on the provisions of law. Counsel also failed to prove that the parties were unable to act at the time of execution of their arbitration agreement.
[26] "The statements made by counsel for Nasinnia that the executed contract was invalid because the contract price exceeded UAH 1,000,000 and no prior approval for its execution was granted by the general meeting of the company's shareholders is refuted by [the GAFTA award], which found that the Contract had been validly executed."

3. Documents for Requesting Recognition and Enforcement

[27] "The argument advanced by counsel for Nasinnia that the contents of the award of the international tribunal as well as of other documents submitted to the court were not certified is beneath notice and is refuted by the duly certified copies of the award of the international tribunal, the recognition and enforcement of which is sought, and of such other documents."

4. Currency

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3. Art. 36(1)(1) of the Ukrainian Law on International Commercial Arbitration reads:

> "1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
> (1) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
> – a party to the arbitration agreement referred to in article 7 was under some incapacity…."

[28] "Given that the [GAFTA award] specifies the amount to be collected in a foreign currency, the moneys to be collected in favor of the award creditor are to be converted into the national currency of Ukraine in accordance with Art. 395(8) of the Ukrainian Code of Civil Procedure and subject to the exchange rate set by the National Bank of Ukraine on the date of this order.
[29] "Thus, bearing in mind the US$ 100/UAH 799.3000 exchange rate set by the National Bank of Ukraine on 24 January 2013, US$ 3,664,946.90 equals … UAH 29,293,920.57."

II. DECISION

[30] "In reliance on Arts. 390-398 of the Ukrainian Code of Civil Procedure, the court orders that:

– the application of Nibulon for the recognition and enforcement of [the GAFTA award] be granted;
– the recognition and enforcement of [the GAFTA award], directing Nasinnia to pay Nibulon monies plus interest assessed quarterly at the rate of 5 percent per annum, for a total of US$ 3,664,946.90 which equals UAH 29,293,920.57 in accordance with the exchange rate of the National Bank of Ukraine on 24 January 2013, because of [Nasinnia]'s failure to perform its obligations under [the Contract], be granted within the territory of Ukraine;
– UAH 107.30 be collected from Nasinnia in favor of Nibulon in restitution of the court fees paid.

[31] "An appeal against this court order may be filed within five days of its announcement to the Court of Appeal for the Chernihivska Region [*Oblast*] through the Sribnyansky District Court of the Chernihivska Region. Should the order be rendered in the appellant's absence, the appeal may be filed within five days of the receipt of a copy of this order."

Court of Appeal, 12 March 2013

(….)
[32] "By its order dated 24 January 2013 the Sribnyansky District Court of the Chernihivska Region granted the application by Nibulon for the recognition and enforcement of [the GAFTA award].

[33] "The court granted recognition and allowed enforcement within the territory of Ukraine of [the GAFTA award]….
[34] "In the appeal the appellant seeks to set aside the order of the Sribnyansky District Court of the Chernihivska Region dated 24 January 2013 and requests a new order dismissing the application for the recognition and enforcement of the foreign arbitral award.
(….)
[35] "The grounds for appeal do not refute the correctness of the findings of the court of the first instance and are not a ground for setting aside its order. Under the circumstances, the court of appeal considers that the court of the first instance has resolved the issue of recognition and enforcement of the foreign arbitral award in compliance with the requirements of law.
[36] "In accordance with Art. 312 of the Ukrainian Code of Civil Procedure the court of appeal shall, upon consideration, dismiss the appeal and uphold the order if the court of the first instance rendered the order in compliance with the requirements of law.
[37] "In reliance on Arts. 303, 307, 308, 313, 315, 317 and 319 of the Ukrainian Code of Civil Procedure, the court of appeal orders that:

– the appeal of Nasinnia be dismissed;
– the order of the Sribnyansky District Court of the Chernihivska Region dated 24 January 2013 be upheld.

[38] "This order becomes effective upon its announcement but may be challenged by way of cassation to the Supreme Court of Ukraine for Civil and Criminal Cases within twenty days of the date of this order."

UNITED STATES

Accession: 30 September 1970
1st and 2nd Reservation

779. United States District Court, Southern District of Florida, 26 September 2011, Case No.: 11-cv-21784-UU
United States Court of Appeals, 11th Circuit, 7 August 2013, No. 12-10686

Parties:	Petitioner/Appellee: Federal Deposit Insurance Corp. as Receiver for Republic Federal Bank N.A. (nationality not indicated) Respondent/Appellant: IIG Capital, LLC (nationality not indicated)
Published in:	*District Court*: no information available; *Court of Appeals*: available online at <www.ca11.uscourts.gov/unpub/ops/201210686.pdf>
Articles:	V; V(1)(*b*); V(1)(*d*); V(2)(*b*)
Subject matters:	– (appearance of) bias of arbitrator (no) – public policy and disclosure by arbitrator – failure by arbitrator to disclose not in accordance with agreement of parties – due process as ground for violation of public policy – due process and bias of arbitrator
Topics:	¶ 508 + ¶ 513 + ¶ 521 + ¶ 523; [3] = ¶ 704(A); [6]-[10] = ¶ 500; [9]-[10] = ¶ 501

Summary

District Court: An ICC award rendered in Miami was granted enforcement. The composition of the arbitral authority and procedure were not at odds with the parties' agreement, nor was

there a violation of due process leading to a violation of public policy, because the sole arbitrator failed to disclose professional interactions with counsel for defendant such as participation in the same arbitration conferences. The court found such interactions normal in the tight-knit arbitration community and noted that to disqualify an arbitrator on such grounds would be disruptive of arbitration. Courts approach allegations of violation of due process with caution, though not lightly. Court of Appeals: the court affirmed the decision below and denied respondent's request for an evidentiary hearing under the Court's 2002 decision in University Commons, finding that respondent did not present sufficient evidence of contacts that called the arbitrator's impartiality into question and led to the belief that the arbitrator had a motive to "curry favor" with counsel.

On 3 August 2007, IIG Capital, LLC (IIG) and Republic Federal Bank N.A. (Republic Bank) entered into an Agreement. Sect. 6 of the Agreement provided for International Chamber of Commerce (ICC) arbitration of disputes in Miami, Florida.

A dispute arose between the parties. On 13 February 2009, IIG commenced ICC arbitration in Miami as provided for in the Agreement, claiming that it was "owed monies" by Republic Bank. On 20 April 2009, Republic Bank filed a counterclaim alleging, inter alia, that IIG had breached the Agreement. On 30 June 2009, Dr. Horacio Grigera Naón signed a statement of independence in accordance with the ICC Rules of Arbitration and, on 9 July 2009, the ICC Secretariat informed the parties that the ICC's Court of International Arbitration had designated Dr. Grigera Naón as the sole arbitrator in the arbitration.

On 11 December 2009, Federal Deposit Insurance Corp. (FDIC) was appointed as receiver of Republic Bank. On 2 March 2010, José I. Astigarraga, a shareholder of the Miami law firm Astigarraga Davis, appeared in the arbitration as additional counsel to Republic Bank. Neither party objected to Dr. Grigera Naón continuing as sole arbitrator after Mr. Astigarraga appeared in the proceedings. On 2 September 2010, the sole arbitrator rendered an award declaring the parties' Agreement terminated; rejecting IIG's claims; granting Republic Bank monetary damages in the amount of US$ 4,000,000 and interest; and directing IIG to reimburse Republic Bank's attorney's fees and costs and to pay half of the cost of arbitration, totaling US$ 948,560.30. On 17 May 2011, FDIC, as receiver, filed a petition to enforce the ICC award.

By the first reported decision, rendered on 26 September 2011, the United States District Court for the Southern District of Florida, per Ursula M. Ungaro, US DJ, granted enforcement. IIG argued in support of its opposition to enforcement that the sole arbitrator and the co-counsel for Republic Bank had a "long time, ongoing, and substantial relationship": they were both founding members of ICC's Latin American Arbitration Group, and participated in the

same arbitration conferences. Failure by Dr. Grigera Naón to disclose that relationship made the award unenforceable because the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement (Art. V(1)(*d*) of the 1958 New York Convention). IIG also maintained that enforcement should also be denied on grounds of public policy, because the arbitrator's failure to disclose violated the due process right of IIG to be heard with respect to the arbitrator's independence and impartiality.

The court dismissed both contentions, finding that IIG did not prove that the sole arbitrator was dependent or biased. Dr. Grigera Naón and Mr. Astigarraga merely had the kind of professional interactions that one would expect of successful lawyers active in the "niche" area of arbitration. Nor did IIG allege any facts that suggested its due process rights were violated in such manner as to constitute a violation of public policy.

To disqualify an arbitrator because of such professional connections would, in effect, disqualify the majority of arbitrators practicing in the field of international arbitration and disrupt the resolution of international disputes by arbitration. Absent a showing of pecuniary interest or some other fact that concretely suggests bias, such tenuous links fail to establish bias and to overcome the strong public policy preference for international arbitration.

The court added that while it does not take allegations of due process violations lightly, it does invoke the public policy defense with caution in light of the countervailing public policy interest in receiving reciprocal treatment from foreign courts. This is the first decision reported.

By the second reported decision, rendered on 7 August 2013, the United States Court of Appeals for the Eleventh Circuit, before Carnes, Chief Judge, Martin and Kravitch, CJJ, in a per curiam opinion, affirmed the decision below, dismissing IIG's contention that it was entitled to an evidentiary hearing to determine the extent of Dr. Grigera Naón and Mr. Astigarraga's contacts and whether the award should be denied enforcement on this ground.

The Court of Appeals reasoned at the outset that foreign awards are subject to "minimal standards of domestic judicial review for basic fairness and consistency with national public policy". IIG alleged three of the grounds for refusal of enforcement exhaustively listed under the New York Convention: (1) violation of due process because IIG was unable to present its case before an impartial arbitrator (Art. V(1)(*b*)); (2) the composition of the arbitral authority not the composition IIG agreed to, because IIG was not aware of Dr. Grigera Naón's contacts with Mr. Astigarraga (Art. V(1)(*d*)); and (3) recognition of the award of a biased arbitrator would be contrary to US public policy (Art. V(2)(*b*)).

IIG relied on a 2002 decision of the Eleventh Circuit in *University Commons* – in which the court held that although the mere appearance of bias is not enough to set aside an award, it suffices to require the district court to grant an evidentiary hearing on this issue – to request an evidentiary hearing on Dr. Grigera Naón's bias.

The Court of Appeals held that IIG did not present sufficient evidence of contacts that called Dr. Grigera Naón's impartiality into question to require the district court to hold an evidentiary hearing. In *University Commons*, the Court held that an evidentiary hearing was warranted when an arbitrator and counsel participated in the same mediation, litigation or other arbitration because an arbitrator's ruling in the arbitration at issue "could be seen as a way to curry favor in the other matter".

Participation in a summer international arbitration program was, as correctly held by the district court, the kind of professional interaction that one would expect of practitioners of the same area of the law, and it was hard to see how it could lead Dr. Grigera Naón, who was the program's director, to curry favor with Mr. Astigarraga by ruling in favor of Mr. Astigarraga's party. Dr. Grigera Naón and Mr. Astigarraga's contacts through two professional organizations also could not give Dr. Grigera Naón a motive for using his decision in the arbitration at issue to curry Mr. Astigarraga's favor. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345071-n>.

Excerpt

District Court, 26 September 2011

(….)

[1] "As its first Affirmative Defense, IIG argues that the Award should not be enforced because 'the composition of the arbitral authority or the arbitral procedure was not in accordance with IIG's and Republic's [Agreement]'. Specifically, IIG contends that the Arbitrator violated Art. 7(3) of the ICC Rules of Arbitration when he failed to disclose certain 'facts and circumstances' which were of such a nature as to call into question Grigera Naon's independence …'. The 'facts and circumstances' which IIG alludes to include specifics regarding Grigera Naon and Jose Artigarraga's joint participation in several professional groups and educational programs related to the practice and study of international arbitration.

[2] "As its Second Affirmative Defense, IIG claims enforcement of the Award should be denied as contrary to Public Policy. In support of this contention, IIG claims the arbitrator's alleged failure to disclose, 'violated the due process right of IIG to be heard with respect to Grigera Naon's independence and impartiality and, concomitantly, his right or ability to continue as arbitrator'.

[3] "Petitioner argues '[a]ny nondisclosure of such personal contacts or arbitrator bias is not a basis to deny enforcement of an international arbitral award under either the controlling New York or Panama Conventions'. In essence, petitioner claims no violation of the ICC Rules of Arbitration occurred, and even if a violation occurred, it would not be enough to meet the high standard required to vacate the Award. Petitioner claims Mr. Grigera Naon's professional contact with Jose Astigarraga did not trigger a duty to disclose under the ICC, nor does it evidence arbitrator impartiality or bias.

[4] "Petitioner also argues IIG's public policy Affirmative Defense fails because respondent has failed to show that any purported bias on the part of the arbitrator was so severe and pervasive that it would be a violation of United States public policy for this Court to confirm the Award'.

[5] "IIG in response, contends that the arbitrator's failure to disclose his relationship with the FDIC's lawyer mandates rejection of the arbitration award or, at a minimum, requires that the parties be ordered to 'plunge headlong into evidentiary fact-finding'. *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002). In support of this contention, IIG claims a violation of the New York Convention occurred because 'the arbitration panel was not in accordance with the parties' agreement'. And '[w]here the arbitrator

fails to make required disclosures, he has not acted in accordance with the parties' agreement'."

I. THE 1958 NEW YORK CONVENTION

[6] "In the instant Motion, FDIC seeks confirmation of the Award under the [1958 New York Convention], 21 U.S.T. 2517. The Federal Arbitration Act (the 'FAA') codifies the New York Convention. The purpose of the New York Convention, and of the United States' accession to the Convention, is to 'encourage the recognition and enforcement of international arbitral awards', *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983),[1] to 'relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation'. *Ultra-cashmere House Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981).

[7] "The Convention provides 'businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards … subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy'. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte*, 141 F.3d 1434, 1440 (11th Cir. 1998)[2] citing, G. Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', 44 Duke L.J. 829, 888 (1995)."

II. STANDARD

[8] "Notably, the FAA displays Congress's 'liberal federal policy favoring arbitration agreements'. G*ilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, (1991) (internal quotation marks omitted). Consequently, 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitrations'. *Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 24, (1983). Judicial review of arbitrator's decisions is limited as the court must 'give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances'. *DeBeers Centenary AG v. Hasson*, 751 F.Supp.2d 1297 (S.D. Fla. 2010) citing, *Scott v. Prudential Sec., Inc.*, 141 F.3d

1. Reported in Yearbook IX (1984) pp. 487-494 (US no. 54).
2. Reported in Yearbook XXIV (1999) pp. 819-831 (US no. 276).

1007, 1014 (11th Cir. 1998). The party seeking vacatur bears the burden of establishing grounds sufficient to vacate the arbitration award. Id.

[9] "Under the New York Convention, the Final Arbitration Award is entitled to be recognized and enforced unless the Court finds one of the grounds for refusal of recognition or enforcement of the award as specified in the Convention[3] is applicable. See 9 U.S.C. Sect. 207. Art. V of the Convention lists the grounds upon which recognition and enforcement of the award may be refused. See 21 U.S.T. 2517, Art. V(1).

[10] "IIG cites two of the seven listed grounds for refusal in support of its Motion in Opposition. Specifically, IIG claims enforcement of the award should be denied due to violation of Art V(1)(*d*) and (2)(*b*) [footnote omitted]."

III. DISCUSSION

[11] "IIG argues enforcement of the award should be vacated due to a violation of Art. V(1)(*d*), alleging that 'The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties …'. IIG claims Art. V(1)(*d*) was violated because Mr. Grigera Naon, as arbitrator, failed to disclose the 'facts and circumstances surrounding his relationship with Jose Astigarraga, who served as additional counsel for FDIC'. IIG claims this failure of disclosure constituted a violation of the International Chamber of Commerce[4] (ICC) Rule of Arbitration, Art. 7, which requires an arbitrator disclose 'any facts or circumstances['] which might call into question the arbitrator's independence 'in the eyes of the parties'.

[12] "IIG contends Mr. Grigera Naon and Mr. Astigarraga maintained a 'long time, ongoing, and substantial relationship' which, according to IIG, suggests impartiality and thus requires disclosure. The basis for IIG's contention is the joint participation of Grigera Naon and Jose Astigarraga in several professional groups and educational programs related to the practice and study of international arbitration.

[13] "IIG has failed to establish grounds sufficient to vacate the arbitration award. IIG does not provide facts which suggest Mr. Grigera Naon acted dependently or was biased in any way because of his relation to Mr. Astigarraga.

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3. "The New York Convention is codified at chapter two of the Federal Arbitration Act ('FAA') 9 U.S.C. Sects. 201-208."
4. "The Agreement between IIG and Republic Bank provides that in the case of any dispute between the parties, they agree to 'submit … to the decision of a single arbitrator designated under the Arbitration Rules and regulations of the International Chamber of Commerce …'."

Although IIG has established that both Mr. Grigera Naon and Mr. Astigarraga are active in the cultivation of the practice and study of the highly specialized, niche area of the law of international arbitration, the mere fact that the arbitrator and counsel for petitioner are both founding 'members of ICC's Latin American Arbitration Group, jointly participated in 'the 2007 Miami International Arbitration Conference', and 'an October 2008 conference regarding the management of business disputes and legal risk in Latin America' is insufficient to suggest bias and trigger a disclosure requirement. Nor does the fact that Mr. Grigera Naon and Mr. Astigarraga both participated in the 'Washington College of Law's International Commercial Arbitration Program' suggest lack of impartiality. 'These particulars reveal nothing beyond the kind of professional interactions that one would expect of successful lawyers active in the specialized area….' See *Midwest Generation EME v. Continuum Chem.Corp.*, 768 F.Supp.2d 939, 949 (N.D. Ill. 2010) (holding that 'given their nature', 'professional interactions' were not required to be disclosed'.)

[14] "IIG next argues enforcement of the award should be denied pursuant to Art. V(2)(*b*) as contrary to public policy because the alleged failure to disclose prevented IIG from exercising its due process rights.

[15] "The Court finds the argument to be without merit. To the contrary, the Court finds public policy weighs in favor of enforcement of the final arbitration award. The Eleventh Circuit has held 'that domestic arbitral awards are unenforceable on grounds that they are violative of public policy only when the award violates some "explicit public policy" that is "well-defined and dominant … [and is] ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interests'".' *Industrial Risk Insurers*, 141 F.3d 1434 (11th Cir. 1998) citing, *Drummond Coal Co. v. United Mine Workers, District 20*, 748 F.2d 1495, 1499 (11th Cir.1984) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983)).

[16] "The Eleventh Circuit applies the same standard to international arbitration awards. See *Industrial Risk Insurers* (stating, 'We believe that rule applies with equal force in the context of international arbitral awards.') See also *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir.1974)[5] (holding that 'the Convention's public policy defense should be construed narrowly' and applies where enforcement of the award 'would violate the forum state's most basic notions of morality and justice').

5. Reported in Yearbook I (1976) p. 205 (US no. 7).

[17] "IIG has not alleged any facts which suggest IIG's due process rights were violated. This court does not take allegations of due process violations lightly. However, in the realm of international arbitration, there also exists a countervailing public policy – namely, the interest in receiving reciprocal treatment from foreign courts. *Parsons and Whittemore*, supra,, thus advised that federal courts 'invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States'. 508 F.2d at 974.

[18] "Indeed, the international arbitration community is a relatively small, tight-knit community where it can only be expected that prominent practitioners will, at some point, cross paths in their day to day practice. To disqualify an otherwise qualified arbitrator because he and a party to the litigation share membership in a professional association, would, in effect, disqualify the majority of arbitrators practicing in the field of international arbitration. It would be 'disruptive of the resolution of [international] disputes by arbitration in this City to disqualify an arbitrator simply because a party to an arbitration proclaims, in circumstances such as these, "the appearance of bias"'. See *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F.Supp. 352, 1979 A.M.C. 1496 (S.D.N.Y. 1979)[6] (where the Court refused to disqualify an arbitrator whose partiality was questioned [who] had no financial interest in the victorious party).

[19] "Absent a showing of pecuniary interest on the part of the arbitrator or some other fact to suggest bias, the due process challenge that concurrent membership in professional societies and educational endeavors is indicative of partiality, fails both to establish arbitrator impropriety and to overcome the strong public policy preference for international arbitration."[7]

IV. CONCLUSION

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6. Reported in Yearbook VI (1981) pp. 244-245 (US no. 30).
7. See *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A. G.*, 480 F.Supp. 352, 1979 A.M.C.4 1496 (S.D.N.Y. 1979) [reported in Yearbook VI (1981) pp. 244-245 (US no. 30)], where it appeared that an arbitrator whose partiality was questioned had no financial interest in the victorious party. Neither he nor his company derived any income from such party, but the sole complaint was that such arbitrator's company represented another company, which in turn asserted a claim (entirely unrelated to those at bar) against the unsuccessful party. The court held that this was far too tenuous a relationship to require the disqualification of an experienced and respected maritime arbitrator under the public policy provision of Art. V(2)(*b*) of the [1958 New York Convention], 21 U.S.T. 2517, on the grounds of appearance of bias, particularly where there was no challenge to the arbitrator's personal integrity."

[20] "For the reasons herein stated, this Court finds that the Award is enforceable. Accordingly, it is hereby ordered and adjudged that Petitioner FDIC's Motion to Confirm and Enforce International Arbitration Award is hereby granted."

Court of Appeals, 7 August 2013

[21] "IIG Capital appeals the district court's confirmation and enforcement of the award resulting from arbitration between the FDIC and IIG on the ground that the sole arbitrator, Grigera Naon, failed to disclose his prior and ongoing contacts with Jose Astigarraga, counsel for the FDIC. IIG argues that it is entitled to an evidentiary hearing to determine the extent of Naon and Astigarraga's contacts and whether the award should be vacated because of them.

[22] "International arbitration awards such as the one in this case 'are subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy'. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998).[8] An 'arbitral award must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Art. V of the New York Convention'. Id. at 1441. IIG asserts three of those defenses : (1) IIG was unable to present its case before an impartial arbitrator, (2) the composition of the arbitral authority was not what IIG agreed to because IIG was not aware of Naon's contacts with Astigarraga, and (3) recognizing the award of a biased arbitrator would be contrary to United States public policy. See Art. V(1)(*b*) and (*d*) and (2)(*b*).

[23] "The 'mere appearance of bias or partiality is not enough to set aside an arbitration award', but it is enough to require the district court to grant an evidentiary hearing. *University Commons - Urbana v. Universal Constructors, Inc.*, 304 F.3d 1331, 1340 (11th Cir. 2002). IIG contends that under *University Commons*, it has presented sufficient evidence of contacts that call Naon's impartiality into question to require the district court to hold an evidentiary hearing to determine if any of the defenses it asserts apply.[9]

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8. Reported in Yearbook XXIV (1999) pp. 819-831 (US no. 276).
9. "The FDIC argues that *University Commons* is inapplicable in this case because the agreement in that case was a domestic arbitration agreement. Because we hold that even under *University Commons*, the district court was not required to grant IIG an evidentiary hearing, we need not decide if *University Commons* applies in cases dealing with an international arbitration agreement."

[24] "IIG focuses its appeal on three contacts between Naon and Astigarraga: (1) Naon, who was the director of an international arbitration program at American University, hired Astigarraga as a faculty member for the summer program, held from 1 June to 17 June 2010; (2) Naon and Astigarraga were two of the three founding members of the ICC's Latin American Arbitration Group in 2003 and may still be members; and (3) Naon and Astigarraga are founding members of the Latin American Arbitration Association, which was organized some time before 10 November 2010.

[25] "We review the district court's factual findings for clear error and its legal conclusions de novo. Id. at 1337.

[26] "The summer international arbitration program took place after the arbitration hearings were over but before the award was rendered on 2 September 2010. The district court concluded that the fact that Naon and Astigarraga participated in that program during the arbitration period reveals 'nothing beyond the kind of professional interactions that one would expect of successful lawyers active in the specialized area'. We agree. In *University Commons* we held that an evidentiary hearing was warranted when an arbitrator and counsel participated in the same mediation, litigation, or other arbitration because an arbitrator's 'ruling in the arbitration could be seen as a way to curry favor in the other matter'. Id. at 1340. It is difficult to see how Naon and Astigarraga's participation in the same summer program would lead Naon to curry favor with Astigarraga by ruling in his party's favor. And Naon, the arbitrator, was the director of the summer program. As the party with the power to hire Astigarraga, Naon had no need to gain Astigarraga's favor through the ruling.

[27] "Naon and Astigarraga's contact through a professional organization in 2003, years before the arbitration began, does not warrant an evidentiary hearing under *University Commons*. See *University Commons*, 304 F.3d at 1340 (holding that the arbitrator and counsel's participation in the same arbitrations, mediations, and litigations before the arbitration began did not warrant an evidentiary hearing because 'familiarity due to confluent areas of expertise does not indicate bias').

[28] "And Naon and Astigarraga's formation of the Latin American Arbitration Association during the period of arbitration is not sufficiently similar to the contacts in *University Commons* to lead us to reverse the district court's decision. That professional contact does not give Naon a motive for using his decision to curry Astigarraga's favor."

780. United States District Court, Southern District of New York, 10 September 2012, 11 Civ. 8909 (DLC)

Parties:	Petitioner: Sonera Holding B.V. (Netherlands) Respondent: Çukurova Holding A.S. (Turkey)
Published in:	Available online at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv08909/388793/24>; U.S. Dist. LEXIS 128602
Articles:	III; V; V(1); V(1)(*b*); V(1)(*c*)
Subject matters:	– personal jurisdiction over foreign defendant – excess of authority of arbitrators (no) – incorporation of ICC arbitration rules evidence that arbitrability is to be decided by arbitrator – review of merits of award (no) – due process and failure to hear witness – due process and disregard of evidence – review of evaluation of evidence (no) – forum non conveniens
Topics:	[2] = ¶ 503; [4]-[11] + [23]-[40] = ¶ 301; [12]-[15] = ¶ 512 + ¶ 502; [16] = ¶ 508; [17]-[19] = ¶ 511 (failure to hear witness); [20]-[22] = ¶ 511 (disregard of evidence)

Summary

An ICC award rendered in Switzerland was granted enforcement. The court had personal jurisdiction over respondent, which was engaged in continuous and systematic business activity in New York. There was no excess of authority under the 1958 New York Convention: the arbitrators's finding that they had jurisdiction – because the arbitration, which had commenced on the basis of the clause in an agreement, could continue in respect of the parties' obligations under a further agreement which the arbitrators found had been concluded pursuant to the first agreement – deserved "great deference" as by agreeing on ICC arbitration the parties clearly and unmistakably expressed their intent to submit questions concerning the scope of the arbitration agreement ("arbitrability") to the arbitrators in the

first instance. Nor was there a violation of due process. Respondent did not show that it had been unable to defend itself because the arbitrators refused to hear a witness and disregarded expert evidence: in the circumstances of the case, the refusal to hear the witness was not improper, and the tribunal did not disregard the expert evidence but merely found it unconvincing. Finally, there was no ground for dismissal under the forum non conveniens doctrine: petitioner's purpose in its choice of forum was legitimate and there was no private or public interest tilting strongly in favor of dismissal. On the contrary, there was a strong national and local interest in favor of allowing the present proceeding to continue: the United States' interest in meeting its Convention obligations to facilitate enforcement of foreign arbitral awards, and New York's interest in promoting arbitration in New York.

On 25 March 2005, Sonera Holding B.V. (Sonera) and Çukurova Holding A.S. (Çukurova) signed a Letter Agreement under which they undertook to conclude a Final Purchase Agreement for the delivery of shares in Turkcell Holding AS – a joint stock corporation owning a controlling stake in Turkcell, the operator of the largest mobile telephone service in Turkey – by Çukurova to Sonera, provided the parties could reach an agreement on a Final Share Purchase Agreement. Sect. 5(4) of the Letter Agreement provided that disputes that could not be amicably resolved within two months would be referred to International Chamber of Commerce (ICC) arbitration in Switzerland:

> "Any dispute, controversy or claim arising out of or in connection with this Agreement … shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC Rules'), except as such ICC Rules may be modified below.
> (a) The place of arbitration shall be Geneva, Switzerland….
> ….
> (d) Any award of the arbitral tribunal shall be final and binding on the Parties. The Parties hereby waive any rights to appeal any arbitration award to, or seek determination of any question of law arising in the course of arbitration from, jurisdictional courts.
> (e) Any award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction of the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be."

A prospective share purchase agreement (the Draft Share Purchase Agreement – DSPA), detailing the terms of a future Final Share Purchase Agreement, was

attached to the Letter Agreement; it also contained a similar clause for ICC arbitration of disputes in Switzerland.

The parties disputed whether a Final Share Purchase Agreement came into existence on 9 May 2005. At any event, on 23 May 2005, Çukurova informed Sonera that it would not proceed with the transaction. On 27 May 2005, Sonera commenced ICC arbitration in Switzerland as provided for in the Letter Agreement. On 15 January 2007, the arbitral tribunal rendered a First Partial Award finding that it had jurisdiction and that a share purchase agreement had been validly reached between the parties on the basis of the DSPA; hence, Çukurova was required to deliver the Turkcell Holding AS shares to Sonera. When Çukurova failed to sell the shares to Sonera in compliance with the First Partial Award, the arbitration entered a second phase. On 29 July 2009, the ICC arbitral tribunal issued a Second Partial Award, ordering Çukurova to deliver the shares to Sonera and determining the shares' price.

By letter of 19 November 2009, Sonera informed the tribunal that it waived its claim for delivery of the shares and sought damages for non-delivery instead. On 1 September 2011, the arbitral tribunal issued a Final Award, directing Çukurova to pay Sonera US$ 932 million in damages for its failure to deliver the shares, with interest and costs. Acknowledging that it could not seek annulment in the Swiss courts because of the waiver in Sect. 5(4)(d) of the Letter Agreement, Çukurova commenced arbitration in Switzerland on 10 April 2012, seeking a refund of any amount to be paid pursuant to the Final Award. This proceeding was pending at the time of the present decision.

In turn, Sonera commenced enforcement proceedings in several jurisdictions: on 4 October 2011, it filed an application for enforcement in the British Virgin Islands; on 14 October 2011 in Switzerland and the Netherlands; and on 17 October 2011 in the Netherlands Antilles. The decision of the President of the Amsterdam Court of First Instance, granting enforcement, is reported in this Yearbook XXXVIII (2013) at pp. 434-437 (Netherlands no. 47). On 6 December 2011, Sonera filed the present application in the United States.

By the present decision, the United States District Court for the Southern District of New York, per Denise Cote, US DJ, granted enforcement of the Swiss award, dismissing Çukurova's objections of lack of personal jurisdiction; excess of authority and violation of due process under the 1958 New York Convention; and forum non conveniens.

The district court first held that it had personal jurisdiction over Çukurova, finding that Sonera met its burden to show that Çukurova and its affiliates were engaged in business activity in New York that was sufficiently continuous and systematic as to give rise to general jurisdiction.

The court then examined Çukurova's arguments under the New York Convention. Çukurova argued that the arbitrators exceeded their authority because they awarded damages to Sonera under the DSPA – which they found to be binding – in an arbitration commenced pursuant to the arbitration clause in the Letter Agreement. The court noted that this argument was already presented to the ICC arbitral tribunal, which concluded that it had jurisdiction. The court reasoned that it owes "great deference" to the arbitral tribunal's finding of its own jurisdiction where there is clear and unmistakable evidence of the parties' intent to submit questions concerning the scope of the arbitration agreement ("arbitrability") to the arbitrator in the first instance. This was the case here, as the parties agreed to arbitration under the ICC Rules, which provide that questions of arbitrability should be submitted to the arbitrators.

Çukurova's due process claims also failed. The court stated first that there is this ground for refusal only if the defendant proves that the award was rendered pursuant to procedures inconsistent with the forum state's standards of due process; this does not mean that the arbitrator did not follow "all the niceties observed by the federal courts" but rather that the defendant was denied the opportunity to defend itself in a meaningful manner. Neither of the alleged violations met this standard: the tribunal's refusal to hear the oral testimony of a witness was not improper in the circumstances of the case, and the tribunal did not overlook the evidence of Çukurova's expert in respect of the calculation of damages but rather decided that it was not convincing.

Finally, the district court denied Çukurova's argument that the doctrine of forum non conveniens required dismissal. This doctrine, which in the Second Circuit applies also to proceedings for the enforcement of an award, and which the court can apply at its own discretion, requires that the court determine the degree of deference to be accorded the plaintiff's choice of forum; whether the alternative forum proposed by the defendant is adequate; and whether the balance of private and public interests points strongly to the alternative forum. The court noted that great caution must be exercised when applying this doctrine in connection with the New York Convention, in light of the Convention's intent to strictly limit the grounds on which the courts of the Contracting States may disregard an arbitration provision or refuse to enforce an award.

In the present case, Sonera's choice of forum was undoubtedly entitled to deference, as its purpose to seek to enforce the Final Award against any Çukurova assets in the United States was legitimate; it was irrelevant that Sonera did not identify any such assets and that both parties were non-US entities. Çukurova's argument that Sonera merely sought to gain access to the broad discovery rights generally available in US courts was also unconvincing, since an

application to confirm an award is a summary proceeding that makes access to US discovery rules unnecessary.

As to the existence of an appropriate alternative forum, the parties did not dispute that enforcement proceedings could proceed and were in fact proceeding in multiple alternative fora, and that they could do so concurrently.

Last, the balance of private and public interests did not tilt so strongly in favor of dismissal as to overcome the presumption in favor of Sonera's choice of forum. The minimal need for witness testimony and other evidence in enforcement proceedings did not make their location in Turkey relevant, and the summary nature of such proceedings did not affect public interest factors such as court congestion or costs. On the contrary, noted the court, there was a strong national and local interest in allowing this proceeding to continue: the United States' interest in satisfying its Convention obligations by permitting enforcement of foreign arbitral awards "in the vast majority of cases", and New York's interest "in convincing the international business community of the benefits of selecting New York law and a New York forum".

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345072-n>.

Excerpt

[1] "[Sonera] seeks confirmation of a foreign arbitral award. [Çukurova] resists confirmation, citing the absence of personal jurisdiction, forum non conveniens, and irregularities in the Swiss arbitration. For the following reasons, the petition for confirmation is granted.
(….)
[2] "This petition for confirmation invokes the provisions of the [1958 New York Convention] as implemented by the Federal Arbitration Act (FAA), 9 U.S.C. Sect. 201 et seq. The FAA provides that a court confronted with a motion to confirm an arbitral award governed by the New York Convention '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'. 9 U.S.C. Sect. 207. 'The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies.' *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).[1] This is a heavy burden, as there is a strong public policy in favor of international arbitration. Id. Furthermore, the Court's review of arbitral awards pursuant to the Convention is 'very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation'. Id. (citation omitted).
[3] "Çukurova resists enforcement of the Final Award with three arguments. It contends that this Court lacks personal jurisdiction over it; that there are two grounds under the Convention that prevent enforcement of the Final Award; and that the petition should be denied under the doctrine of forum non conveniens."

I. PERSONAL JURISDICTION

[4] "Çukurova contends that there is no personal jurisdiction over Çukurova under either New York's long arm statute or pursuant to the Due Process Clause. To confirm a foreign arbitral award pursuant to the New York Convention, a court is required to have personal or quasi in rem jurisdiction over the parties. *Frontera Resources Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic*, 582 F.3d 393, 397 (2d Cir. 2009).[2] Because a petition to confirm an arbitral award is 'treated as akin to a motion for summary judgment', *D.H. Blair*

1. Reported in Yearbook XXX (2005) pp. 1136-1143 (US no. 520).
2. Reported in Yearbook XXXIV (2009) pp. 1186-1197 (US no. 679).

&*Co., Inc. v. Gottdiener*, 462 F.3d 95, 109 (2d Cir. 2006), Sonera must establish that the undisputed facts in the petition and the accompanying record support personal jurisdiction by a preponderance of the evidence. See *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

[5] "Under New York's long-arm statute, personal jurisdiction exists over a foreign corporation that is doing business in the state 'not occasionally or casually, but with a fair measure of permanence and continuity'. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (citation omitted); N.Y. C.P.L.R. 301 (codifying caselaw that incorporates 'doing business' standard). A fact-specific inquiry is necessary to determine whether a corporation's contacts with New York demonstrate 'continuous, permanent and substantial activity'. *Wiwa*, 226 F.3d at 95 (citing *Landoil Res. Corp. v. Alexander &Alexander Servs.*, 918 F.2d 1039, 1043 (2d Cir. 1990)). Because the requirements for personal jurisdiction under New York law are more restrictive than those under the federal constitution, satisfaction of the former necessarily entails satisfaction of the latter. See *D.H. Blair*, 462 F.3d at 105.

[6] "In assessing whether jurisdiction exists over a foreign corporation, courts have traditionally focused on 'whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests'. *Wiwa*, 226 F.3d at 98. The continuous presence and substantial activities that satisfy the requirement of doing business, however, 'do not necessarily need to be conducted by the foreign corporation itself'. Id. at 95. Personal jurisdiction may exist when a foreign corporation 'affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available'. Id. While the agent 'must be primarily employed by the defendant and not engaged in similar services for other clients', the agent need not be involved with 'the core' business of the foreign corporation. Id. at 95-96. In other words, its work must be 'of meaningful importance' to the defendant. Id. at 96. The choice of a New York office for an agent may reflect a desire 'to establish easy access to New York's rich market of potential customers'. Id. at 97. A listing on a New York stock exchange [is] insufficient to confer jurisdiction, but may be considered along with other contacts in determining jurisdiction. Id.

[7] "Sonera asserts in its amended petition that personal jurisdiction exists over Çukurova because (1) it gave contractual consent through its agreement that an

award may be enforced wherever a court has 'jurisdiction over the award'; and (2) it has engaged in a continuous and systematic course of business in New York. The commercial contacts on which Sonera relies include Çukurova's negotiations with two New York-based private equity funds regarding the sale of a portion of a television channel; Çukurova's SEC-registered secondary offering of approximately 64 million American Depository Shares (ADS) in Turkcell on the New York Stock Exchange, which began in 2006; Çukurova's sale of 90 million Turkcell shares to an underwriter for resale to foreign investors, including US investors; US activities of its subsidiary Turkcell, which Çukurova describes as its 'flagship in the telecommunications sector'; the US digital pay television services provided by Digiturk, a joint venture between Çukurova and US-based Providence Equity Partners; and the location on Park Avenue in Manhattan of two Çukurova affiliates: Baytur Insaat Taahhüt A.S. (Baytur), Çukurova's construction arm, and Equipment and Parts Export Inc. (EPE), which facilitates trade between US companies and Çukurova and describes itself as Çukurova's 'gateway to the Americas'.

[8] "Sonera has carried its burden of establishing that there is general jurisdiction over Çukurova in New York. Although Çukurova disputes Sonera's characterization of its business activities in certain respects, the undisputed evidence is clear that Çukurova and its affiliates are engaged in business activity in New York that is sufficiently continuous and systematic as to give rise to general jurisdiction under the state's long arm statute and the Due Process Clause.

[9] "In resisting personal jurisdiction, Çukurova argues chiefly that the US-based activities of Turkcell, Digiturk, EPE, and Baytur cannot be attributed to it, because these entities 'do not have the power to bind Çukurova and do not have an agency relationship with Çukurova'. As noted above, however, an agency relationship need not be formalized in order to give rise to personal jurisdiction under New York law. Rather, it is enough that the New York-based affiliate 'renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available'. *Wiwa*, 226 F.3d at 95.

[10] "That test is unquestionably met here. To take just one example, it is undisputed that EPE was founded by the Çukurova, describes itself as the 'gateway to the Americas for Çukurova Group', and devotes a substantial portion of its activities to distributing textiles produced by a Çukurova affiliate that EPE describes as its 'sister company'. Although Çukurova asserts that it owns only a single, nominal share in EPE, there is no indication in the record that EPE is

engaged in business on behalf of interests other than those of Çukurova. Nor does EPE's website identify any clients of the company other than Çukurova, which is itself featured prominently. It thus appears that EPE's primary function is to give Çukurova 'easy access to New York's rich market of potential customers'. Id. at 97. Moreover, the record plainly demonstrates that EPE's activities are sufficient to subject it to jurisdiction in New York; Çukurova does not argue otherwise. Thus, there can be no question, in light of the close affiliation just described, that Çukurova is subject to jurisdiction in the state as well.

[11] "This conclusion is only reinforced by the other activities identified by Sonera in its petition. Although, Çukurova argues that many of the activities cited by Sonera are by themselves insufficient to support the exercise of personal jurisdiction, taken together they do reflect the continuous use of New York as the forum for Çukurova to conduct its substantial business with the United States. That is all that is required to give rise to personal jurisdiction under New York law and the Due Process Clause."

II. GROUNDS FOR REFUSAL

[12] "Çukurova argues that the Final Award should not be enforced on two separate grounds. First, Çukurova contends that the arbitrators exceeded the powers granted by the Agreement, in violation of Art. (V)(1)(*c*) of the Convention, by imposing obligations that fall outside of the Agreement. Second, the panel refused to hear live testimony of Çukurova's only witness to the parties' negotiations, in violation of Art. (V)(1)(*b*) of the Convention."

1. Excess of Authority

[13] "First, Çukurova argues that the tribunal exceeded its authority when it awarded damages to Sonera for Çukurova's non-delivery of shares in Turkcell. Çukurova contends that any damage award could only be ordered pursuant to an arbitration conducted pursuant to the parties' draft share purchase agreement or DSPA and not pursuant to the Agreement. This dispute was presented to the tribunal, which concluded that it had jurisdiction to decide Sonera's claim for delivery of shares and related damages 'even though [it had] been formed under the arbitration clause of the Letter Agreement and the claims for delivery of the Shares arise out of the [D]SPA'.

[14] "Çukurova's effort to re-litigate the issue of the tribunal's authority under the Agreement is misplaced. 'Although the [New York] Convention recognizes

that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement.' *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012)[3] (citation omitted). Cukurova's assertion that the tribunal lacked jurisdiction to award damages is a claim regarding the scope of arbitrability. Where there is 'clear and unmistakable evidence' of the parties' intent to submit such questions to the arbitrator in the first instance, the district court owes great deference to the tribunal's determination of its own jurisdiction. Id. at *4-5.

[15] "Here there is such evidence, in the form of the parties' agreement to arbitrate pursuant to the rules of the International Chamber of Commerce, which provide, inter alia, that questions of arbitrability should be submitted to the ICA, the arbitral body of the ICC. See *Shaw Group Inc. v. Triplefine Intern. Corp.*, 322 F.3d 115, 122 (2d Cir. 2003). Given this deferential posture, there is no error in the tribunal's conclusion that, in committing to arbitrate '[a]ny dispute, controversy or claim arising out of or in connection with [the] Agreement', the parties agreed that an arbitration commenced under the Agreement would be empowered to award damages of the type imposed by the tribunal here."

2. Due Process

[16] "Next, Çukurova contends that [it] was denied an opportunity to present its case by two separate evidentiary rulings of the tribunal.[4] Under Art. V(1)(*b*) of the Convention, an exception to enforcement arises where '[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case'. As interpreted by the Second Circuit, a party seeking to avoid confirmation of an arbitral award on the basis of Art. V(1)(*b*) must demonstrate that the award was rendered pursuant to procedures inconsistent with the forum state's standards of due process. *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).[5] Accordingly, to succeed on this defense, it is not enough for Çukurova to show that '[i]n handling evidence [the] arbitrator [did] not follow all the niceties observed by the federal courts'. *Bell Aerospace Co. Div. of Textron, Inc.*

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3. Reported in Yearbook XXXVII (2012) pp. 417-419 (US no. 777).
4. "Çukurova mentions a third error in a footnote, but the Court will not address it here. It is well settled, that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived'. *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001)."
5. Reported in Yearbook XVIII (1993) pp. 596-605 (US no. 143).

v. International Union, United Auto., etc., 500 F.2d 921, 923 (2d Cir. 1974). Rather, Çukurova must establish that it was denied 'an opportunity to be heard at a meaningful time and in a meaningful manner'. *Iran Aircraft*, 980 F.2d at 146 (citation omitted). Neither of the evidentiary rulings challenged by Çukurova rises to the level of a due process violation."

a. Refusal to hear oral testimony

[17] "First, Çukurova complains that the tribunal refused to permit Mr. Osman Berkmen, an advisor to [Çukurova's] chairman, to testify. The issue over Berkmen's testimony arose as follows. In November 2005, the tribunal scheduled an evidentiary hearing for 1 and 2 February 2006. On 5 January 2006, Çukurova informed the tribunal that Berkmen could not attend because of a scheduled surgery. It submitted a detailed witness statement from Berkmen dated 11 January, but did not request an adjournment of the hearing. At the close of the 2 February hearing, the tribunal requested post-hearing briefs and asked Çukurova to identify 'those points of fact on which they consider the testimony of [Berkmen] decisive for their case'. The tribunal noted that it would thereafter determine whether 'an additional hearing is necessary' for Berkmen's testimony. After considering the post-hearing briefs, the tribunal concluded in writing that 'it was not necessary for it to hear' Berkmen in person.

[18] "The parties had submitted written witness statements from not only Berkmen but also Sonera CEO Anders Igel regarding a telephone conversation of 9 May 2005 in which they discussed the terms of the DSPA. Igel testified during the February session, as did Çukurova's Mehmet Karamehmet. According to Çukurova, if Berkmen had been permitted to testify, he would have explained that he was not familiar with the DSPA and had no authority to bind Çukurova. In its decision 15 October 2007, the tribunal wrote that it had assumed that 'Berkmen's written testimony was correct and that, when appearing for testimony in person, he would confirm the explanations in his witness statement'. It also assumed that any personal testimony from Berkmen would 'have confirmed' Çukurova's 'factual allegations … in this context'.

[19] "Çukurova has not shown that the tribunal acted improperly in refusing to reopen the hearing to permit Berkmen to testify in person. Çukurova did not seek an adjournment of the hearing when it learned that Berkmen would be unavailable. Çukurova was permitted to present Berkmen's testimony in written form and the tribunal accepted it as truthful. Çukurova has not shown any violation of its rights or impropriety by the tribunal."

b. Evidence overlooked

[20] "The second alleged error by the tribunal concerns the calculation of damages. Çukurova contends that the tribunal overlooked evidence from its damages expert Christopher Osborne regarding the illiquidity discount rate. The tribunal observed that Sonera's expert Professor Lind

> 'explained in detail the range that is discussed in the literature, in some cases from 13 percent to 45 percent. He has explained why he considered the 20 percent as the proper rate. Mr. Osborne has not provided an alternative rate and the Tribunal sees no reason for picking a rate different from that proposed by Professor Lind. It accepts this percentage.'

[21] "Osborne had testified on 13 and 14 September 2010, and opined inter alia that a discount rate of 'no more than 10' percent was appropriate.
[22] "This complaint by Çukurova fails as well. The tribunal's decision is best understood as a comment on the quality of the expert opinion testimony given by Osborne rather than any oversight. The tribunal was fully aware of Osborne's evidence; it referred to him by name. In its view, however, Osborne failed to provide a persuasive, 'detail[ed]' explanation for choosing a rate other than that presented by Lind."

III. FORUM NON CONVENIENS

[23] "Finally, in opposing the petition, Çukurova places particular emphasis on its argument that the doctrine of forum non conveniens requires dismissal. Within the Second Circuit, the doctrine does apply to proceedings to confirm an arbitration and enforce its award. See, e.g., *Figueiredo v. Republic of Peru*, 665 F.3d 384, 389 (2d Cir. 2011).[6] But see, id. at 396-399 and 396 n. 1 (Lynch, J., dissenting).
[24] "The framework for analyzing a forum non conveniens motion is well established. 'The decision to dismiss a case on forum non conveniens grounds lies wholly within the broad discretion of the district court', I*ragorri v. United Technologies Corporation*, 274 F.3d 65, 72-76 (2d Cir. 2001) (en banc), although that discretion is guided by a familiar three-step framework.
[25] "The district court first determines 'the degree of deference properly accorded the plaintiff's choice of forum'. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005). Although there is 'a strong presumption in

6. Reported in Yearbook XXXVII (2012) pp. 346-349 (US no. 756).

favor of the plaintiff's choice of forum', *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), the appropriate degree of deference 'moves on a sliding scale' and is correlated with the 'degree of convenience' that the choice reflects. Id. at 154 (citation omitted). 'The more it appears that a … plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice.' Id. (citation omitted). Conversely, the more that a plaintiff's choice of a United States forum appears motivated by forum shopping, the less deference that choice commands. Id.

[26] "At the second step of the forum non conveniens analysis, the district court 'considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute'. Id. at 153. A forum is generally adequate if the defendant is amenable to service of process there, but it may be inadequate if the remedy it offers 'is clearly unsatisfactory', such as where the alternative forum 'does not permit litigation of the subject matter in dispute'. *Piper*, 454 U.S. at 254 n. 22. The alternative forum is not inadequate simply because it does not afford plaintiffs the identical causes of action or relief available in the plaintiffs' chosen forum. *Norex*, 416 F.3d at 158.

[27] "Finally, at step three, the court 'balances the private and public interests implicated in the choice of forum'. Id. at 153. Even if the plaintiff's choice of forum is entitled to little difference and there is an adequate alternative forum, dismissal is not appropriate unless the court concludes that the balance of public and private interest factors 'tilts strongly in favor' of the alternative forum. *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998). Private interest factors include:

> 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive'.

Iragorri, 274 F.3d at 73-74 (citation omitted). Among public interest factors, the court may consider: the administrative inefficiency in trying a case in a busy court and away from the locus of the injury; the burden that jury duty may impose on the community if the case is tried in a venue with no connection to the issues in dispute; a community's interest in having a local case decided at home; and the benefits to having a matter tried in the forum whose law will govern the case. Id. at 74.

[28] "Çukurova has not shown that this Court should exercise its discretion to dismiss this petition through application of the doctrine of forum non conveniens. Most of its arguments have little force or are inapposite to a proceeding to confirm an arbitration award.

[29] "As recently noted by the Honorable Gerard E. Lynch in his dissent, 'because arbitrators have no power to enforce their judgments, international arbitration is viable only if the awards issued by arbitrators can be easily reduced to judgment in one country or another and thereby enforced against the assets of the losing party'. *Figueiredo*, 665 F.3d at 395. To strengthen international commerce and, indeed, to enable businesses to enter into international commercial agreements, the drafters of the New York Convention crafted a 'document that would carefully circumscribe the bases on which the courts of a signatory nation could disregard an arbitration provision or refuse to enforce an arbitral award'. Id. at 396. Given this backdrop, before dismissing a petition based on a forum non conveniens argument, a court should be alert to the context in which such an application is made. Arguments that may have some weight or even considerable weight in the context of a lawsuit in which the merits of a claim will be decided may have limited appeal when the context is the enforcement of an arbitration award governed by the New York Convention.

[30] "As concerns the first step of the forum non conveniens analysis, Sonera's choice of forum is undoubtedly entitled to deference. Sonera seeks to enforce the Final Award against any Çukurova assets that may be found in the United States. This is an entirely legitimate purpose. The New York Convention and the FAA sanction the use of this forum for that very purpose.

[31] "In opposing confirmation, Çukurova notes that Sonera has identified no assets in the United States against which it might seek to enforce the Final Award, that both parties to the arbitration are non-US entities, and that there is no relevant evidence in this country. Çukurova therefore concludes that in seeking confirmation here, Sonera hopes to gain access to the broad discovery rights generally available in American courts.

[32] "But the fact that it has not identified US assets belonging to Çukurova does not establish that Sonera lacks a good-faith basis for seeking enforcement here. Çukurova may acquire property in the United States in the future; if that occurs, 'having a judgment in hand', as opposed to merely an arbitral award, 'will expedite the process of attachment'. *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303, 366 U.S. App. D.C. 320 (D.C. Cir. 2005).[7]

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7. Reported in Yearbook XXX (2005) pp. 1179-1192 (US no. 525).

[33] "Nor are the nationalities of the parties of much relevance in the particular context of a proceeding to confirm an arbitral award. As already discussed, the New York Convention and the FAA were both intended to encourage international commerce and to make an American forum as hospitable to enforcement of foreign arbitral awards as we hope foreign venues will be to enforcement proceedings begun by American businesses. Consequently, it would be contrary to American law to find that the motives of Sonera can be impugned when it seeks to enforce an international arbitral award simply because it is a foreign company.

[34] "Çukurova's third argument in this regard – that the absence of evidence in the United States suggests impermissible motives on the part of the petitioner – is likewise unconvincing. Because this is an application to confirm an arbitration award, the absence of witnesses and documents concerning the merits of the parties' claims is irrelevant. Similarly, a confirmation proceeding is intended to be a summary proceeding, making access to American discovery rules unnecessary. Neither of these reasons, therefore, suggests that Sonera's choice of forum is entitled to reduced deference.

[35] "The second step of the analysis does not weigh significantly in favor of or against dismissal. The parties agree that there are multiple alternative fora in which enforcement proceedings could proceed. These include each of the countries in which Sonera has already commenced enforcement proceedings and Turkey. But the parties also agree that enforcement proceedings may properly be brought concurrently in multiple venues.

[36] "The relevant question is thus whether the balance of private and public interest factors 'tilts [so] strongly in favor' of dismissal as to overcome the presumption in favor of the plaintiff's choice of forum. See *PT United Can Co.*, 138 F.3d at 74.

[37] "The private interests that should be considered in connection with the forum non conveniens doctrine do not suggest that this petition should be dismissed. In this summary proceeding, the parties may present their arguments for and against confirmation on paper without resort to either discovery or the presentation of evidence in open court. Again, in its discussion of the private interests that are at stake, Çukurova ignores the nature of a confirmation proceeding. It argues that such private interests as the existence of 'potential witnesses and evidence … some 5,000 miles away' make litigation in New York inconvenient. While the location of witnesses and evidence would be relevant to the conduct of a trial on the merits, it is not germane to a confirmation proceeding.

[38] "The public interest factors likewise point in favor of this forum. This proceeding will have no impact on issues of court congestion. There is no need for a jury trial or any other imposition on the citizenry of New York. It is unnecessary for this Court to apply foreign law in adjudicating this confirmation petition. Finally, there are strong national and local interests in allowing this confirmation proceeding to go forward in this jurisdiction. The United States undoubtedly has a strong interest in satisfying its treaty obligations by permitting confirmation and enforcement of foreign arbitral awards 'in the vast majority of cases'. *Figueiredo*, 665 F.3d at 394 (Lynch, J., dissenting). And New York has a particular interest in convincing the international business community of the benefits of selecting New York law and a New York forum in order to ensure fairness and predictability in their commercial relationships. Indeed, the Honorable Judith Kaye, formerly Chief Judge of the State of New York, recently spearheaded a task force under the auspices of the New York State Bar Association whose mission was precisely that. See Final Report of the New York State Bar Association's Task Force on New York Law in International Matters (25 June 2011), available at <www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentFileID=53613>.

[39] "In its discussion of the public interest factors, Çukurova largely relies on Turkey's significant interest in a dispute regarding a major Turkish telecommunications provider and the existence of Çukurova assets in Turkey. While it is undeniable that Turkey has a strong interest in this dispute, it is noteworthy that Çukurova executed an agreement that provided for international arbitration in Switzerland with no appeal rights. That agreement further provided that enforcement of the arbitration award could proceed 'in any court having jurisdiction over the award.... Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be.'

[40] "This Court has jurisdiction over the Final Award, and Çukurova does not suggest otherwise. Çukurova having executed an agreement that provided for foreign arbitration and foreign enforcement of any arbitral award, it is difficult to find that Turkey's interest in its telecommunications industry should trump any of the other public policy interests that support foreign enforcement of foreign arbitral awards."

IV. CONCLUSION

[41] "Sonera's 6 December 2011 petition to confirm the Final Award is granted…."

781. United States Court of Appeals, Eighth Circuit, 19 September 2012, Nos. 12-1065, 12-1067, 12-1079, 12-1080, 12-1081, 12-1084, 12-1086, 12-1087, 12-1088, 12-1092, 12-1095

Parties:	Plaintiffs/Appellees: Sr. Kate Reid, et al. (Peru) Defendants/Appellants: (1) Doe Run Resources Corporation (US); (2) D.R. Acquisition Corp. (US); (3) Marvin K. Kaiser (nationality not indicated); (4) Albert Bruce Neil (nationality not indicated); (5) Jeffrey L. Zelms (nationality not indicated); (6) Theodore P. Fox, III (nationality not indicated); (7) Daniel L. Vornberg (nationality not indicated); (8) The Renco Group, Inc. (US); (9) Renco Holdings, Inc. (US); (10) Ira L. Rennert (nationality not indicated)
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Topics:	¶ 217

Summary

The Court of Appeals confirmed the district court's decision that an action brought by Peruvian children against US investors in a Peruvian metallurgical smelting and refining complex alleging injuries due to exposure to toxic substances should not be stayed pending a related arbitration against Peru in which the investors sought to be indemnified for any

damages. The court held that it had jurisdiction because the matters "related to" an arbitration falling under the 1958 New York Convention. The lower court correctly denied a mandatory stay pending arbitration because the matters of the action were not "referable to arbitration" within the meaning of Sect. 3 Federal Arbitration Act, made applicable by Sect. 208 FAA to Convention cases: the children were not signatories to the arbitration agreement and had not relied on the investors' contract. An estoppel theory did not mandate a stay as there were differing allegations in the children's lawsuit claims and the investors' claims in the arbitration. The children's claims related to negligence, conspiracy and liability, whereas the issue in the arbitration was whether Peru had breached its duty to defend and indemnify. The court had no appellate jurisdiction over the denial of a discretionary stay claim because that order was neither a final judgment nor an interlocutory order.

The facts of this case are also reported in Yearbook XXXVI (2011) at pp. 478-481 (US no. 744) and Yearbook XXXVII (2012) at pp. 342-345 (US no. 755).

In 1974, the Peruvian Government expropriated the La Oroya Complex of smelters and refineries and transferred ownership and operations to Centromin, a state-owned company. When significant pollution was found in the area, legislation was adopted requiring Centromin to complete certain environmental projects by 2007. In 1997, US investors purchased the La Oroya Complex pursuant to a Stock Transfer Agreement (STA). Centromin agreed to continue some environmental cleanup and to assume liability for any claims by third parties arising from the Complex's toxin emissions released before the sale. Peru guaranteed Centromin's agreements in a separate Guaranty. The US investors agreed to continue some clean-up efforts and to be responsible to third parties for any damages they alone caused.

In 2007, and again in 2008, a group of Peruvian children who alleged that they were injured by exposure to toxic substances released by the Complex sued in Missouri state court through their next friends, Sisters Kate Reid and Megan Heeney, bringing tort claims against the US investors: Doe Run Resources Corporation, its associate The Renco Group, Inc. (Renco), related companies and executives at those companies (collectively, Doe Run). Doe Run attempted several times unsuccessfully to remove the cases to federal court. They also attempted to get Peru to enter into the case and defend them against the plaintiffs' claims. When this failed, Renco notified Peru of its intent to arbitrate pursuant to the United States-Peru Trade Promotion Agreement of 12 April 2006. On 29 December 2010, Renco submitted its claim against Peru to arbitration, seeking to compel Peru to step in and defend claims against Renco; indemnify, release and hold Renco harmless in third-party actions; and remediate the land near the Complex.

On 7 January 2011, Doe Run removed the case to federal court on the basis of Sect. 205 of the Federal Arbitration Act (FAA), asserting that the children's claims were related to the pending arbitration and thus removable under the 1958 New York Convention.

In a decision of 22 June 2011, the United States District Court for the Eastern District of Missouri, Eastern Division, denied the plaintiffs' motion to remand to state court. The Court noted that Sect. 205 FAA allows removal of actions whose subject matter – as in the present case – "relates to an arbitration agreement or award falling under" the 1958 New York Convention. This decision is reported in Yearbook XXXVI (2011) pp. 478-481 (US no. 744). Doe Run then moved to stay the proceedings in the district court under the FAA, pending the completion of the arbitration, basing their motion on (1) Sect. 3 FAA mandating a stay when the issues are "referable to arbitration"; and (2) the district court's discretionary authority over its own docket. In a decision of 7 December 2011, the district court denied the motion to stay the proceedings pending the arbitration as the issues were not referable to arbitration as provided by Sect. 3 FAA: in the arbitration with Peru, defendants were seeking a declaration that Peru was required to appear in the lawsuits and to indemnify the defendants from third-party claims, while the plaintiffs' claims in the US courts related to specific actions taken by the defendants causing particular damages. The court also declined to grant a stay as a discretionary matter, reasoning that the risk of inconsistent rulings was low because the issues were separate and distinct; the plaintiffs would not be bound by the outcome of the arbitration; and the possible prejudice that might result weighed in favor of allowing the proceedings to go forward because otherwise the plaintiffs' claims would remain unaddressed for a potentially very lengthy period. By a second decision of 14 March 2012, the district court granted a stay of the case pending appeal by the defendants of the decision of 7 December 2011, reasoning that it was an appropriate exercise of its discretion under the court's inherent power to control its trial docket. Both decisions are reported in Yearbook XXXVII (2012) pp. 342-345, first and second decisions (US no. 755). Two successive stays were granted on 1 October 2012 and 5 October 2012.

By the present decision, the United States Court of Appeals for the Eighth Circuit, before Melloy and Benton, CJJ, and Baker, DJ, in an opinion by Benton, affirmed the district court's decision denying the motions for a mandatory and discretionary stay pending the outcome of the arbitration.

The Court of Appeals first rejected the objection by the plaintiffs that it lacked subject-matter jurisdiction; though the district court had already held that it had jurisdiction under the 1958 New York Convention, courts must independently determine, at any stage of the litigation, whether they have jurisdiction. Sect.

205 FAA allows for removal where the subject matter of an action or proceeding relates to an agreement falling under the 1958 New York Convention. This was the case here. The Court interpreted the phrase "relates to" broadly in line with decisions of the Fifth and Ninth Circuits, finding that the arbitration could conceivably affect the outcome of the case.

The Court then found that it did not have appellate jurisdiction of the discretionary stay claim under Sect. 16(a)(1) FAA which grants appellate jurisdiction over specific orders, as the district court's order denying the discretionary stay was neither a final judgment nor an interlocutory order. Nor could the Court exercise pendant jurisdiction over the discretionary-stay claim. Pendant appellate jurisdiction is appropriate only in exceptional circumstances where the claims are inextricably intertwined. Here, the resolution of the direct claim would not necessarily resolve the pendant claim.

The Court of Appeals reviewed de novo the motion for a mandatory stay pending the outcome of the arbitration under Sect. 3 FAA, made applicable to the Convention by Sect. 208 FAA (this motion had already been denied by the district court). The Court rejected defendants' argument that the estoppel theory mandated a stay because the children had relied on and benefitted from the STA. The court noted that the children were non-signatories to the arbitration agreement and had not benefitted from the STA. They did not invoke the STA anywhere in their complaint and only referenced it for the limited purpose of objecting to jurisdiction and to refute defendants' contention that it retained no liability due to the STA. The issues in the case – which related to negligence, conspiracy and liability – were not referable to arbitration and the district court had properly denied a mandatory stay.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345073-n>.

Excerpt

I. JURISDICTION

[1] "The children object to subject matter jurisdiction. This court must independently determine, at any stage of the litigation, whether it has jurisdiction. *Hertz Corp. v. Friend*, _ U.S. _ , 130 S.Ct. 1181, 1193, 175 L.Ed.2d 1029 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), citing Fed.R.Civ.P. 12(h)(3). The children also argue that this court does not have pendent appellate jurisdiction over the discretionary-stay claim."

1. Subject Matter Jurisdiction

[2] "The parties agree that the arbitration agreement falls under the [1958 New York Convention]. Doe Run removed this case under the Convention, which allows for removal '[w]here the subject matter of an action or proceeding … relates to an arbitration agreement or award falling under the Convention'. 9 U.S.C. Sect. 205. The children contend that this suit does not 'relate to' the arbitration.

[3] "The removal right in Sect. 205 is 'substantially broader' than that in the general removal statute. *Ensco Int'l, Inc. v. Certain Underwriters at Lloyd's*, 579 F.3d 442, 451 (5th Cir. 2009).[1] This court has not interpreted 'relates to' in Sect. 205; only the Fifth and Ninth Circuits have done so. The Fifth Circuit held that an arbitration relates to a plaintiff's suit when the arbitration 'could *conceivably* affect the outcome of the plaintiff's case'. *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002).[2] The Ninth Circuit agreed, noting that '[t]he phrase "relates to" is plainly broad, and has been interpreted to convey sweeping removal jurisdiction in analogous statutes'. *Infuturia Global Ltd. v. Sequus Pharms., Inc.*, 631 F.3d 1133, 1138 (9th Cir. 2011). The Fifth Circuit further expanded its definition to include cases having some 'connection', 'relation', or 'reference' to the arbitration clause. *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 378-379 (5th Cir. 2006).[3]

[4] "In other contexts, this court has embraced the broad nature of 'relates to' language. See, e.g., *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007),

1. Reported in Yearbook XXXIV (2009) pp. 1163-1173 (US no. 677).
2. Reported in Yearbook XXVII (2002) pp. 909-921 (US no. 398).
3. Reported in Yearbook XXXI (2006) pp. 1494-1502 (US no. 579).

quoting *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ('The phrase "relating to" carries a "broad" "ordinary meaning", i.e., "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with…."'); *Estes v. Fed. Express Corp.*, 417 F.3d 870, 872 (8th Cir. 2005) ('Estes's state law claims are preempted if the claims "relate to" an employee benefit plan, 29 U.S.C. Sect. 1144(a), such that they [1] ha[ve] a connection with or [2] reference to such a plan.' (alterations in original) (internal quotation marks omitted)); *Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc.*, 810 F.3d 782, 786 (8th Cir. 1987) ('For a proceeding to be "related to" a bankruptcy case for purposes of bankruptcy jurisdiction, courts require that it have some effect on the administration of the debtor's estate.'(internal quotation marks omitted)).

[5] "Joining the Fifth and Ninth Circuits, this court holds that a case may be removed under Sect. 205 if the arbitration could conceivably affect the outcome of the case. Here, the issues in the arbitration could conceivably affect the outcome of this case. As the district court noted, the outcome of the arbitration could impact disputes at issue in this case, such as whether the pollution occurred when the defendants owned the facility, and whether the pollution caused children's injuries. Also, depending on the outcome of the arbitration, Peru might be a party in this case.[4] While the children contend that the cases are completely independent and unrelated, either party could conceivably inject portions of the arbitration into this case. For example, if the arbitration panel found Renco completely liable for all environmental damage and injuries, the children could conceivably introduce that finding.

[6] "The children assert that no federal jurisdiction exists because the arbitration panel's ruling will not have preclusive effect and is only a tangential focus of this case. Their only support is *In re Conoco EDC Litigation*, 123 F.Supp.2d 340, 341-342 (W.D. La. 2000),[5] a district court case decided before *Beiser* and *Infuturia* (and is probably superceded by *Beiser*). At any rate, no circuit has required that an arbitration be preclusive in order for jurisdiction to be proper under Sect. 205. This case was properly removed under Sect. 205."

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4. "The children correctly note that they cannot be forced to sue Peru regardless of the outcome of the arbitration. As they were not a party to the arbitration, they are not bound by its outcome. See *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379-2381, 180 L.Ed.2d 341 (2011); *Taylor v. Sturgell*, 553 U.S. 880, 898-901, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008). Even if Peru is brought into the suit through third-party practice, however, that conceivably affects the outcome of this case. See Fed.R.Civ.P. 14(a)."

5. Reported in Yearbook XXVI (2001) pp. 1027-1032 (US no. 350).

2. *Jurisdiction of the Discretionary-Stay Claim*

[7] "The children argue that this court does not have appellate jurisdiction of the discretionary-stay claim. The order denying the discretionary stay is neither a final judgment, nor an interlocutory order subject to appeal. 28 U.S.C. Sect. 1291; 28 U.S.C. Sect. 1292(a). Doe Run asserts jurisdiction under 9 U.S.C. Sect. 16(a)(1), because this order 'frustrate[s] attempts to resolve disputes through arbitration'. See *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 (1st Cir. 2008).[6] That assertion, however, ignores the plain language of the statute, which grants appellate jurisdiction over specific orders. 9 U.S.C. Sect. 16(a)(1).[7] Additionally, *Sourcing Unlimited* analyzes jurisdiction in the context of a specific order under 9 U.S.C. Sect. 16(a)(1)(C). 526 F.3d at 44.

[8] "'Pendent appellate jurisdiction is appropriate only in exceptional circumstances.' *Lockridge v. Bd. of Trs. of Univ. of Ark.*, 315 F.3d 1005, 1012 (8th Cir. 2003) (en banc) (citations omitted) (internal quotation marks omitted). This court has pendent appellate jurisdiction over claims that are 'inextricably intertwined' with claims over which this court has appellate jurisdiction. Id. Claims are inextricably intertwined when resolution of the direct claim 'necessarily resolves' the pendent claim. Id.

[9] "The issues here are not inextricably intertwined. The question on the mandatory stay is whether the issues in this case are 'referable to' arbitration. 9 U.S.C. Sect. 3. To evaluate a discretionary stay pending arbitration, courts weigh three factors: (1) the risk of inconsistent rulings; (2) the extent to which the parties will be bound by the arbiters' decision; and (3) the prejudice that may result from delays. *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 242 F.3d 777, 783 (8th Cir. 2001). Whether the issues in this case are 'referable to' arbitration may relate to the *AgGrow* factors, but the determination does not 'necessarily resolve' the discretionary-stay claim.

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6. Yearbook XXXIII (2008) pp. 1163-1171 (US no. 643).
7. 9 U.S.C. Sect. 16(a)(1) reads in relevant part:

> "(a) An appeal may be taken from—
> (1) an order—
> (A) refusing a stay of any action under section 3 of this title,
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
> (C) denying an application under section 206 of this title to compel arbitration,
> (D) confirming or denying confirmation of an award or partial award, or
> (E) modifying, correcting, or vacating an award…."

[10] "Doe Run argues that this court previously exercised pendent appellate jurisdiction over a permissive motion to intervene when appellate jurisdiction over a mandatory motion to intervene was present. See *ACLU of Minn. v. Tarek Ibn Ziyad Acad.*, 643 F.3d 1088, 1092 n. 2 (8th Cir. 2011). In *Ziyad*, however, this court did not analyze whether the claims were inextricably intertwined, but relied on this court's *Barnett* opinion. Id., citing *South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 785 n. 2 (8th Cir. 2003). Similarly in *Barnett*, this court did not analyze whether the claims were inextricably intertwined, but relied on an opinion from this court that does not discuss pendant appellate jurisdiction, and an opinion from the D.C. Circuit. *Barnett*, 317 F.3d at 785 n. 2, citing *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999) and *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31, 342 U.S.App.D.C. 26 (D.C. Cir. 2000). In the D.C. Circuit's opinion, the court determined that the motions were inextricably intertwined because the 'basis' for the motions was the same – a standard much different than this court's 'necessarily resolves' standard. See *In re Vitamins*, 215 F.3d at 31. Moreover, this line of cases considers permissive interventions and not discretionary stays.

[11] "For this court to exercise pendent appellate jurisdiction, the prerequisite is clear: the resolution of the direct claim must necessarily resolve the pendent claim. *Lockridge*, 315 F.3d at 1012. Here, the resolution of the mandatory-stay claim does not necessarily resolve the discretionary-stay claim. This court may not exercise pendent appellate jurisdiction over the discretionary-stay claim."

II. MANDATORY STAY PENDING OUTCOME OF ARBITRATION

[12] "Doe Run argues that the district court erred by denying its motion for a mandatory stay pending the outcome of the arbitration. A district court's denial of a motion to stay pending arbitration under 9 U.S.C. Sect. 3 is reviewed de novo. *Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc.*, 516 F.3d 695, 698 (8th Cir. 2008). There is strong policy favoring arbitration, and doubts are resolved in favor of arbitration. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-639, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985);[8] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

[13] "The Federal Arbitration Act requires a district court to issue a stay if an issue in the case is 'referable' to arbitration. 9 U.S.C. Sect. 3, made applicable

8. Reported in Yearbook XI (1986) pp. 555-566 (US no. 59).

to the Convention by 9 U.S.C. Sect. 208. The children are nonsignatories to the arbitration agreement, but claims made by nonsignatories can be subject to a stay under 9 U.S.C. Sect. 3. *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 732 (8th Cir. 2009).

[14] "In this case, Doe Run is seeking a stay, not an arbitration with the children.[9] Doe Run therefore believes that the court should be more inclined to grant the stay due to the strong policy favoring arbitration. See *Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 347 (5th Cir. 2002). 'Section 3 of the Arbitration Act … is broad enough to permit the stay of litigation between nonarbitrating parties as long as that lawsuit is based on issues referable to arbitration under an arbitration agreement governed by the Arbitration Act.' *Contracting Nw., Inc. v. City of Fredericksburg, Iowa*, 713 F.2d 382, 387 (8th Cir. 1983).

[15] "A nonsignatory attempting to bind a signatory to an arbitration agreement is distinct from a signatory attempting to bind a nonsignatory. *Nitro Distrib., Inc. v. Alticor, Inc.*, 453 F.3d 995, 999 (8th Cir. 2006). '[A] willing signatory seeking to arbitrate with a non-signatory that is unwilling must establish at least one of the five theories described in *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)' *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005), quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131-132 (2d Cir. 2003). Those five theories are (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *Thomson-CSF*, 64 F.3d at 776.

[16] "Doe Run primarily argues that an estoppel theory mandates a stay. State contract law determines which claims are enforceable under Sect. 3. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-631, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). Missouri recognizes an estoppel theory where the party must directly benefit from the contract. *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 348 (Mo. banc 2006).

[17] "Nonsignatories can be bound to an arbitration agreement when they directly benefit from the agreement. *Thomson-CSF*, 64 F.3d at 776. The Fifth Circuit calls this 'direct benefits estoppel' – a party can become bound to an agreement '(1) by knowingly seeking and obtaining "direct benefits" from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract'. *Noble Drilling Servs. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010). 'Direct benefits estoppel applies when a nonsignatory knowingly exploits the agreement

9. "Even so, both parties discuss the leading cases seeking to compel arbitration as guidance for when an arbitration agreement will implicate a nonsignatory."

containing the arbitration clause.' *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361-362 (5th Cir. 2003) (citation omitted) (internal quotation marks omitted). The children are not direct beneficiaries of the terms of the agreement, but Doe Run argues that they benefitted from the agreement by invoking its terms throughout this case. The claims are so similar, Doe Run says, that they are 'based upon the same operative facts' and are 'inherently inseparable' from the claims in the arbitration. *Hill*, 282 F.3d at 347.

[18] "According to Doe Run, the children's references to the STA throughout this case demonstrate their reliance on and benefit from the agreement. As the children and the district court properly noted, however, the children do not invoke the STA anywhere in their complaint. Moreover, the children referenced the STA for two limited purposes: to object to jurisdiction because their claims did not 'relate to' the agreement; and to refute Doe Run's contention that it retained no liability due to the STA. The jurisdictional basis shows an attempt to *avoid* the agreement, not to benefit from it. The second purpose was to demonstrate that a case existed against the named defendants, and as discussed below, did not result in the same claims being argued before two tribunals.[10]

[19] "Renco's arbitration seeks an order requiring Peru to, inter alia, step in and defend the claims against Renco; indemnify, release, and hold Renco harmless in third-party actions; and require Peru to remediate the land near the facility. Renco claims that Peru must indemnify it as to 'nearly all claims by third parties'. For Renco to have any liability, it believes that three preconditions must be met: (1) the third party's damages must have been exclusively attributable to Renco; (2) the claims must not arise from PAMA (a Peruvian environmental program designed to improve the quality of the land near the facility); and (3) Renco must have been using standards and practices less protective of the environment than the facility's previous owner. These three questions, therefore, will be the questions before the arbitration panel.

[20] "In this case, the children bring negligence, conspiracy, and strict liability claims against Doe Run,[11] based on its handling and disposing of metals at the facility. Some of the claims vary by defendant (such as failure to warn and

10. "The parties disagree about what material is properly before this court to demonstrate the children's references to the STA. Doe Run seeks to include examples from the 2007 litigation that the children voluntarily dismissed. These additional examples do not affect this court's holding. Therefore, even considering the additional material, the analysis and outcome are unaltered."

11. "Recall that 'Doe Run' includes several individual defendants as well as Doe Run and Renco. The only claimant in the arbitration is Renco on its own behalf and on behalf of 'Doe Run Peru'. (Doe Run Peru is not a party to this case). While this alone does not prove the claims are separate – the claims could be identical even if the parties were not – it indicates that the issues in this case differ from those in the arbitration."

negligent decision making). The strict liability claims allege an abnormally dangerous activity.

[21] "Renco asserts that both tribunals must determine the three preconditions at issue in the arbitration. A trier in this case, however, will decide only the theories pled in the complaint. These theories do not rely on the STA, do not turn on whether the claims arise from PAMA, and do not relate to the practices of the former facility operator. The question closest to overlapping, causation, will be sufficiently different as well. The arbitration panel will consider whether the damages are *exclusively* attributable to Renco. On the other hand, the trier in this case will consider whether each defendant sufficiently caused the children's injuries according to the applicable law. 'The negligence of the defendant need not be the sole cause of the injury, as long as it is one of the efficient causes thereof, without which injury would not have resulted' *Hensley v. Jackson Cnty.*, 227 S.W.3d 491, 496 (Mo. banc 2007) (citation omitted).[12]

[22] "Doe Run is correct that this court must 'look past the labels the parties attach to their claims to the underlying factual allegations'. *3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008). The factual allegation underlying this case is that the defendants negligently operated the facility. The factual allegation underlying the arbitration is breach of contract: Renco alleges that Peru breached its duty to defend and indemnify. Courts frequently address indemnification in separate proceedings from those determining liability. See, e.g., *Cremona, S.p.A. v. R.S. Bacon Veneer Co.*, 433 F.3d 617 (8th Cir. 2006). Renco asserts that the agreement provides more than mere indemnification because Peru also must step in and defend the claims. Even so, that fact affects damages in the breach of contract suit, but does not preclude the children from continuing this case.

[23] "The estoppel cases Doe Run cites contain a much closer nexus between the nonsignatory and the agreement with the arbitration clause. See *Blaustein v. Huete*, 449 F.Appx. 347, 350 (5th Cir. 2011) (explaining how the nonsignatory obtained tangible direct benefits from the terms of the agreement); *Graves v. BP America, Inc.*, 568 F.3d 221, 223-224 (5th Cir. 2009) (holding that a wrongful death suit must be made pursuant to the employment agreement – which contained an arbitration clause – because Texas law established that wrongful death suits are derivative of the decedent's rights and a workplace-injury suit

12. "This quotation serves only to demonstrate the causation approach that applies in a normal negligence case (although this case may involve Peruvian law), as opposed to the unique question of exclusive causation before the arbitration panel. See *H&R Block Tax Servs. LLC v. Franklin*, 691 F.3d 941, 943 (8th Cir. 2012) 'Federal courts sitting in diversity apply the choice-of-law rules of the forum state.'); *Kennedy v. Dixon*, 439 S.W.2d 173, 184 (Mo. banc 1969) (adopting the most-significant-relationship test for tort cases)."

would have been subject to arbitration); *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)[13] (holding that the nonsignatory received direct benefits, prior to litigation, from the agreement, including lower insurance rates and other maritime rights).

[24] "This court's decision in *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001), is inapposite. There, the defendant, a *signatory* to the agreement, wanted to invalidate it because some of the plaintiff's partnerships were not signatories. *Dominium*, 248 F.3d at 728. Because the defendant-signatory had previously argued that those same partnerships were liable for failure to perform that very agreement, this court held it was inequitable to allow the defendant-signatory to claim there is no agreement. Id. In this case, Doe Run never alleged liability of the children under the STA, and Doe Run never attempted to invalidate the arbitration clause of the STA.

[25] "The issues in this case are not referable to arbitration. The district court properly denied a mandatory stay under 9 U.S.C. Sect. 3."

III. CONCLUSION

[26] "This court holds that the issues in this case 'relate to' the arbitration but are not 'referable to' arbitration. As the district court correctly stated, the 'relate to' standard is 'different and much lower than the question of whether the issues are "referable to arbitration"'."

13. Reported in Yearbook XXIV (1999) pp. 895-899 (US no. 286).

782. United States District Court, Northern District of Texas, Dallas Division, 3 December 2012, Civil Action no. 3:12-CV-0011-B

Parties:	Plaintiff: Jay Nanda (India) Defendants: (1) Atul Nanda (India); (2) Dibon Solutions Inc. (US)
Published in:	Available online at <www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_12-cv-00011/pdf/USCOURTS-txnd-3_12-cv-00011-1.pdf>; 2012 U.S. Dist. LEXIS 171228
Articles:	III; V; V(1)(*b*); V(1)(*c*)
Subject matters:	– excess of authority of arbitrators by imposing obligations on nonsignatory (no) – estoppel – due process and misconstruction of evidence (no) – review of merits of award (no) – motion to confirm award v. motion for summary judgment
Topics:	[3]-[4] = ¶ 500; [6]-[15] = ¶ 303 + ¶ 512; [16]-[20] = ¶ 511 (misconstruction of evidence); [22]-[23] = ¶ 502; [24]-[25] = ¶ 301

Summary

A US award was granted enforcement under the 1958 New York Convention. The sole arbitrator did not exceed his authority by imposing obligations on a nonsignatory, since the obligations arose under a proposal for the division of assets made by the first defendant and incorporated by reference in the award. For the same reason the first defendant was estopped from raising this defense. The second defendant was estopped from arguing that it was not a party to the arbitration agreement and award, because it ratified the award by performance and judicially admitted that it was a party in an earlier suit. There was no violation of due process: first defendant misread an email in which the arbitrator did not admit that he misconstrued evidence but rather stated that misconstruction is always possible. Substantive

corrections of the award sought by first defendant related to the merits of the award and could not be reviewed.

The facts of this case are also reported in Yearbook XXXVII (2012) at pp. 399-401 (US no. 771). Jay Nanda and Atul Nanda, two Indian brothers residing in Texas, were in dispute over control of Dibon Solutions, Inc. (Dibon), a Texas IT consulting company, and the distribution of assets among their other holdings. In May 2011, the brothers commenced actions in Texas state courts. On 14 October 2011, all Dibon's shareholders – the Nanda brothers, their mother and father – entered into a written agreement to dismiss the pending litigation and submit all disputes between Dibon's shareholders to a sole arbitrator (the Arbitration Agreement). The Arbitration Agreement was signed by all four shareholders. On 19 November 2011, a sole arbitrator rendered an award in the United States dividing Dibon and another company, RTS, according to a proposal made by Atul Nanda.

On 8 December 2011, Jay Nanda, alleging that Atul Nanda refused to comply with the award, filed a suit in the 44th Judicial District Court of Dallas County, Texas, against Atul Nanda and Dibon (collectively, Defendants). Defendants removed the suit to federal court.

By order of 12 June 2012, the United States District Court, Northern District of Texas, Dallas Division, per Jane J. Boyle, US DJ, held that removal was proper under Sect. 205 of the Federal Arbitration Act (FAA) because the award fell under the 1958 New York Convention. This decision is reported in Yearbook XXXVII (2012) pp. 399-401 (US no. 771). Jay Nanda then sought confirmation of the award.

By the present decision, the district court, again per Jane J. Boyle, US DJ granted confirmation. The court noted at the outset that confirmation, which may be sought within three years of rendition of the award, must be granted unless there is one of the grounds for refusal exhaustively listed in Art V of the New York Convention; review of the award is "exceedingly narrow" and does not include the merits of the case.

Defendants raised five objections to confirmation. First, they argued that the arbitrator exceeded the scope of the Arbitration Agreement because the award imposed requirements on Dibon, which was not a party to the Arbitration Agreement and did not participate in the arbitration. This constituted a ground for refusal under Art. V(1)(*c*) of the Convention.

The district court noted that the part of the award that had been written directly by the sole arbitrator did not place any obligations on Dibon. The only part of the award which did impose such obligations was the part incorporating – by reference – Atul Nanda's proposal for the division of assets , which included

provisions requiring Dibon to provide and retain certain benefits. The court concluded that Atul Nanda was therefore estopped from arguing that the arbitrator exceeded the scope of his powers.

Dibon was also estopped from arguing that it was not a party to the Arbitration Agreement and the award, because it ratified the award by performing under it and judicially admitted that it was a party to the Arbitration Agreement. Dibon had filed an earlier suit against Jay Nanda; its brief on appeal suggested that the award incorporated Jay Nanda's promise not to interfere with Atul Nanda's business operations, and that Jay Nanda breached that promise. Thus, Dibon asked the appellate court to decide aspects of the case on the basis of Jay Nanda's breach of the award, thereby relying on Dibon's own position as a party to the award. Also, Dibon took several actions required by the award (such as making payments to RTS; obtaining individual ownership of servers and computers that formerly belonged to RTS and Dibon jointly; and evicting RTS from joint office space) and therefore voluntarily performed under it.

Second, Atul Nanda claimed that he was not allowed to meaningfully present his evidence in the arbitration (Art. V(1)(*b*) of the Convention). He cited in support only the arbitrator's admission in an email that he misconstrued the evidence submitted during the arbitration. The district court held that Atul Nanda failed to prove his contention and that his reading of the email was incorrect. The arbitrator merely stated in the email that it is always possible that evidence be misconstrued – and blamed the parties' "obsessive haste" for any procedural imperfections in the proceedings. Further, Jay Nanda pointed out that Atul Nanda helped draft the rules of the arbitration, participated in the hearings, was represented by counsel, submitted argument and evidence to the arbitrator, and drafted the proposal for the division of assets which was accepted and adopted by reference by the arbitrator.

The court did not consider Defendants' third argument, that Jay Nanda was equitably estopped from seeking confirmation of the award because following the filing of the award it attempted to destroy Dibon's business in violation of the award. This argument was not properly before the court and was unsupported; also, this dispute had been submitted to another court in a separate case between the parties.

By the fourth objection, Atul Nanda sought certain substantive modifications to the award because of alleged mis-descriptions and mis-calculations. The court held that Atul Nanda was in fact attempting to raise an issue relating to the merits of the arbitration and the award, which could not be reviewed in confirmation proceedings.

The fifth objection concerned the allegation that Jay Nanda improperly filed a motion to confirm the arbitration award rather than a motion for summary judgment. The court disagreed, remarking that filing a motion to confirm an award, rather than a motion for summary judgment, is the common and proper method of seeking this relief.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345074-n>.

Excerpt

[1] "This case is one of many arising from a dispute between two brothers, Plaintiff Jay Nanda (Plaintiff) and Defendant Atul Nanda (Defendant Nanda), over the control of Defendant corporation Dibon Solutions, Inc. (Dibon) (together with Atul Nanda, 'Defendants'). Since May 2011, parties have been litigating the control of Dibon and distribution of assets among their other holdings in Texas state courts. On 14 October 2011, the parties entered into a written agreement to dismiss the pending litigation and settle certain disputes in arbitration (the 'Arbitration Agreement'). Following arbitration proceedings, an award dividing Dibon and another company, RTS, was entered on 19 November 2011 (the Arbitration Award). Thereafter, Plaintiff accused Defendants of refusing to comply with the Arbitration Award and filed this lawsuit against Defendants on 8 December 2011 in the 44th Judicial District Court of Dallas County, Texas. Defendants subsequently removed the suit to this Court. By its Order of 12 June 2012, this Court decided that the Arbitration Award fell under the [1958 New York Convention] and removal was therefore proper under 9 U.S.C. Sect. 205.

[2] "Plaintiff then filed First Amended Complaint, requesting confirmation of the Arbitration Award under the Federal Arbitration Act [(FAA)], 9 U.S.C. Sect. 9, et seq.; seeking a declaratory judgment under the Federal Declaratory Judgment Act; and requesting attorney's fees and costs. Thereafter, Plaintiff filed a Motion to Confirm the Arbitration Award. The Motion has been fully briefed and is ripe for review."

I. LEGAL STANDARD

[3] "Under the Convention, a party may file a motion to confirm an arbitration award within three years of the entry of the award. 9 U.S.C. Sect. 207. The Court *must* confirm the arbitration award unless there are grounds for refusing confirmation of the award under the Convention.[1] Art. V(1) of the Convention

1. "Some Courts have found that Art. V of the Convention also permits the refusal to confirm an arbitration award under Chapter 1 of the FAA. See *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997) [reported in Yearbook XXIII (1998) pp. 1058-1067 (US no. 261)] ('We read Art. V(1)(*e*) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.'); *LaPine v. Kyocera Corp.*, No. C-07-06132-MHP, 2008 U.S. Dist. LEXIS 41172, at *15-17 (N.D. Cal. 22 May 2008) [reported in Yearbook XXXIV

states that the following are grounds for refusing to confirm an arbitration award: (a) the agreement to arbitrate is invalid; (b) the respondent was unable to present its case; (c) the award exceeds the scope of the agreement to arbitrate; (d) the arbitration procedures did not comport with those in the arbitration agreement or the laws of the country where the award was issued; and (e) the award has been set aside. Art. V(2) adds that the Court may refuse to confirm an arbitration award where (a) federal law prohibits arbitration of the subject matter or (b) recognition of the award would be contrary to public policy.

[4] "A district court's review of an arbitration award is exceedingly narrow. *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352 (5th Cir. 2004) (noting that the court must have an 'exceedingly deferential' view of the arbitrator's decision). The Court 'may not reconsider an award based on alleged errors of fact or law or misinterpretation of the contract'. *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-165 (5th Cir. 1998) (internal citations omitted). 'In other words, [the court] must affirm the arbitrator's decision if it is rationally inferable from the letter or the purpose of the underlying agreement.' *Executone Info. Sys. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994). 'In determining whether the arbitrator exceeded his jurisdiction, we resolve all doubts in favor of arbitration.' *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 (5th Cir. 1993) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983))."

II. ANALYSIS

[5] "Plaintiff requests that this Court enter an order confirming the arbitrator's award. In his Motion, Plaintiff properly included the Arbitration Agreement (which included the selection of the arbitrator) and the Arbitration Award. See 9 U.S.C. Sect. 13. Defendants separately file objections to confirmation of the Arbitration Award.[2] The Court addresses each argument, in turn."

1. Party to the Arbitration Agreement

(2009) pp. 951-965 (US no. 654)] (citing cases)."

2. "Defendant Dibon objects only to its inclusion in the arbitration proceedings. Defendant Nanda also objects to Dibon's inclusion as a party, but makes four additional objections to confirmation of the award."

[6] "Both Defendants argue in their Responses that the arbitrator exceeded the scope of the Arbitration Agreement under Art. V(1)(*c*) of the Convention because the Arbitration Award purports to impose requirements on Defendant Dibon. Defendants claim that Dibon was not a party to the Arbitration Agreement but merely an asset under it and that Dibon did not participate in the arbitration proceedings, so any confirmation of the Arbitration Award should be against Defendant Nanda only. Plaintiff replies that Dibon agreed to be bound by the award because all of Dibon's shareholders and Board of Directors signed the Arbitration Agreement. Plaintiff poses the question why Dibon's shareholders and Board of Directors signed the Arbitration Agreement if Dibon would not be subject to the arbitration and if arbitration was between only Plaintiff and Defendant Nanda. Plaintiff also states that all four of Dibon's shareholders participated in the arbitration.[3]

[7] "The Arbitration Agreement expressly submits all disputes between all of Dibon's shareholders to an arbitrator. The Arbitration Agreement is also signed by all four shareholders. The agreement does not expressly list Dibon as a 'party' to the arbitration, but instead offers it up as an 'asset' for division and disbursement as ordered by the arbitrator. The agreement states that the arbitrator is directed to divide up assets between Plaintiff and Defendant Nanda. The Arbitration Award expressly provides that there are three parties to the Arbitration Award: Plaintiff Jay Nanda, Defendant Atul Nanda, and Defendant Dibon. The arbitrator's own written portion of the award does not purport to place any obligations on Dibon to provide or receive any benefit. Instead, the arbitrator incorporated by reference Defendant Nanda's personal Proposal for division of assets, which includes provisions requiring Dibon to provide and retain benefits. The parties agree that all shareholders in Dibon actually participated in the arbitration proceedings; they apparently disagree, however, whether the two non-party shareholders participated in the arbitration in their capacities as representatives of Dibon or in some other capacity as witnesses.

[8] "Defendant Nanda suggests that the entire Arbitration Award should be stricken because the obligations allegedly imposed on Dibon in the award are inextricably intertwined with the remaining provisions of the award and because it was improper for the arbitrator to make requirements on Dibon given that it was not a party to the arbitration. However, because the only portion of the award that places this burden on Dibon is the portion incorporating by reference Defendant Nanda's own proposals, the Court concludes that Defendant Nanda is estopped from arguing that the arbitrator exceeded the scope of his powers.

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3. "Dibon's four shareholders are the Nanda brothers and their mother and father."

[9] "Plaintiff next suggests that Dibon, too, is estopped from arguing that it should not have been a party to the Arbitration Agreement, because Dibon (1) has ratified the Arbitration Award by performing under it and (2) judicially admitted that it was bound to the agreement and award by filing a separate lawsuit against Plaintiff based on the award.

[10] "Under Texas law:

> 'Ratification occurs if a party recognizes the validity of a contract by acting or performing under the contract or by otherwise affirmatively acknowledging it. In other words, if a party by its conduct recognizes a contract as valid, having knowledge of all relevant facts, it ratifies the contract. Once a party ratifies a contract, it may not later withdraw its ratification and seek to avoid the contract. Ratification may be inferred by a party's course of conduct and need not be shown by express word or deed. Any act inconsistent with an intent to avoid a contract has the effect of ratifying the contract. Whether a party has ratified a contract may be determined as a matter of law if the evidence is not controverted or is incontrovertible.'

Mo. Pac. R.R. Co. v. Lely Dev. Corp., 86 S.W.3d 787, 792-793 (Tex. App. – Austin 2002, pet. dism'd) (internal citations omitted).

[11] "Plaintiff submits the Arbitration Award, filings in Dibon's prior lawsuit against Plaintiff, and Plaintiff's Affidavit as evidence. Plaintiff states that these documents demonstrate that Dibon took the following actions required by the Arbitration Award in performing under it: Dibon dismissed with prejudice its separate lawsuit against Plaintiff; Dibon made seven of ten $ 50,000 payments to RTS; Dibon has individually retained accounts receivables of $ 2.5 million and employees of RTS; Dibon cut off RTS from access to joint servers (including email, data, terminal, and hosting servers) and other shared resources; Dibon accepted RTS' payment of a share of Dibon's attorney's fees on the Martin Air lawsuit; Dibon obtained individual ownership of servers and computers that formerly belonged to RTS and Dibon jointly; and Dibon forcefully evicted RTS from the joint office space in December 2011.

[12] "The Court has reviewed the Arbitration Award and the acts averred in Plaintiff's Affidavit and concludes that Defendant Dibon has voluntarily performed under the Arbitration Award in ways that are certainly inconsistent with a belief that Dibon is not a party to the award. Further, Dibon has accepted multiple benefits under the award. See *Mo. Pac. R.R. Co.*, 86 S.W.3d at 792-793. Accordingly, the Court concludes that Dibon has engaged in conduct that ratifies

the Arbitration Award. Dibon may not now contend that it is not a party to the Arbitration Award and thus is not bound to meet its remaining obligations.

[13] "Alternatively, Plaintiff attaches Dibon's Second Amended Petition and later Appellate Brief in Dibon's prior lawsuit against Plaintiff as evidence that Dibon admits that it was a party to the Arbitration Agreement. The Court has reviewed the petition, which was filed only by Dibon and not Defendant Nanda. Although the petition mentions the Arbitration Award, nothing in the petition alleges that Dibon was a party to the award, nor does the petition seek legal redress on the basis of the award. At most, the petition alleges that the Arbitration Award is valid in its award of Dibon to Defendant Nanda, which does not indicate whether Dibon itself was a party to the award. However, Dibon's later appellate brief does suggest that the Arbitration Award required Plaintiff to not interfere with Defendant Nanda's business operations, that Plaintiff violated that portion of the contract, and that the lower court erred in refusing to issue a temporary injunction in favor of Dibon based on Plaintiff's breach ('Jay Nanda made a contractual promise, incorporated into the [Arbitration] Award, that he would not interfere in business operations of Dibon and other jointly-owned assets.... Jay Nanda is plainly breaking that promise by sending anonymous and disparaging communications that have caused Dibon to lose millions of dollars in business. The Trial Court should have issued a temporary injunction *on this basis*.' (alterations omitted, emphasis added)).

[14] "It thus appears to the Court that although Dibon's Second Amended Petition did not set forth a claim based on the Arbitration Award, Dibon certainly made arguments to the Texas Court of Appeals that it should decide aspects of the case on the basis that Plaintiff breached the Arbitration Award. In order to make a valid argument for breach of the Arbitration Award on which Dibon is entitled to relief, Dibon is asserting that it was a party to the Arbitration Award.

[15] "The Court concludes that Plaintiff has demonstrated that Dibon is estopped from arguing that it is not a party to the Arbitration Award because Dibon has ratified the award and has judicially admitted that it was a party to the agreement. Either of these actions is sufficient to demonstrate estoppel, and the Court finds that Dibon cannot reasonably argue that it is not bound by the Arbitration Award and that the arbitrator exceeded his authority. As such, the Arbitration Award will not be rejected on this basis."

2. Due Process

[16] "Next, Defendant Nanda contends that the Arbitration Award should not be confirmed because the arbitrator conducted the arbitration in a way that prevented Defendant Nanda an opportunity to meaningfully present his evidence. He also suggests that his due process rights were violated. His argument presumably finds defect under Art. V(1)(*b*) of the Convention, which requires that a party in arbitration be able to 'present his case'.
[17] "Defendant Nanda's only support for this contention is his belief that the arbitrator admitted that he misconstrued the evidence submitted during the arbitration proceeding. Defendant Nanda submits an email from the arbitrator, sent in response to the parties' request to modify the award. The email states, in relevant part:

> 'In any event, the suggestion has been made that the evidence has been "misunderstood or ignored", and the award contains "clearly an error of omission". I will always concede that evidence may have been misunderstood. I will never concede that evidence was ignored. Is there not another possibility? That in the parties' *obsessive haste*, where urgency and a desire for speed rendered a desire for an orderly process moot, where the original hearing date, which all acknowledged was unreasonably hasty, was moved up by *two weeks* to accommodate the *travel plans of family*, resulted in a hearing process where the evidence was poorly, and sloppily, presented, where after the hearing, non-parties are sending *ex parte* communications asking for modifications to an award? I didn't design the process. I argued against it.'

[18] "The Court concludes that nothing in the arbitrator's email contains an admission of the arbitrator that he misconstrued evidence. Instead, the Court interprets the arbitrator's statements to merely reflect the arbitrator's general position that it is always possible that evidence might have been misconstrued. If anything, the email implies that it was the parties, and not the arbitrator, who are to blame for any imperfections in the process.
[19] "Plaintiff stresses that Defendant Nanda was able to fully participate in the proceedings and present his case, as he helped draft the rules of the arbitration, participated in two days of hearings, was represented by counsel, submitted argument and evidence to the arbitrator, and even drafted the proposal for the division of assets which was accepted and adopted by reference by the arbitrator. See *Consorcio Rive v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003) [reported in Yearbook XXIX (2004) pp. 1160-1171 (US no. 472)] (finding that a party was able to present its case because it could have chosen to send an

attorney, it did designate the arbitrator, and it filed over eighty pages of legal argument and documents); *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974) [reported in Yearbook I (1976) p. 205 (US no. 7)] (finding that a party was able to present its case even though a key witness was unavailable, because the arbitrator need not reschedule proceedings to accommodate witnesses and parties scattered around the globe).
[20] "Without any further evidence or argument in support of his due process argument, the Court concludes that Defendant Nanda has not demonstrated that he was unable to present his case as required by Art. V(1)(*b*) of the Convention."

3. Plaintiff's Alleged Wrongdoing

[21] "Defendant Nanda next contends that Plaintiff is equitably estopped from seeking confirmation of the Arbitration Award, because following the filing of the award, Plaintiff has attempted to destroy Dibon's business in violation of the award. This argument is not properly before the Court, as it does not relate to the validity of the underlying Arbitration Award. Further, Defendant Nanda does not provide legal support for his claim, other than citing a federal case that is not on point. More importantly, this very dispute has been submitted to another court in a separate case between the parties. Accordingly, the Court will not consider the matter."

4. No Review of Merits

[22] "Fourth, Defendant Nanda contends that the Arbitration Award should, at the very least, be modified under Texas law because it contained mis-descriptions and mis-calculations (referring to car expenses, a UK transfer, and employee-generated profit). However, review of Defendant Nanda's argument demonstrates that he is attempting to raise a dispute of fact or law as to what expenses were legitimate or illegitimate and thus should or should not have been paid to Plaintiff under the Arbitration Award.
[23] "The Court may not consider factual disputes in reviewing a motion to confirm an arbitration award, *Nauru Phosphate Royalties*, 138 F.3d at 164-165, so this argument is dismissed."

5. Motion to Confirm Award v. Motion for Summary Judgment

[24] "Finally, Defendant Nanda argues that Plaintiff has improperly filed a motion to confirm the arbitration award rather than a motion for summary judgment, so Defendant Nanda is unfairly precluded from raising disputes of fact.
[25] "Filing a motion to confirm an arbitration award, rather than a motion for summary judgment, is a commonly utilized and proper method of seeking relief under these circumstances. The Court therefore rejects this argument."
(....)

783. United States District Court, Northern District of Illinois, Eastern Division, 6 December 2012, No. 09 C 7629

Parties:	Plaintiff: China National Chartering Corp. (PR China) Defendant: Pactrans Air & Sea, Inc. (US)
Published in:	Available online at <http://docs.justia.com/cases/federal/district-courts/illinois/ilndce/1:2009cv07629/238354/63>; 2012 U.S. Dist. LEXIS 172899
Articles:	III; V(1); V(1)(*a*); (V)(1)(*b*); V(2)(*b*)
Subject matters:	– grounds for refusal of enforcement are exhaustive and strict – invalidity of arbitration clause for failure to predetermine matters to be arbitrated, applicable law and arbitral tribunal (Chinese law) – due process and failure to admit evidence – irregularities in arbitration (awarding of fees) – irregularities in arbitration (incorrect notice) – irregularities in arbitration (counsel not admitted) – waiver of defense not raised in arbitration and annulment action in country of origin – review of merits of award (no) – narrow concept of public policy
Topics:	[2]-[4] = ¶ 500; [4] = ¶ 501; [5]-[13] = ¶ 507 (invalid agreement); [14]-[23] = ¶ 502 + ¶ 511 (refusal to accept evidence); [24]-[33] = ¶ 513; [26]-[27] = ¶ 303; [34]-[38] = ¶ 521; [35] = ¶ 518; [39]-[43] = ¶ 301

Summary

Enforcement of a Beijing CMAC award was granted. The arbitration clause contained all required elements and was therefore valid under the applicable PR Chinese law. There was no violation of due process; rather, the arbitrators decided not to admit evidence that they found unreliable, and their decision could not be reviewed. There were no procedural irregularities in respect of the notice of arbitration (only the Chinese version contained

inaccuracies that were later cured, while the English version was correct) and the participation of counsel not admitted to the bar in mainland China (to which defendant did not object when asked by the arbitrators). A claim that the tribunal awarded attorney's fees in excess of Chinese law was deemed waived as defendant did not raise it in a request for correction of the award to CMAC or in the subsequent, failed annulment proceedings in China. Defendant did not prove its contention that the connection between CMAC and plaintiff, both controlled by the Chinese Government, affected the fairness of the arbitration.

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 499-500 (US no. 687) and Yearbook XXXV (2010) at pp. 526-527 (US no. 697).

On 24 April 2006, Pactrans Air & Sea, Inc. (Pactrans) – acting as agent for Devon International Trading Inc. (Devon) – and China National Chartering Corp. (China National) entered into a Uniform General Charter Agreement (the Charter Agreement) under which China National chartered the ship *M/V SANKO RALLY* to Pactrans to transport gypsum wallboard from China to Florida. The Charter Agreement contained a clause for arbitration of disputes at the China Maritime Arbitration Commission (CMAC) in Beijing, PR China.

A dispute arose when upon arrival in Florida the cargo was found to have been damaged during transport. Arbitration and court proceedings followed in China and the United States in respect of shipment and demurrage claims.

The shipment claim and Shanghai CMAC award: On 29 August 2006, Pactrans filed an action for declaratory judgment in respect of the shipment in the Northern District of Florida; defendant Devon sought referral of the dispute to arbitration, while defendant China National did not appear in the proceeding. The Florida court referred the parties to arbitration and, on 9 July 2008, Devon accordingly commenced CMAC arbitration in Shanghai. Pactrans attempted to file a counterclaim; when this was dismissed on procedural grounds, it filed a separate claim which was consolidated with Devon's claim. By an award of 23 November 2009, a Shanghai CMAC arbitral tribunal found in favor of Pactrans (the Shanghai CMAC award). On 29 March 2010, the Northern District of Florida, Pensacola Division, granted enforcement of the Shanghai CMAC award. This decision is reported in Yearbook XXXV (2010) pp. 526-527 (US no. 697).

The demurrage claim and Beijing CMAC award: In November 2006, China National sought prejudgment attachment of Pactrans's assets in the Southern District of New York in respect of its demurrage claim. China National also commenced CMAC arbitration in Beijing in respect of the same claim. By an award of 31 March 2009, a CMAC arbitral tribunal found in favor of China National in the amount of US$ 543,814.74 plus arbitration and legal costs (the Beijing CMAC award).

Pactrans sought annulment of the Beijing CMAC award in the Tianjin Maritime Court; on 14 October 2009, the court dismissed the request and affirmed the award. China National then sought enforcement of the Beijing CMAC award in the Southern District of New York. On 13 November 2009, the court granted enforcement. This decision is reported in Yearbook XXXV (2010) pp. 499-500 (US no. 687). Pactrans appealed the district court's determination of personal jurisdiction to the Second Circuit Court of Appeals.

On 8 December 2009, China National also filed a petition for the recognition of the Beijing CMAC award in the Northern District of Illinois, Eastern Division. The court stayed the case pending resolution of the appeal to the Second Circuit.

On 19 January 2011, the Second Circuit determined that the maritime attachment of wire funds did not provide the Southern District of New York with personal jurisdiction over Pactrans. As a consequence of this decision, (1) the Southern District of New York dismissed China National's petition to enforce the Beijing CMAC award; and (2) the Northern District of Illinois, Eastern Division lifted the stay of the case and dealt with the merits of China National's petition.

By the present decision, the Illinois district court, per Charles P. Kocoras, US DJ granted recognition and enforcement of the Beijing CMAC award.

Pactrans opposed enforcement on four grounds under the 1958 New York Convention: (1) invalidity of the arbitration agreement (Art. V(1)(*a*)); (2) violation of due process (Art. V(1)(*b*)); (3) failure of the arbitral tribunal to follow the applicable law (Art. V(1)(*d*)); and (4) the contention that enforcement would violate public policy (Art. V(2)(*b*)). The court dismissed all arguments.

Pactrans first claimed that the arbitration clause in the Charter Agreement failed to specify the matters to be arbitrated, the applicable law and the competent arbitral body; as a consequence, it did not meet the requirements for a valid arbitration agreement under the applicable law of PR China. The district court disagreed. The Charter Agreement provided for "Arbitration in Beijing, China" in Box 25 within the Law and Arbitration section; it also specified that if the location of the arbitration was given – as was the case here – then Sect. 19(c) applied, which provided that disputes arising under the Charter Agreement "shall be referred to arbitration at the place indicated in box 25, subject to the procedures applicable there. The laws of the place indicated in box 25 shall govern this Charter." Thus, the Charter Agreement indicated both the matters to be arbitrated and the applicable law. Though the competent arbitral body was not specified in the arbitration clause, it appeared from the record that Pactrans expressly assented to CMAC arbitration in a letter from its attorney, which constituted a supplemental agreement properly establishing CMAC as the

competent arbitral body. All the requirements for a valid arbitration agreement under Chinese law were met.

The district court also dismissed Pactrans's contention that it was unable to present its case in the arbitration because it could not introduce evidence and cross-examine witnesses. In fact, the arbitrators took Pactrans's evidence into account and decided not to admit it finding that it was not credible and its authenticity, legality and relevance to the case were doubtful. The court noted that "our judicial system is not meant to provide a second bite of the apple" for those who are not satisfied with the outcome of adjudication they have sought in other fora. As to the cross-examination contention, the record showed that no oral witness testimony was offered during the arbitration.

Pactrans further argued that the Beijing CMAC arbitrators failed to follow PRC law on arbitration by awarding attorney and handling fees in excess of what PRC law allows; by sending Pactrans an incorrect notice of the arbitration; and by allowing China National to be represented by a Hong Kong attorney who was not permitted to practice in mainland China. All these contentions failed. Pactrans implicitly waived its claim in respect of the awarding of attorney's fees by failing to raise it by way of a request for correction of the award to CMAC and in the annulment proceedings in the Tianjin Maritime Court. The inaccuracy in the Notice of Arbitration – an indication that the arbitration was domestic and that the Rules of the China International Economic and Trade Arbitration Commission (CIETAC) rather than those of CMAC Rules applied – concerned only the Chinese version and was cured in the course of the arbitration proceedings. Finally, Pactrans did not object, even when expressly asked, to the presence of a Hong Kong lawyer as co-counsel for China National.

Pactrans's public policy objections were equally unsuccessful. Pactrans contended that there was a conflict of interest between CMAC and China National because both are controlled by the Chinese Government. Noting that the public policy defense under the New York Convention is narrowly construed "to give effect to the Convention's goal of encouraging the timely and efficient enforcement of awards", the court concluded that Pactrans failed to prove that a bias existed, or that the connection had a substantive effect on the arbitration. Mindful of its limited review of foreign awards in enforcement proceedings, the court dismissed as irrelevant Pactrans's argument that the Shanghai CMAC arbitration with Devon – in which Pactrans prevailed – "was starkly different" from the arbitration before the Beijing CMAC.

The district court finally granted China National compensation for attorneys' fees, finding that Pactrans submitted baseless and unsubstantiated arguments to support its opposition to enforcement, and entered final judgment to enforce the Beijing CMAC award against Pactrans based on the court's recognition.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345075-n>.

Excerpt

[1] "This matter comes before the Court on [China National]'s petition for recognition and confirmation of a foreign arbitration award against [Pactrans]. China National also moves for an award of attorneys' fees against Pactrans and seeks the entry of a final judgment against Pactrans pursuant to Federal Rule of Civil Procedure Rule 54(b). For the reasons set forth below, the foreign arbitrational award is confirmed, the Court grants an award of reasonable attorneys' fees and final judgment is entered."
(….)

I. LEGAL STANDARD

[2] "Confirmation of foreign arbitration awards are governed by the [1958 New York Convention. See *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 588 (7th Cir. 2001).[1] The requirements of the Convention were incorporated into federal law in Chapter 2 of the Federal Arbitration Act ('FAA'). 9 U.S.C. Sect. 201, et seq. '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.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).[2]
[3] "Under 9 U.S.C. Sect. 207, within three years after an 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.' 9 U.S.C. Sect. 207.
[4] "Comporting with the deference accorded to foreign arbitral awards, Art. V of the Convention enumerates seven narrow grounds which can serve as the basis for a court's refusal to recognize and enforce a foreign arbitration award. See *Slaney*, 244 F.3d at 588. Pactrans opposes confirmation of the foreign arbitration award and argues that Art. V bars enforcement based on (1) the invalidity of the arbitration agreement, (2) its lack of ability to present its case,

1. Reported in Yearbook XXVI (2001) pp. 1091-1102 (US no. 359).
2. Reported in Yearbook I (1976) pp. 203-204 (US no. 4).

(3) the failure of the arbitration panel to follow the applicable law, and (4) recognition of the arbitration award would be against the public policy of the United States. The Court will address each in turn."

II. GROUNDS FOR REFUSAL OF ENFORCEMENT

1. Valid Arbitration Agreement (Art. V(1)(a) Convention)

[5] "Pactrans first contends that the arbitration provision contained in the Charter Agreement did not conform with the requirements of a valid arbitration agreement under PRC Arbitration Law. This failure, Pactrans argues, means that the CMAC did not have jurisdiction to arbitrate the disputed claims, and consequently under Art. V(1)(*a*) the enforcement of the award must be denied. [Quotation of Art. V(1)(*a*) omitted.]

[6] "Pactrans raises three grounds challenging the validity of the CMAC's jurisdiction over the arbitration proceeding. Pactrans argues that the Charter Agreement failed to meet the requirements of a valid arbitration agreement by: (1) failing to specify the matters to be arbitrated, (2) failing to state the applicable law to be applied, and (3) failing to set forth the appropriate Arbitration Commission to conduct the arbitration. Under PRC Arbitration Law, a valid arbitration agreement must contain: (1) the assent of the parties to arbitrate their claims, (2) the matters to be arbitrated, (3) the Arbitration Commission selected by the parties. Art. 16 Chapter III, Arbitration Law of the PRC, adopted 1994.

[7] "Before we examine the contract, the Court recognizes '[t]he preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which parties had entered, a consideration which requires that we rigorously enforce agreements to arbitrate'. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). When parties agree to have their disputes resolved through arbitration, they also agree to accept the arbitrator's view of the facts and the meaning of the contract. See *United Paperworkers Int'l, AFL-Union CIO v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). In interpreting a contract the court's primary objective is to effectuate the intent of the parties from the plain language of the agreement. See, e.g., *Church v. General Motors Corp.*, 74 F.3d 795, 798 (7th Cir. 1996)."

a. Failure to specify matters to be arbitrated (no)

[8] "Pactrans argues that the Charter Agreement did not adequately specify the matters which could be brought to arbitration. In box 25 of the Charter Agreement, within the Law and Arbitration section the contract states: 'Arbitration in Beijing, China.' The Charter Agreement provides that if the location of the arbitration is given, as in this case, then the provisions of 19(c) apply. Charter Agreement provision 19(c) states that; '[a]ny dispute arising out of this Charter [Agreement] shall be referred to arbitration at the place indicated in box 25, subject to the procedures applicable there. The laws of the place indicated in box 25 shall govern this Charter [Agreement].'

[9] "The Charter Agreement clearly indicates that the parties intended to submit their claims to arbitration in Beijing, China. In choosing the location of the arbitration proceeding, the parties assented to the provisions of Sect. 19(c). Sect. 19(c) clearly states that any matter arising out of the Charter Agreement is subject to arbitration. In this case, the heart of the CMAC arbitration proceeding dealt with resolving which party would be responsible for incurring the demurrage costs, laid out in the Charter Agreement. Due to the specificity of the matters which encompass the arbitration agreement the Court finds that the arbitration agreement satisfies the 'matters to be arbitrated' requirement for a valid arbitration agreement under PRC law. Art. 16, Arbitration Law of PRC."

b. Applicable arbitration law

[10] "Pactrans argues that English Arbitration Law should have governed the arbitration dispute, as opposed to PRC Arbitration Law. "Pactrans's contention is without support or merit. As indicated above, the Charter Agreement Sect. 19(c) states that the applicable law of the location indicated on the form, Beijing, China, would be applied to any arbitration proceeding. According to the language of the Charter Agreement the CMAC correctly applied PRC Arbitration Law, which is the law which governs arbitration disputes in Beijing, China."

c. Failure to indicate arbitral body (no)

[11] "Pactrans asserts that the failure of the Charter Agreement to include the appropriate Arbitration Commission results in an incomplete arbitration agreement under PRC law. Pactrans relies on Art. 18 of the PRC Arbitration Law which states in pertinent part that if the agreement is not clear about the selection of the Arbitration Commission and the parties have failed to reach a supplemental agreement then the arbitration agreement shall be invalid. Art. 18 Chapter III, Arbitration Law of the PRC, adopted 1994.

[12] "The evidence in the record prominently shows that Pactrans assented to the CMAC arbitration. 'If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter.' *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000). On 8 August 2007, Pactrans's attorney sent a letter to China National stating, '[w]e are counsel for Pactrans and on behalf of our client, confirm agreement to arbitration of demurrage claims before CMAC'. Pactrans's assent to arbitrate its claims before the CMAC cannot be reconciled with its current challenge to the validity of the arbitration agreement. Pactrans's agreement to arbitrate its dispute before the CMAC constituted a supplemental agreement which properly established the CMAC as the Arbitration Commission to hear the case."

d. Conclusion

[13] "For the aforementioned reasons the Charter Agreement constituted an enforceable arbitration agreement under PRC Arbitration Law and therefore was properly before the CMAC to arbitrate the dispute."

2. Due Process (Art. V(1)(b) Convention)

[14] "Pactrans contends that the CMAC limited Pactrans's ability to introduce evidence and cross examine witnesses which resulted in a denial of Pactrans's fundamental right to due process. Under Art. V(1)(*b*) of the Convention, proof that a party was 'unable to present his case' constitutes a proper defense. (Convention, Art. V(1)(*b*)).

[15] "The application of this defense corresponds to the due process defense that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner as defined in *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1129 (7th Cir. 1997).[3] An arbitral award should not be enforced if Pactrans proves that they were not given a meaningful opportunity to be heard, as due process jurisprudence defines it. Id. The arbitration panel provides a fundamentally fair hearing if adequate notice is given, a hearing on the evidence is provided, and the decision of the arbitrator is impartial. Id."

a. Admission of evidence

3. Reported in Yearbook XXIII (1998) pp. 1076-1081 (US no. 263).

[16] "Pactrans argues that during the arbitration proceeding, CMAC unfairly admitted and considered all of the evidence submitted by China National and expressly refused to consider the evidence tendered by Pactrans. Pactrans concludes that if its evidence would have been considered the results of the arbitration proceeding would have been different.

[17] "'Our judicial system is not meant to provide a second bite of the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received.' *Slaney*, 244 F.3d at 581. The Supreme Court has noted that '[a]rbitrators are not bound by the rules of evidence'. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203-204 n. 4, 76 S.Ct. 273, 100 L.Ed. 199 (1956). Nor are arbitrators required to hear all of the evidence tendered by the parties. *Hoteles Condado Beach v. Union de Tronquistas*, 763 F.2d 34, 39 (1st Cir. 1985). District courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. See *United Paperworkers*, 484 U.S. at 37-38.

[18] "Pactrans mainly cites its failed attempts to admit several substantive emails between the parties, which allegedly establish a defense to China National's claim. The CMAC award opinion provided a detailed description of the evidence offered by China National and Pactrans in conjunction with a description of what each piece of evidence sought to prove. Additionally the CMAC ruling contains arguments for and against the admission of the evidence and finally the CMAC's decision on the evidence. The CMAC thoroughly reviewed the admissibility of each piece of evidence and reached a conclusion based on the application of PRC Arbitration Law. Ultimately the arbitration panel determined that some of the evidence submitted by Pactrans was not credible and expressed their doubts concerning the authenticity, legality, and relevance to the case.

[19] "Contrary to Pactrans's assertion, they were able to submit their evidence to the CMAC for consideration. Pactrans submitted its evidence to the CMAC which had the duty to weigh the credibility and relevance of the evidence to assess its importance in reaching a final decision. Although the final determinations on the value of the submitted evidence did not yield a positive result for Pactrans, the CMAC did take the evidence into consideration. Pactrans has not pointed to a single instance where the evidentiary ruling of the CMAC failed to comport with the standards of due process. Pactrans is not able to sustain a due process claim based on their lack of opportunity to submit evidence."

b. Cross-examination

[20] "Pactrans contends that the CMAC unjustly suppressed its right to cross examine witnesses, which interfered with their ability to present their case.
[21] "However, a review of the record shows that no oral witness testimony was offered during the arbitration proceeding. Pactrans does not point to a single instance when it attempted to cross examine a witness and was prevented from doing so. Without substantive examples establishing their assertion, Pactrans's complaint alleging a prohibition on cross examination is not persuasive when countered with the evidence establishing a complete lack of testimony.
[22] "For the aforementioned reasons the Court finds that the CMAC did not prevent Pactrans from cross examining witnesses and presenting its case."

c. Conclusion

[23] "A review of the CMAC proceeding makes it clear that Pactrans was afforded all the process that it was due."

3. Arbitration Proceedings in Accordance with the Law of the Seat of the Arbitration (Art. V(1)(d) Convention)

[24] "Pactrans asserts that the CMAC failed to follow PRC Arbitration Law. Art. V(1)(*d*) provides a defense against enforcement if the procedures employed by the arbitration panel were not in 'accordance with the law of the country where the arbitration took place'. (Convention, Art. V(1)(*d*)). Pactrans highlights several rulings which they assert were contrary to the law of the PRC. First, Pactrans claims that the CMAC awarded attorney and handling fees in excess of what PRC Arbitration Law allows. Second, Pactrans states that they were prejudiced by the incorrect Notification of Arbitration they received from the CMAC. Finally, Pactrans argues that the CMAC impermissibly allowed China National to be represented by an attorney who was not permitted to practice before the CMAC."

a. Awarding of fees

[25] "Pactrans asserts that the CMAC panel did not follow CMAC Arbitration Law when it calculated the award for attorney and handling fees. CMAC Arbitration Art. 66 allows for the losing party to pay for expenses 'incurred by the winning party in dealing with the case'. Art. 66 Chapter II, CMAC Arbitration Rules, adopted 2004. However, Rule 66 caps the potential award at 10 percent of the total amount awarded to the winning party. Id. The CMAC awarded China National [US]$ 543,814.74 for the demurrage charge claim. Pactrans asserts that the attorney and handling fee award in the amount of $

105,056.41 was above the statutory maximum allowable by CMAC Arbitration Rule 66. China National argues that Pactrans waived its argument concerning the CMAC's calculation of attorney and handling fees when they failed to raise it with the CMAC panel and the Tainjin Maritime Court.

[26] "Generally, waiver is 'the intentional relinquishment of a known right'. *Sethness-Greenleaf, Inc. v. Green River Corp.*, 65 F.3d 64, 67 (7th Cir. 1995). Waiver of a contractual right can be express or implied from actions taken which are inconsistent with the assertion of a right. *Cent. States, Se. and Sw. Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663, 672 (7th Cir. 2005). 'It is axiomatic that arguments not raised below are waived on appeal.' *Keene Corp. v. International Fidelity Ins. Co.*, 736 F.2d 388, 393 (7th Cir. 1984).

[27] "CMAC Arbitration Art. 68 permits either party to request the CMAC to review any 'writing, typing, calculating, and similar errors contained in the award within 30 days from the date of receipt of the award'. Art. 68 Chapter II, CMAC Arbitration Rules, adopted 2004. Pactrans did not submit a request for the CMAC to review the calculation of fees, and likewise Pactrans failed to challenge the calculation of fees with the Tainjin Maritime Court. Because Pactrans chose to omit its challenge to the attorney and handling fees award from the CMAC and the Tainjin Maritime Court, their claim is implicitly waived. See *Winforge, Inc. v. Coachmen Indus.*, 691 F.3d 856, 872 (7th Cir. 2012) (explaining that waiver applies where a party voluntarily or intentionally relinquishes a known right)."

b. Notification of arbitration proceeding

[28] "Pactrans argues that the Notice of Arbitration sent to them by the CMAC was defective and prejudiced the preparation of their defense. Pactrans points to the fact that the original Notice of Arbitration stated the arbitration was a domestic case and the applicable law to be applied was China International Economic and Trade Arbitration Regulations, as opposed to Chinese Maritime Arbitration Law.

[29] "Pactrans fails to specify how it was prejudiced by the incorrect Notice of Arbitration. The record indicates that the misprint was limited to the Chinese language portion of the Notice of Arbitration. The English version of the Notice of Arbitration correctly stated the appropriate case classification and applicable arbitration law. Finally the record shows that at the initial arbitration proceeding Pactrans raised the issue involving the incorrect Notification of Arbitration. The CMAC cured any potential damage by adjourning and rescheduling the hearing for a later date.

[30] "The Court finds that Pactrans was not prejudiced in the preparation of its defense."

c. Presence of attorney during proceeding

[31] "Pactrans contends that the CMAC wrongfully allowed China National to be represented by Lianjun Li (Li), of the Hong Kong law firm Richards Butler, who was not permitted to practice in mainland China. Pactrans asserts that China National's representative was acting as an attorney, as opposed to an authorized agent, which was impermissible under CMAC Arbitration Law.

[32] "Art. 21 of the CMAC Arbitration Rules allows parties to choose authorized agents and authorized attorneys to deal with matters related to the arbitration proceeding. Art. 21 Chapter II, CMAC Arbitration Rules, adopted 2004. When the issue of China National's representation was raised during the CMAC hearing, the panel reasoned that Art. 21 does not restrict an individual's participation in the arbitration proceeding based on his nationality being other than that of the PRC. The record demonstrates that prior to the CMAC proceeding, Pactrans was asked if they objected to Li's presence and representation of China National, which they did not. Without an objection from Pactrans the CMAC panel allowed Li to assist with the arbitration on China National's behalf. Additionally, China National was primarily represented by Henry Hai Li (Hai Li), from a law firm based in Shenzhen, PRC. Li was supposed to represent China National during the initial hearing, however it was postponed. Thereafter Hai Li assumed the role of lead counsel throughout the rest of the arbitration proceeding, with Li attending the remainder of the proceedings as a representative of China National.

[33] "In consideration of permissible allowance of representation contained in Art. 21 of the CMAC Arbitration Rules and Pactrans's assent to Li's presence, Pactrans's parsing of the type of representation Li was acting under is unconvincing."

4. Public Policy

[34] "Pactrans lastly contends that a conflict of interest between the CMAC and China National existed because both are controlled by the Chinese Government. Pactrans argues this conflict of interest warrants the denial of the arbitration award on public policy grounds, contained in Art. V(2)(*b*). [Quotation of Art. V(2)(*b*) Convention omitted.]

[35] "The Convention's public policy defense has been narrowly construed to give effect to the Convention's goal of encouraging the timely and efficient

enforcement of awards. *Slaney*, 244 F.3d at 593 (citing *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975)).[4] As the Second Circuit noted, 'an expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement'. P*arsons & Whittemore Overseas Co., Inc., v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974).[5]

[36] "Pactrans asserts that China National's association with the Chinese Government prohibited them from obtaining a fair hearing. Pactrans mainly supports its proposition by pointing to the disparate results obtained between the contested Beijing CMAC arbitration proceeding and a completely different CMAC arbitration proceeding in Shanghai which Pactrans participated in. Pactrans claims that the Shanghai CMAC arbitration proceeding which involved Pactrans and Devon, both US companies, was starkly different from the Beijing CMAC proceeding. In supporting their argument for the bias of the Beijing CMAC proceeding, Pactrans merely restates all the aforementioned issues at the heart of its argument against enforcement of the arbitration award.

[37] "As discussed above the procedures of the arbitration proceeding were conducted in accordance with the terms of the Charter Agreement and PRC Arbitration Law. This Court is mindful of its limited role in reviewing the Beijing CMAC arbitration award and we decline the invitation to delve into a secondary Shanghai arbitration proceeding conducted by a different arbitration panel, in a different location, concerning different parties. The Court is not convinced that the procedures employed by the CMAC are indicative of a biased proceeding to substantiate a disqualifying relationship.

[38] "Absent support for its argument, the Court is left with Pactrans's assertion that China National's involvement with the Chinese Government influenced the arbitration proceeding. Pactrans has not provided sufficient evidence showing that a bias existed, or that any such connection had a substantive effect on the arbitration proceeding. Pactrans's conclusory assertion does not amount to a disqualifying claim that would be contrary to the public policy of this country."

III. ATTORNEYS' FEES

[39] "China National seeks an award of attorneys' fees against Pactrans. China National argues that Pactrans asserted misleading and groundless arguments in

4. Reported in Yearbook I (1976) pp. 202-203 (US no. 3).
5. Reported in Yearbook I (1976) p. 205 (US no. 7).

the course of contesting the confirmation of the foreign arbitration award. Under the American rule, a party must pay its own attorneys' fees and expenses unless there is express statutory authorization to the contrary. *Fednav Intern. Ltd. v. Cont'l. Co.*, 624 F.3d 834, 838-839 (7th Cir. 2010). However when a party acts, 'in bad faith, vexatiously, wantonly, or for oppressive reasons', a court may award attorneys' fees under its inherent equitable powers. See *F.D. Rich Co., Inc., v. United States*, 417 U.S. 116, 129, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974).

[40] "Pactrans has engaged in a prolonged struggle to contest the confirmation of the foreign arbitration award. In the course of their pursuit, Pactrans has submitted baseless and unsubstantiated arguments to support their position. Pactrans's arguments concerning the appropriateness of the CMAC as the proper Arbitration Commission, its lack of opportunity to cross examine witnesses, the prejudicial effect of the incorrect Notification of Arbitration, the presence of a China National representative during the arbitration proceeding, and the bias of the CMAC proceeding were submitted under the guise of legitimacy, but lacked any meritorious foundation.

[41] "The Court finds that an award of reasonable attorney's fees is warranted based on Pactrans's submission of baseless arguments which unnecessarily multiplied the proceedings. The Court encourages the parties to resolve the award of reasonable attorneys' fees amongst themselves, prior to submitting the allocation of fees to the Court's discretion. The Court does not find that punitive damages should be imposed."

IV. MOTION FOR FINAL JUDGMENT

[42] "China National moves the Court for entry of a final judgment against Pactrans based on the Court's confirmation of the arbitration award. There are three prerequisites to the entry of a judgment under Rule 54(b). First, the claim upon which certification is sought must constitute a single 'claim for relief'. See, e.g., *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1444-1445 (7th Cir. 1988). Second, the judgment entered on the claim must be final within the meaning of 28 U.S.C. Sect. 1291. See *United States v. Ettrick Wood Prod., Inc.*, 916 F.2d 1211, 1217 (7th Cir. 1990) (judgment is final when it resolves all claims against a particular party). Finally, we must find that there is no just reason for delay, taking into consideration judicial efficiency and equity. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980) (Rule 54(b) determination based on 'judicial administrative interests as well as the equities involved').

[43] "The confirmation of the foreign arbitration award resolves all claims brought by China National in this action. A judgment in China National's favor will also result in the conservation of judicial resources and will not prejudice any party. The Court finds that the judgment is final and there is no reason for delay and therefore grants final judgment, in the amount of the total CMAC Arbitration Award, in favor of China National against Pactrans pursuant to Rule 54(b)."

V. CONCLUSION

[44] "For the reasons set forth above, China National's petition for confirmation of the foreign arbitration award is granted. China National's request for attorneys' fees is granted. China National's motion for entry of a final judgment is granted."

784. United States District Court, Central District of California, 17 December 2012, CV 12-2663-CAS (AJWx)

Parties:	Plaintiff: Anthony Yuzwa (Canada) Defendant: *M/V OOSTERDAM* (nationality not indicated) et al.
Published in:	Available online at <http://scholar.google.nl/scholar_case?case=9069527932085297 89&q=Anthony+Yuzwa+v.+M/V+Oosterdam,+et+al.%29&hl=en&as_sdt=2006>; 2012 U.S. Dist. LEXIS 181458
Articles:	II(3)
Subject matters:	– arbitration agreement "null and void" on public policy grounds (no) (by virtue of Jones Act) – unenforceable choice of arbitration venue clause severed from Seafarer's Agreement – unenforceable choice of law clause severed from Seafarer's Agreement – jury trial (no)
Topics:	¶ 220

Summary

A seafarer's dispute was referred to arbitration in the US under US law. The arbitration clause provided for a Canada seat and application of the law of the British Virgin Islands, but this combined choice would deprive plaintiff of his statutory rights under the US Jones Act and made the arbitration agreement null and void. The impermissible part of the arbitration clause could be severed because plaintiff also brought common law maritime claims that could be viable under BVI law; hence, he could obtain an award and raise his inability to bring his Jones Act claim in arbitration as a public policy ground for refusal at the award's enforcement stage. However, the court need not decide this issue because defendant offered to arbitrate in the US under US law. This solution best harmonized the policy in favor of seamen and the policy in favor of arbitration.

Anthony Yuzwa was hired to work as a performer aboard the *M/V OOSTERDAM* cruise ship. The parties dispute whether plaintiff was employed only by HAL Maritime, Ltd. (HAL) or also by Stiletto Entertainment and Stiletto Television, Inc. (collectively, Stiletto). Yuzwa signed a Seagoing Employment Agreement (SEA), which provided that "wage disputes, property damage, personal injury, death, or any other claim … shall be governed in all respects by the Laws of the British Virgin Islands" (BVI) and that "all such disputes no matter how described, pleaded or styled, shall be resolved by binding arbitration pursuant to the [1958 New York Convention] 21 U.S.T. 2517 … exclusively in your country of citizenship, or if your home country is not a party to the Convention, then in Seattle, Washington".

While on board the vessel rehearsing for a performance, Anthony Yuzwa was injured when a stage lift crushed his right foot and toes; as a result of the accident, most of his toes were amputated. On 28 March 2012, Yuzwa filed a Seaman's Complaint for Personal Injuries against *M/V OOSTERDAM*, HAL and Stiletto, bringing claims for (1) Jones Act negligence; (2) unseaworthiness; (3) maintenance and cure; (4) negligence under general maritime law; (5) strict products liability; and (6) breach of warranty. Only the first three claims were asserted against HAL. On 29 October 2012, HAL moved to compel arbitration pursuant to the SEA. On 26 November 2012, Yuzwa filed an opposition. On 29 November 2012, HAL offered to agree to arbitration in California rather than Canada before a mutually agreed upon arbitrator, with limited discovery and application of US maritime law. HAL contended that it never received a response to this proposal.

The United States District Court for the Central District of California, per Christina A. Snyder, US DJ, granted HAL's motion to refer Yuzwa's claim to arbitration, but compelled arbitration in California under US law, as offered by HAL, rather than in Canada under BVI law as provided for in the SEA.

The court noted at the outset that the case presented two conflicting policies: the policy that seamen are a "favored class" afforded special legal remedies in case of injury (such as the negligence claim available under the Jones Act), and the liberal federal policy favoring arbitration in the Federal Arbitration Act (FAA).

The FAA codifies the 1958 New York Convention in its Chapter 2; under the Convention and the FAA, the United States shall recognize agreements in writing referring disputes to arbitration, unless the court find them to be invalid and unenforceable. The disputes to be referred must be commercial, as a consequence of the United States making the commercial reservation to the New York Convention.

In the present case, all the requirements of the four-factor test to determine whether to enforce an arbitration agreement under the Convention were met: the SEA contained an arbitration agreement in writing; arbitration was to be held in Canada, a Convention signatory; one of the parties was not a US citizen; and the Ninth Circuit holds employment contracts of seafarers to arise out of commercial legal relationships.

The remaining issue was whether, as alleged by Yuzwa, there were public policy grounds not to compel arbitration. By reference to the 2009 Ninth Circuit's decision in *Balen*, Yuzwa argued that the choice for BVI law and for a Canadian seat had the combined result of depriving him of his statutory Jones Act rights. The arbitration clause was therefore null and void. As the SEA did not contain a severability clause, the court could not sever the choice of law provision from the rest of the arbitration provision and therefore must find the entire arbitration provision unenforceable. Yuzwa further argued that if the court did find that it could sever the choice of law and venue provision and compel arbitration, it could only do so if HAL agreed to arbitration in the United States under US law.

The district court reasoned that in the present case the choice for a Canada seat and BVI law would indeed force Yuzwa to forgo his statutory Jones Act claim. However, Yuzwa also brought common law maritime claims that could be viable under BVI law. As a consequence, as in *Balen*, he could obtain an award and could challenge his inability to bring his Jones Act claim in arbitration at the award enforcement stage, by raising the objection that enforcement should be denied on public policy grounds.

The district court held that it did not need to decide this issue, however, because HAL offered to arbitrate the dispute with Yuzwa in Los Angeles under US maritime law. Yuzwa had also requested in the alternative that arbitration be held in Los Angeles and that US law be applied. In the court's opinion, this solution best harmonized the "emphatic" US policy favoring arbitration with Congress's special solicitude for seaman as a protected class.

The court dismissed two further contentions by Yuzwa. Yuzwa argued that his maintenance and cure claims were not subject to the arbitration clause in the SEA, because these claims were not part of the seaman's employment contract, but rather arose out of the employment relationship and could not be contracted away. The court found that Yuzwa did not "contract away" his claims to maintenance and cure, but rather diverted them to the arbitration forum by agreeing to the arbitration clause.

Nor was Yuzwa's argument that he had a right to a jury trial to determine who was his "Jones Act employer" (HAL or the Stiletto defendants) successful. The

district court held that it could compel arbitration without determining who the Jones Act employer was, and that this issue could be decided in arbitration. The court added that an agreement to arbitrate necessarily effectuates a waiver of the party's right to a jury trial.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-.....>.

Excerpt

[1] "HAL's argument in support of its motion is straightforward: all of plaintiff's claims against HAL should be dismissed because his claims are subject to mandatory arbitration.

[2] "Broadly speaking, this case presents two conflicting policy goals. First, '[s]eamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class.' *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1294 (11th Cir. 2011) (Barkett, J., dissenting)[1] (quoting *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932)); see also id. at 1295 ('the perils of the sea include the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor') (alterations and quotations omitted). Accordingly, Congress has afforded injured seamen special legal remedies, 'in order to assuage their hazardous exposure to the perils of the sea'. Id. at 1295 (quotation omitted); see also *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151-1152 (9th Cir. 2008)[2] ('[s]eamen from the start were wards of admiralty'). This includes the negligence claim available under the Jones Act, 46 U.S.C. Sect. 30104, which adopts a 'featherweight' causation standard – 'causation may be found [if] the defendant's acts or omissions played any part, no matter how small, in bringing about the injury'. Id. (quotation omitted).

[3] "Second, the Federal Arbitration Act (FAA) 'sets forth a liberal federal policy favoring arbitration and reverses years of hostility by the courts towards arbitration agreements'. *Lozano v. AT & T Wireless Services, Inc.*, 504 F.3d 718, 725 (9th Cir. 2007). To overcome this liberal presumption in favor of arbitration, 'the burden is on the party opposing arbitration … to show that Congress intended to preclude arbitration of the statutory claims involved'. Id. In short, '[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'. *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 652 (9th Cir. 2009)[3] (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); see also id. ('The Supreme Court has consistently recognized "the emphatic federal policy in favor of arbitral dispute resolution", a policy that "applies with special force in the field of international commerce". (quoting

1. Reported in Yearbook XXXVII (2012) pp. 330-336 (US no. 752).
2. Reported in Yearbook XXXIV (2009) pp. 926-950 (US no. 653).
3. Reported in Yearbook XXXV (2010) pp. 478-480 (US no. 681).

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985))."[4]

I. THE 1958 NEW YORK CONVENTION

[4] "Directly relevant here is the [1958 New York Convention] 21 U.S.T. 2517, which Congress codified in the FAA at 9 U.S.C. Sects. 201-208 ('the Convention Act'). See *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1153 (9th Cir. 2008). Under Art. II(1) of the Convention, '[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'. Id. (quoting the Convention). In the Convention Act, the United States declared that the Convention would apply to only '[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, in turn, provides that:

> '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.'

9 U.S.C. Sect. 2.

[5] "HAL moves to compel arbitration pursuant to 9 U.S.C. Sect. 206, which provides that '[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein

4. Reported in Yearbook XI (1986) pp. 555-566 (US no. 59).

provided for, whether that place is within or without the United States'.[5] The Ninth Circuit has adopted a four-factor test to determine whether to enforce an arbitration agreement under the Convention:

(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....

Balen v. Holland Am. Line Inc., 583 F.3d 647, 654-655 (9th Cir. 2009) (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294-1295 (11th Cir. 2005)).[6]

[6] "HAL contends that all of these requirements have been met here, and plaintiff does not appear to argue to the contrary. First, the agreement to arbitrate is clearly set forth in writing, signed by plaintiff. Second, the agreement provides for arbitration in the employee's country of citizenship; plaintiff is a citizen of Canada, and Canada is a signatory to the Convention. As such, the arbitration required by the SEA will be held in a signatory nation. Third, the Ninth Circuit has twice found that '[t]he employment contracts of seafarers arise out of legal relationships which are considered as commercial, and therefore those contracts fall under the Convention'. *Rogers*, 547 F.3d at 1155; see also *Balen*, 583 F.3d at 652. And fourth, plaintiff is not an American citizen.

[7] "Accordingly, the Court finds that unless the SEA is otherwise unenforceable as against public policy, plaintiff must arbitrate his claims against HAL."

II. PUBLIC POLICY

5. "Although the FAA explicitly exempts the 'contracts of employment of seamen' from domestic arbitration, 9 U.S.C. Sects. 1, 2, the Ninth Circuit held in *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1154 (9th Cir. 2008) [reported in Yearbook XXXIV (2009) pp. 926-950 (US no. 653)], that the FAA's 'exemption clause' did not apply to arbitration agreements covered by the Convention."
6. Reported in Yearbook XXX (2005) pp. 1070-1085 (US no. 513).

[8] "Plaintiff offers three reasons why this Court should not compel arbitration despite the clear mandate of the SEA.[7] First, plaintiff argues that both the choice of law provision and the choice of forum provision of the SEA violate US public policy and are 'null and void' under the Convention. Citing to the Ninth Circuit's decision in *Balen*, plaintiff contends that courts will not enforce an arbitration provision in a seaman's employment agreement that results in the seaman being deprived of his 'substantive rights' under US law. 583 F.3d at 654; see also *Javier v. Carnival Corp.*, 2010 WL 3633173, at *4 (S.D. Cal. 2010) (finding the same under *Balen*). Plaintiff argues that the arbitration clause at issue in this litigation impermissibly limits plaintiff's statutory remedies, because the arbitration panel has no discretion to apply US law or procedure, and there is no Jones Act remedy available to him under British Virgin Islands law. As such, plaintiff argues that the arbitration clause is void as a matter of public policy. See *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1121 (11th Cir. 2009).[8]

[9] "Furthermore, because the SEA appears to contain no severability clause, plaintiff contends that the Court has no basis to sever the impermissible choice of law provision from the remainder of the arbitration provision and therefore must find the entire arbitration provision unenforceable.

[10] "In the alternative, plaintiff argues that assuming the Court determines it has the inherent power to strike the choice of law and venue provision and compel arbitration, the Court may only do so if HAL 'concedes that all claims in the arbitration will be governed by US law and procedure and that arbitration take place in the United States'. Cf. *Dumitru v. Princess Cruise Lines, Ltd.*, 732

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7. "At oral argument, counsel for plaintiff presented a fourth argument not contained in his briefing – that the arbitration provision at issue in this case is void or otherwise unenforceable because of its vagueness. Counsel argues that the provision fails to delineate what procedural rules will apply to the arbitration or the number of arbitrators who will preside over the proceeding. The Court finds this argument unavailing. There is no dispute that plaintiff's claims fall within the scope of the arbitration provision, as the provision is unambiguous on this point. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) [reported in Yearbook XXIX (2004) pp. 232-237] (holding that courts may consider 'questions of arbitrability' including 'a gateway dispute about whether the parties are bound by a given arbitration clause'). Issues of procedure and discovery, however, should be addressed by the arbitrator the parties ultimately select. See id. ('"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide'). In addition, the Court notes that numerous other courts have considered this same or similar arbitration provision and none have found it to be unenforceable on vagueness grounds. See, e.g., *Javier*, 2010 WL 3633173, at *1, 11. Because issues of procedure and discovery may be properly decided by the arbitrator, the arbitration provision at issue is not void for vagueness."

8. Reported in Yearbook XXXIV (2009) pp. 1136-1150 (US no. 674).

F.Supp.2d 328, 346-347 (S.D.N.Y. 2010)[9] (striking choice of law and venue provisions from arbitration clause in seaman's employment agreement containing severability clause).

[11] "In *Balen*, the Ninth Circuit addressed the plaintiff's argument that the arbitration provision of his contract was null and void because it is contrary to public policy. 583 F.3d at 653. The plaintiff, on behalf of himself and all others similarly situated, sought to bring a claim under the Wage Act, 46 U.S.C. Sect. 10313, against a cruise line operator. Turning to the Convention, Art. II(3), the court found that 'courts must enforce an agreement to arbitrate unless the agreement is '"null and void, inoperative or incapable of being performed"'. Id. at 654 (quoting 21 U.S.T. at 2519).[10] The court found that unless plaintiff could show that 'the public policy regarding the proper treatment of seafarers is stronger than the public policy favoring the arbitration', plaintiff would have to arbitrate his claims. *Balen*, 583 F.3d at 654.

[12] "As stated by another Ninth Circuit district court, the key determination is whether enforcing a choice-of-law provision in an international arbitration agreement would force a plaintiff 'to waive claims arising under statute and risk obtaining no relief whatsoever'. *Javier v. Carnival Corp.*, No. 09-cv-2003, 2010 WL 3633173 at * 4 (S.D. Cal. 13 Sept. 2010).

[13] "In *Balen*, the employment agreement did not mandate that the law of a particular country be applied; instead, the foreign arbitrators could theoretically apply whatever law they deemed appropriate. As such, the court found that plaintiff could not establish 'what statutory remedy or procedure he could pursue in the United States that he could not pursue in the [foreign arbitration]'. *Balen*, 583 F.3d at 654; see also *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148,

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9. Reported in Yearbook XXXVI (2011) pp. 378-380 (US no. 716).

10. "Art. II(3) states in full: '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.' This provision applies at the motion to compel arbitration stage, permitting the assertion of the usual defenses to contractual formation, and is incorporated into US law via 9 U.S.C. Sect. 206. See *Lindo v. BCL (Bahamas), Ltd.*, 652 F.3d 1257, 1263 (11th Cir. 2011). On the other hand, 'Art. V of the Convention … enumerates seven defenses that – like 9 U.S.C. Sect. 207 – are directed at courts considering whether to recognize and enforce an arbitral award.' Id. The Ninth Circuit in *Balen* appeared to adopt this distinction without comment, specifically quoting the 'null and void' language of Art. II(3) of the Convention in considering the plaintiff's public policy argument, and not Art. V. *Balen*, 583 F.3d at 654. While the Eleventh Circuit's most recent decision in *Lindo* calls into serious question the propriety of considering 'public policy' defenses at the motion to compel stage, the Court will follow *Balen* in considering whether plaintiff's agreement to arbitrate is 'null and void' as against public policy under Art. II(3) of the Convention."

1159 (9th Cir. 2008) (finding public policy defense to motion to compel arbitration unavailing, where the plaintiffs had no 'evidence that international arbitration would nullify any of the statutory rights Congress has conferred on seafarers'). The court held that because the plaintiff would be free to return to district court at the enforcement stage, he retained the opportunity to move to set aside any award in the event that the foreign arbitrator refused to apply the Wage Act to plaintiff's claim.

[14] "Here, by contrast, the SEA mandates that plaintiff arbitrate his claims in Canada pursuant to the laws of the British Virgin Islands (BVI). As such, enforcing the choice of law provision in the SEA would force plaintiff to forgo his Jones Act claim entirely, as no one disputes that this claim could not be raised under BVI law. This is the type of 'nullification' of plaintiff's statutory rights that *Rogers* and *Balen* indicated may render an arbitration clause 'null and void'.

[15] "However, because plaintiff also brings common law maritime claims that may be viable under BVI law, plaintiff could obtain an arbitration award that would allow him to challenge in a subsequent enforcement proceeding, on public policy grounds, his inability to bring his Jones Act claim in arbitration. Compare *Balen*, 583 F.3d at 654 (finding arbitration clause valid, because plaintiff had arbitrable claims under foreign law that would allow him to return to federal district court to attempt to set aside the award and pursue his US statutory claim) with *Thomas*, 573 F.3d at 1123 (refusing to enforce arbitration provision that forced the plaintiff to arbitrate a single Wage Act claim in the Philippines under Panamanian law, because the plaintiff would have no award to enforce in US courts).

[16] "The Court need not conclusively determine this issue, however, because HAL has offered to stipulate to arbitration in Los Angeles with a mutually agreed upon arbitrator, along with application of US maritime law. This is in accord with plaintiff's argument in his opposition, that the Court ought not to compel arbitration unless 'HAL concedes that all claims in the arbitration will be governed by US law and procedure and that arbitration take place in the United States'. In light of defendant's representations to the Court and plaintiff, the Court finds it appropriate to compel arbitration of all of plaintiff's claims, under US law, in Los Angeles. See, e.g., *Rivas v. Carnival Corp.*, 09-cv-23628, 2010 WL 2696676, at *2 (S.D. Fla. 30 Mar. 2010) aff'd, 448 F. App'x 981 (11th Cir. 2011) (compelling arbitration pursuant to the defendant's stipulation to the application of US law); *PPG Industries, Inc. v. Pilkington PLC*, 825 F.Supp. 1465, 1482-1483 (D. Ariz. 1993)[11] (referring plaintiff's claims to arbitration pursuant

11. Reported in Yearbook XX (1995) pp. 885-890 (US no. 172).

to the defendant's 'representation and consent to arbitration of the plaintiff's claims under US law); *Kovacs v. Carnival Corp.*, No. 09-CV-22630, 2009 WL 4980277 at *1 (S.D. Fla. 21 Dec. 2009) (refusing to compel arbitration because defendants would not stipulate to application of US law to plaintiff's Jones Act claim).

[17] "The Court finds that referring this matter to arbitration in the United States, under US law, best harmonizes the 'emphatic' policy favoring arbitration with Congress's special solicitude for seaman as a protected class."

III. OTHER GROUNDS FOR REFUSAL

[18] "The Court finds that plaintiff's other arguments against compelling arbitration are unavailing.

[19] "Plaintiff contends that his maintenance and cure claims are not subject to the arbitration clause contained in the SEA, because these claims 'are not part of the alleged seaman's employment contract, but rather arise out of the employment relationship and cannot be contracted away' … (citing to *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 422 n. 9 (2009) (noting that the right to maintenance and cure 'cannot be modified or waived')).

[20] "The Court finds this argument unavailing. Plaintiff did not explicitly waive his claims to maintenance and cure under the SEA, but only agreed to arbitrate any such claims against HAL arising out of his employment. Thus, plaintiff's claims have not been 'contracted away', as he contends, but instead diverted to a different forum. See, e.g., *Bautista*, 396 F.3d at 1296, 1303 (affirming an order that compelled arbitration of a claim for maintenance and cure based on an arbitration provision); *Fernandes v. Carnival Corp.*, No. 09-15675, 2012 U.S. App. LEXIS 14270, *4-5 (11th Cir. 12 July 2012)[12] (per curiam).

[21] "In addition, plaintiff argues that he is entitled to have a jury determine who his 'Jones Act employer' is, as between HAL and the Stiletto defendants. See *Glyn v. Roy Al Boat Mngmt. Corp.*, 57 F.3d 1495, 1498 (9th Cir. 1994). Plaintiff alleges that he was employed by both HAL and the Stiletto defendants, and that HAL and the Stiletto defendants are guilty of negligence under the Jones Act for committing numerous negligent and wrongful acts in breach of the duty of care owed to plaintiff. He also asserts his maintenance and cure claim against HAL and the Stiletto defendants, for failing to 'provide promptly all maintenance and cure' for the 'grievous injuries suffered by plaintiff while in the service of the vessel'.

12. Reported in Yearbook XXXVII (2012) pp. 407-408 (US no. 773).

Because plaintiff asserts that he may not recover from more than one employer under the Jones Act – as only one entity may be deemed his 'Jones Act employer' – plaintiff contends that this issue going to the merits of his claim makes it impossible to decide the arbitration issue at this stage of the proceedings.

[22] "The Court finds that despite plaintiff's contention that HAL and the Stiletto defendants are plaintiff's co-employers, the Court may still order plaintiff to arbitrate his claims without deciding who is plaintiff's employer for purposes of the Jones Act. It is true, as plaintiff contends, 'that there can be only one Jones Act employer'. *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1500 (9th Cir. 1995), abrogated on other grounds by *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009). However, it is not essential that a jury, rather than a court, decide who plaintiff's Jones Act employer is. In *Glyn* itself, the district court found as a matter of law that a particular person was the plaintiff's Jones Act employer; the Ninth Circuit only found error in the district court's submitting to the jury the question of whether an *additional* entity was also the plaintiff's Jones Act employer. Id. at 1500.

[23] "What plaintiff appears to be contending is that enforcing arbitration would impermissibly waive his right to a jury trial of his Jones Act claims, whether on the issue of co-employment or more generally. In accord with numerous other courts to have considered the issue, the Court finds this argument unavailing. An agreement to arbitrate his claims necessarily effectuates a waiver of plaintiff's right to a jury trial; this is not a bar to arbitration in general or of Jones Act claims in particular. See, e.g., *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 126 (2d Cir. 2010) (rejecting waiver of jury trial for a Jones Act claim as a defense to an arbitration agreement); *Hodgson v. Royal Caribbean Cruises, Ltd.*, 706 F.Supp.2d 1248, 1258 (S.D. Fla. 2009) ('Numerous courts … have required arbitration of Jones Act claims according to the Convention.'). Accordingly, the Court finds that plaintiff waived his right to a jury trial in the arbitration agreement; an arbitrator is competent to decide who plaintiff's employer is for purposes of the Jones Act."

IV. CONCLUSION

[24] "In accordance with the foregoing, the Court stays this action only as to defendant HAL and grants HAL's motion to compel arbitration of the claims asserted against it. Such arbitration shall apply US maritime law to plaintiff's claims and take place in Los Angeles, California or other mutually agreed upon

location. The Court will retain jurisdiction over this matter for purposes of enforcing any award that results from the arbitration…."

785. United States Court of Appeals, Fifth Circuit, 21 December 2012, No. 12-30383

Parties:	Plaintiffs/Appellants: Covington Marine Corporation (Marshall Island) et al. Defendant/Appellee: Xiamen Shipbuilding Industry Company, Limited (People's Republic of China)
Published in:	Available online at <www.ca5.uscourts.gov/opinions%5Cunpub%5C12/12-30383.0.wpd.pdf>; U.S. App. LEXIS 26297
Articles:	III; V
Subject matters:	– personal jurisdiction over foreign defendant – alter ego theory
Topics:	¶ 301

Summary

An application to enforce an LMMA award was dismissed for lack of personal jurisdiction. Foreign entities may raise a personal jurisdiction defense under the 1958 New York Convention as a matter of constitutional due process. It was contended that the court need not establish personal jurisdiction over a foreign sovereign. The respondents, however, were not alter egos of the PRC as had been argued because it was not established that the PRC reviewed respondent's management decisions, took a direct role in managing respondent's business, or otherwise required authorization for performing certain acts. Consequently they were entitled to raise a personal jurisdiction defense.

On 23 February 2003, Covington Marine Corp., Explorer Investment Co., Pioneer Investment Co. and Washington Marine Corp. (Covington), shipbuilding companies registered in the Marshall Islands, concluded a contract with the Chinese shipbuilding and petroleum producer Xiamen Shipbuilding Industry Co., Ltd (Xiamen) for the construction and purchase of four bulk carrier vessels.

A contractual dispute arose between the parties and it was submitted to arbitration under the rules of the London Maritime Arbitration Association in May 2003. On 11 January 2005, the arbitral tribunal issued an award finding

neither party liable (the liability award). Covington appealed the matter to the English High Court of Justice on 26 May 2005. Shortly thereafter, the arbitral tribunal issued a separate award on costs, apportioning 40 percent of the costs to Covington and 60 percent to Xiamen (the costs award).

In July 2005, Xiamen sought enforcement in the People's Republic of China (PRC) of the liability award under the 1958 New York Convention. On 21 November 2005, Covington sought enforcement of the costs award. The Chinese court granted both petitions on 18 August and 21 December 2005, respectively. Covington sought to vacate the Chinese enforcement judgments in March and April 2007. Those proceedings were pending at the time of the present decision.

In the meantime, on 16 December 2005, the English High Court reversed the arbitral tribunal's ruling on liability and held Xiamen liable for breach of contract as well as 100 percent of the costs. Xiamen's appeal against this decision was denied on 31 July 2006. The arbitral tribunal reissued the final awards on 26 October 2006 and 3 July 2007 respectively.

On 26 October 2009, Covington petitioned the District Court for the Eastern District of Louisiana to confirm the arbitral awards on liability and costs against Xiamen and the PRC. A series of motions for entry of default followed. By agreement of the parties, the final certificate of default as to Xiamen was vacated. On 28 February 2012, the district court also granted Xiamen's motion to vacate default as to the PRC and determined that it lacked subject matter jurisdiction over the PRC. Xiamen sought dismissal of the petition to enforce the awards and on 14 March 2012, the district court granted Xiamen's motion to dismiss for lack of personal jurisdiction.

On 11 April 2012, Covington appealed to the Court of Appeals for the Fifth Circuit, where the case was consolidated with *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding* (*First Investment)* (reported in this Yearbook XXXVIII (2013) at pp. 509-513 (US no. 786)).

On appeal, Covington argued that foreign entities without property or presence in the United States were not entitled to the protections of constitutional due process. Further, the 1958 New York Convention grounds for refusal of confirmation of an award did not include the requirement of personal jurisdiction. In contesting the dismissal for lack of jurisdiction, Covington also argued that it was not necessary to establish personal jurisdiction as to Xiamen because Xiamen was an alter ego of the PRC and a court need not have personal jurisdiction over a foreign state. Covington requested, in addition, that the award be confirmed against the PRC despite the PRC not having been a party to the arbitration agreement. Finally, Covington argued, that to the extent that an alter

ego relationship between Xiamen and the PRC was not demonstrated, the district court had erred in not permitting jurisdictional discovery.

By the present decision, the Court of Appeals affirmed the decision of the district court. The Court noted that the majority of Covington's arguments had been addressed in *First Investment* and that the Court had decided there that foreign entities may raise a personal jurisdiction defense under the 1958 New York Convention as a matter of constitutional due process. Here, the Court considered only the arguments that were factually distinct or not raised in *First Investment*.

The Court of Appeals agreed with the district court's conclusion that Covington had not alleged facts sufficient to demonstrate that there was an alter ego relationship between Xiamen and the PRC.

The Court referred to its holding in *First Investment* that instrumentalities of a foreign state are to be accorded a presumption of independent status. To overcome that presumption the court looks to the ownership and management structure of the instrumentality, whether the government is involved in the day-to-day operations as well as the extent to which an agent holds itself out to be acting on behalf of the government. It also considers whether the instrumentalities' corporate form must be disregarded in order to prevent a fraud or injustice.

The Court of Appeals concluded that Covington had not shown that the PRC reviewed Xiamen's management decisions, took a direct role in managing Xiamen's business or otherwise required authorization for performing certain acts.

Covington also relied on a declaration (the Breibart Declaration) which did not appear to have been considered by the district court. The Court of Appeals found that the Breibart Declaration only showed a perception by Covington's experts that the PRC would respond adversely to the expert's involvement in a lawsuit against the PRC, but did not demonstrate control or show that the PRC used Xiamen's corporate form to commit a fraud or injustice.

The Court of Appeals therefore held that because Covington failed to establish that Xiamen was an alter ego of the PRC, Xiamen was entitled to raise a personal jurisdiction defense. The district court had also correctly dismissed the PRC for lack of subject matter jurisdiction on sovereign immunity grounds. Because Xiamen was not an alter ego of the PRC, it could not bind the PRC to an arbitration agreement and bring it under the arbitration exception of the Foreign Sovereign Immunity Act.

The Court finally found that the district court's decision to deny limited discovery into the relationship between Xiamen and the PRC for an abuse of

discretion was also correct, as there was no indication that the PRC and Xiamen cooperated to intimidate Covington's experts into withdrawing, and the allegations fell short of the "specific facts" that the court required to approve discovery into a foreign sovereign's affairs.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345077-n>.

Excerpt

I. DISCUSSION

[1] "As noted, the district court dismissed Xiamen for lack of personal jurisdiction and, in a separate order, dismissed the PRC for lack of subject matter jurisdiction. On appeal, Covington argues that foreign entities without property or presence in the United States are not entitled to the protections of constitutional due process. Further, Covington argues that the [1958] New York Convention provides the only grounds for denying confirmation of an award, and that these grounds do not include personal jurisdiction. Covington also argues that it need not establish personal jurisdiction as to Xiamen because Xiamen is an alter ego of the PRC, and a court need not have personal jurisdiction over a foreign state. Seemingly applying the same reasoning, Covington asks that we confirm the arbitration award against the PRC, despite the PRC not having been a party to the arbitration agreement. Finally, Covington contends that, to the extent it has not demonstrated an alter ego relationship between Xiamen and the PRC, the district court erred in not permitting jurisdictional discovery.

[2] "The majority of Covington's legal arguments are addressed by our decision in *First Investment*. In that opinion, we concluded that foreign entities may raise a personal jurisdiction defense under the New York Convention as a matter of constitutional due process. Here, we address only those arguments that are factually distinct or that were not raised in *First Investment*. We thus consider whether Covington has established an alter ego relationship between Xiamen and the PRC, and whether Covington was entitled to jurisdictional discovery."

1. Alter Ego Theory

[3] "Before the district court, Covington argued that it was not required to establish personal jurisdiction over Xiamen because Xiamen was a company, agency, or instrumentality controlled by the PRC. Referring to its 28 February 2012 decision dismissing the PRC for lack of subject matter jurisdiction, the district court concluded that Covington had not alleged facts sufficient to establish an alter ego relationship between Xiamen and the PRC. The court rejected Covington's contention that sufficient control was established based on evidence that the PRC controlled three of Xiamen's major shareholders, a representative of the Chinese Communist Party inspected one of Xiamen's properties, and Xiamen listed, as one of its objectives, 'strength[ening] China with shipbuilding'.

[4] "As discussed in greater detail in *First Investment,*[1] a party attempting to show an alter ego relationship between a foreign state and its instrumentality faces a high bar. See, e.g., *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 713 F.Supp.2d 267, 279 (S.D.N.Y. 2010) (control over board of directors through shareholder voting rights did not establish government control over bank's day-to-day affairs); *Minpeco, S.A. v. Hunt*, 686 F.Supp. 427, 437 (S.D.N.Y. 1988) (alter ego relationship not established by evidence that foreign supreme court voided arbitration agreement between corporation and private miners where decision did not depend on evidence of fraud, injustice, or excessive intrusion by government). We start by observing that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status'. *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 627, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). To overcome this presumption a party must show 'that the instrumentality is the agent or alter ego of the foreign state'. *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006). '[W]e look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government.' *Walter Fuller Aircraft Sales, Inc. v. Republic of Phillipines*, 965 F.2d 1375, 1382 (5th Cir. 1992) (citing *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 178, 181 (5th Cir. 1989)). Finally, we consider whether we must disregard the instrumentality's corporate form to prevent a fraud or injustice. See *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006).

[5] "The evidence the district court discussed clearly is insufficient to establish the control necessary to establish an alter ego relationship. See *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F.Supp. 660, 666 (W.D. Mich. 1985) (foreign corporation's contacts with United States could be imputed to government defendant where defendant exercised direct control over the corporation, appointed majority of board of directors, required checks in excess of certain amount be signed by a government-appointed director, required government ministry to approve invoices for certain shipments, and included own seal on some of the invoices for shipments sent to the United States). Covington has not shown that the PRC reviewed Xiamen's management decisions, took a direct role in managing Xiamen's business, or otherwise required authorization for performing certain acts.

[6] "Covington draws attention to the declaration of Evan Breibart, which does not appear to have been considered by the district court. The Breibart declaration

1. Reported in this Yearbook XXXVIII (2013) pp. 509-513 (US no. 786).

shows that Covington's Chinese experts asked Covington not to use their declarations in any action against the PRC for fear of negative repercussions to their personal safety or career advancement. Such allegations show, at best, a perception by Covington's experts that the PRC would respond adversely to the experts' involvement in a lawsuit against the PRC. The allegations do not demonstrate that the PRC controlled Xiamen. The allegations also do not show that the PRC used Xiamen's corporate form to commit a fraud or injustice. See *Bridas S.A.P.I.C.*, 447 F.3d at 417.

[7] "Accordingly, Covington has not established that Xiamen is an alter ego of the PRC. Xiamen was thus entitled to raise a personal jurisdiction defense and the district court was empowered to dismiss Xiamen as a party on those grounds. Likewise, the district court correctly dismissed the PRC for lack of subject matter jurisdiction on sovereign immunity grounds[.] See 28 U.S.C. Sect 1604 ('a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' except under statutorily defined exceptions). Because Xiamen is not an alter ego of the PRC, Xiamen could not bind the PRC to an arbitration agreement that the PRC was not a party to, and thus could not bring it within the arbitration exception of the Foreign Sovereign Immunity Act, 28 U.S.C. Sect. 1605(a)(6)."[2]

2. Jurisdictional Discovery

[8] "The district court denied Covington's request to conduct limited discovery into the relationship between Xiamen and the PRC. Noting that Covington had merely alleged that Xiamen was controlled or owned by the PRC, without alleging any specific facts, the district court held that permitting discovery would be contrary to our decision in *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528 (5th

2. 28 U.S.C. Sect. 1605(a)(6) reads in relevant part:

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
> (….)
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if
> (….)
> (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards…."

Cir. 1992). Covington points to the Breibart declaration as demonstrating 'the PRC's active and pernicious interference in [Covington's] attempts to obtain confirmation of the final arbitration award', thereby entitling Covington to engage in jurisdictional discovery.

[9] "We review a district court's discovery rulings for abuse of discretion. *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000). The Breibart declaration only shows that Covington's Chinese experts asked that their declarations not be used in enforcement proceedings against the PRC for fear of negative repercussions. Absent from the Breibart declaration is any indication that the PRC and Xiamen cooperated to intimidate Covington's experts into withdrawing. Covington's general allegations fall far short of the 'specific facts' this court has required before approving discovery into a foreign sovereign's affairs. *Arriba Ltd.*, 962 F.2d at 537 n. 17. Accordingly, the district court's decision not to permit jurisdictional discovery on the basis of such sparse allegations did not constitute an abuse of discretion."

II. CONCLUSION

[10] "For the foregoing reasons, the district court's judgment is affirmed in all respects."

786. United States Court of Appeals, Fifth Circuit, 21 December 2012, No. 12-30377

Parties:	Petitioner/Appellant: First Investment Corporation (Marshall Islands) Respondents/Appellees: Fujian Mawei Shipbuilding, Ltd. (PRC) et al.
Published in:	Available online at <www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-30377-CV0.wpd.pdf>; 2012 U.S. App. LEXIS 26207
Articles:	III; V
Subject matters:	– personal jurisdiction over foreign defendant – alter ego doctrine
Topics:	¶ 301

Summary

Respondent foreign entities were entitled to due process protection, so sufficient contacts must be established in order to exercise personal jurisdiction over them. The requirement of personal jurisdiction over a foreign respondent was appropriate as a matter of constitutional due process even though the 1958 New York Convention does not list personal jurisdiction as a ground for refusal of enforcement. Although the petitioner was only seeking to confirm the award, not to enforce it, the respondents' substantive rights were implicated and thus dismissal on the ground of lack of personal jurisdiction was possible. It was contended that the court need not establish personal jurisdiction over a foreign sovereign. However, the respondent entities were not considered alter egos of the People's Republic of China as there was insufficient evidence to overcome the presumption of the separateness of the respondent entities from the PRC. There was no subject-matter jurisdiction over the PRC, which was also named in the action, because it was not a party to the original arbitration agreement.

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 349-352 (China no. 6) and Yearbook XXXVII (2012) at pp. 377-380 (US no. 765).

On 15 September, 2003, First Investment Corporation of the Marshall Islands (First Investment) entered into a series of shipbuilding contracts with Fujian

Shipbuilding Industry Group Corp. (FSIGC), a Chinese State-owned entity, and Fujian Mawei Shipbuilding Ltd. (Mawei), a private corporation of which FSIGC was a majority shareholder.

A dispute arose between the parties and First Investment initated arbitration in London under the rules of the London Maritime Arbitration Association. First Investment appointed Mr. Bruce Harris as arbitrator and FSIGC and Mawei (collectively, the Fujian Entities) appointed Dr. Wang Sheng Chang. The party-appointed arbitrators appointed Professor J. Martin Hunter as chair.

All of the arbitrators participated in the hearings, deliberations and initial stages of drafting of the award. Professor Hunter circulated a first draft of the award. Dr. Wang provided comments and filed a draft dissenting opinion in February 2006. Professor Hunter expressed his belief, as he had done earlier, that to finalize the award in-person discussions would be necessary. Dr. Wang replied that he would agree to a final award by email, but that he could also meet in London in April 2006. On 25 March 2006, Professor Hunter sent a second draft of the award to Mr. Harris and Dr. Wang. Mr. Harris submitted some final proof-reading changes, and the finalized award was sent to the arbitrators on 31 March 2006. However, Dr. Wang did not receive the second draft of the award as he had been detained by the Chinese authorities on 20 March 2006. Professor Hunter and Mr. Harris signed the award and attached Dr. Wang's dissent. The award granted First Investment US$ 26 million in damages.

First Investment sought to confirm the award pursuant to the 1958 New York Convention in the Xiamen Maritime Court in Fujian province, People's Republic of China (PRC). First Investment alleged that it encountered numerous difficulties in attempting to do so, which it attributed to Chinese authorities, including refusal to authenticate necessary documents, not being permitted the assistance of its Chinese counsel at a hearing and being denied a competent translator. On 11 May 2008, the Chinese court denied enforcement reasoning that the arbitral tribunal was not in accordance with the agreement signed by the parties which required that each member of the tribunal fully participate in the arbitration proceedings. Because Wang never reviewed the final draft of the award, it could not be confirmed pursuant to Art. V of the New York Convention. This decision is reported in Yearbook XXXV (2010) at pp. 349-352 (China no. 6).

First Investment then sought confirmation of the award on 27 May 2009 in the United States District Court for the Eastern District of Louisiana against the Fujian Entities as well as against the PRC. On 12 March 2012, the district court granted Fujian's motion to dismiss for lack of personal jurisdiction and dismissed First Investment's petition against the PRC for lack of subject matter jurisdiction.

This decision is reported in Yearbook XXXVII (2012) at pp. 377-380 (US no. 765).

First Investment appealed this decision to the United States Court of Appeals for the Fifth Circuit.

By the present decision, the Court of Appeals, before Stewart, Chief Judge and King and Owens, Circuit Judges, in an opinion by King, affirmed the decision of the district court, concluding that granting the petition to dismiss on personal jurisdiction grounds and dismissing the petition against the PRC for lack of subject matter jurisdiction were appropriate.

The Court of Appeals reviewed the district court's decision that it lacked personal jurisdiction de novo, noting that the burden of establishing jurisdiction rested with the party seeking to invoke the court's power, but that party need only present prima facie evidence. First Investment argued that the Fujian Entities, as foreign entities with no contacts in the United States, were not entitled to the protections of the United States Constitution Fifth Amendment Due Process Clause. In addition, First Investment argued that personal jurisdiction was not a valid defense under the 1958 New York Convention. Finally, First Investment argued that because the Fujian Entities were alter egos of the PRC, a foreign state over which personal jurisdiction was not required, the district court was wrong to dismiss the Fujian Entities.

The Court of Appeals rejected First Investment's first argument that foreign entities that are neither present nor have property in the United States are not entitled to due process protection, noting that the US Supreme Court had already reaffirmed that foreign corporations are entitled to due process protections regardless of whether they have contacts with the United States.

The Court of Appeals also rejected First Investment's second argument that a party resisting enforcement under the 1958 New York Convention cannot raise the defense of lack of personal jurisdiction as this ground is not contained in the seven grounds listed in Art. V for refusal of enforcement. The court noted that it had previously declined to rule on this question, but with the question squarely before it, it held in accordance with every circuit to have considered this issue, that dismissal of a petition under the 1958 New York Convention for lack of personal jurisdiction is appropriate as a matter of constitutional due process. The fact that a treaty and its implementing legislation did not specify that a petition may be dismissed for lack of personal jurisdiction was not dispositive. The Due Process Clause of the Constitution required that a court dismiss an action over which it had no personal jurisdiction. The 1958 New York Convention, through its implementing legislation, was an exercise of presidential and congressional power, but personal jurisdiction was grounded in constitutional due process

concern. Thus, the Constitution took precedence regardless of Congress's intent in failing explicitly to include a personal jurisdiction requirement.

The Court of Appeals also rejected First Investment's argument that because it was only seeking to confirm the award, not enforce it, the Fujian Entities' substantive rights were not implicated and thus dismissal on the ground of lack of personal jurisdiction would be improper. Confirming an award affected a party's rights in various ways. A party could avoid the application of the 1958 New York Convention by converting the confirmation of an award into a court judgment that could be enforced elsewhere as a foreign judgment. Confirmation would make the award enforceable in the jurisdiction in which it was confirmed and could also result in a party losing the right to raise defenses to enforcement it might have relied on in enforcement proceedings under the Convention. A party could seek to enforce an award that had been confirmed as a judgment which could allow it to circumvent the three-year statute of limitations for enforcement under the New York Convention. It would also permit a party to avoid the Convention Art. V defenses in a proceeding to enforce a foreign judgment under state law. Moreover, even if a confirmation proceeding did not affect a party's rights, it would not alleviate the constitutional protections that enable a party to defend itself against being called into court in a jurisdiction with which the party had no contacts.

The Court of Appeals also rejected First Investment's final argument that the Fujian Entities were alter egos of the PRC and that the court need not establish personal jurisdiction over a foreign sovereign. The court accepted, without deciding, that a foreign sovereign cannot raise a personal jurisdiction defense because it is not a "person" under the Due Process Clause. The court relied on the standard established by the Supreme Court in *First National City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*) whereby there is a rebuttable presumption that instrumentalities of a foreign state are to be accorded independent status. Factors to be considered to establish that an instrumentality is the agent or alter ego of a foreign state include nature of the owner and management status such as whether the government is involved in the day-to-day operations or the extent to which the agent holds itself out to be acting on behalf of the government. Also, the corporate form may be disregarded where respecting it would lead to injustice.

The Court of Appeals held that the district court did not err in applying these standards in determining that FSIGC and Mawei were separate juridical identities. Regarding FSIGC, the district court had considered declarations by partners in two separate Chinese law firms. The declarations established that FSIGC was wholly owned by the PRC and a branch of the PRC appointed the

board of directors and senior management. However, FSIGC possessed operational and managerial authority. There was no evidence that FSIGC's officers were acting in the PRC's interest and controlling FSIGC's day-to-day operations on the PRC's behalf. Nor did the declarations evidence any injustce that would flow from respecting FSIGC's corporate form. In addition, the Court of Appeals agreed with the district court's treatment of a declaration that merely showed that First Investment encountered many obstacles in confirming the award in China, but did not demonstrate the level of control necessary to overcome the presumption in favor of FSIGC's separate identity. Nor had First Investment shown equitable considerations sufficient to disregard FSIGC's corporate identity. To do so, it would have had to show that the PRC had manipulated FSIGC's corporate form to perpetuate a fraud or injustice. The only evidence presented was that the PRC was FSIGC's sole shareholder, which was insufficient to establish an alter ego relationship. Nor was the PRC committing fraud against First Investment as First Investment ultimately did succeed in bringing an action in China and obtained a reasoned opinion denying enforcement.

Evidence of PRC's control over Mawei was even more attenuated and depended on there being an alter ego relationship between FSIGC and the PRC. FSIGC's majority share ownership of Mawei was not sufficient to demonstrate that the PRC through FSIGC controlled Mawei and constituted an alter ego relationship.

The Court of Appeals also affirmed the district court's dismissal of the PRC for lack of subject-matter jurisdiction. As there was not an alter ego relationship between the Fujian Entities and the PRC, the PRC a non-signatory, was not bound by the arbitration agreement.

The Court of Appeals issued a separate opinion in *Covington Marine, et al. v. Xiamen Shipbuilding Industry Company, Limited* (reported in this Yearbook XXXVIII (2013) at pp. 505-508 (US no. 785), which was consolidated for argument with the present case.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345078-n>.

Excerpt

I. PERSONAL JURISDICTION

[1] "The district court dismissed First Investment's petition against the Fujian Entities for lack of personal jurisdiction. We review de novo a district court's determination that it lacks personal jurisdiction. *Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 219 (5th Cir. 2012).The burden of establishing jurisdiction rests with the party seeking to invoke the court's power, but it need only present prima facie evidence. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006). 'In determining whether a *prima facie* case exists, this Court must accept as true [the Plaintiff's] uncontroverted allegations, and resolve in [its] favor all conflicts between the [jurisdictional] facts contained in the parties' affidavits and other documentation.' *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004)[1] (alterations in original) (quoting *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 378 (5th Cir. 2002)) (internal quotation marks omitted).

[2] "On appeal, First Investment does not contend that, under a traditional due process analysis, the district court had personal jurisdiction over the Fujian Entities. Instead, First Investment argues that the Fujian Entities, as foreign entities with no contacts in the United States, were not entitled to the protections of the Fifth Amendment's Due Process Clause.[2] First Investment further asserts that personal jurisdiction is not a valid defense under the New York Convention. Finally, First Investment argues that because the Fujian Entities were alter egos of the PRC, a foreign state over which personal jurisdiction was not required, the district court was wrong to dismiss the Fujian Entities. We consider each of First Investment's arguments in turn."

1. Foreign Entities

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1. Reported in Yearbook XXX (2005) pp. 891-907 (US no. 498).
2. The Fifth Amendment of the United States Constitution (the "Due Process Clause") reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[3] "First Investment argues that foreign entities that are neither present nor have property in the United States are not entitled to due process protections. We find no support for this proposition in current caselaw. The decisions First Investment relies on are clarified by later circuit decisions or are superseded by the Supreme Court's recent decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011).

[4] "The first case First Investment relies on is *People's Mojahedin Organization of Iran v. U.S. Department of State*, in which the court held that '[a] foreign entity without property or presence in [the United States] has no constitutional rights, under the [D]ue [P]rocess [C]lause or otherwise'. 182 F.3d 17, 22, 337 U.S.App.D.C. 106 (D.C. Cir. 1999). But that holding was recently clarified by the D.C. Circuit in *GSS Group Ltd. v. National Port Authority*, where the court reasoned that '[w]hen a foreign corporation is summoned into court, it is being forced to defend itself' and '[i]n opposing personal jurisdiction on due process grounds the corporation, through its attorney, makes itself present'. 680 F.3d 805, 816 (D.C. Cir. 2012) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Thus, having 'been forced to appear in the United States … [the foreign corporation] is entitled to the protection of the *Due Process Clause*'. Id. (citing *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001)).[3] The *GSS Group* court ultimately did not have to rely on this reasoning because the Supreme Court had already reaffirmed that foreign corporations are entitled to due process protections, regardless of whether they have contacts with the United States. Id. at 816-817 (citing *Goodyear*, 131 S.Ct. at 2853).First Investment next relies on *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965 (9th Cir. 2012). There, the court observed that 'many (and likely most) of the designated persons [in this case] are not United States citizens or entities' and so '[m]any of those persons likely cannot assert the due process protections that are available to … a United States entity'. Id. at 984 (citing *Nat'l Council of Resistance of Iran v. Dep't of State,* 251 F.3d 192, 201, 346 U.S.App.D.C. 131 (D.C. Cir. 2001)). The *Al Haramain* court did not, however, discuss the Supreme Court's decision in *Goodyear*, which we find controlling here.

[5] "The *Goodyear* Court addressed whether 'foreign subsidiaries of a United States parent corporation [are] amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State'[.] 131 S.Ct. at 2850. The

3. "Alternatively, the court reasoned that due process protections might attach because 'when a United States court exercises jurisdiction over a foreign corporate defendant it inflicts damage on that defendant … *in the United States*'. *GSS Grp.*, 680 F.3d at 816."

Court held that because the district court lacked both specific and general jurisdiction, the court could not exercise personal jurisdiction over the subsidiaries. Id. at 2851. By engaging in a minimum contacts analysis where the foreign entities were not registered in the forum state, did not solicit business there, and did not design, manufacture, or advertise products in the forum state, the Court made clear that such foreign corporations could avail themselves of the protections of the Due Process Clause. Id. at 2852-2854; see also *GSS Grp.*, 680 F.3d at 813 ('Both the Supreme Court and this court have repeatedly held that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction over them.').

[6] "Thus, there is no basis to conclude that a party's status as a foreign entity permits a court to ignore personal jurisdiction or exercise such jurisdiction without first establishing sufficient contacts between the defendant and the forum state."

2. The New York Convention

[7] "First Investment next argues that a party against whom confirmation of a foreign arbitral award is sought under the New York Convention cannot raise a personal jurisdiction defense. First Investment points out that the New York Convention expressly provides for seven grounds on which confirmation may be denied and that personal jurisdiction is not among the listed grounds. First Investment further observes that an action to confirm an award under the New York Convention is a summary proceeding that does not impact a defending party's rights and thus it is unnecessary for a court to have personal jurisdiction.

[8] "We have previously declined to rule on whether dismissal of a confirmation action would be proper on personal jurisdiction grounds. *Gulf Petro Trading Co. v. Nigerian Nat'l Petrol. Corp.*, 512 F.3d 742, 753 (5th Cir. 2008) (King, J.).[4] With the question squarely before us, we hold, in accordance with the decision of every circuit to have considered this issue, that dismissal of a petition under the New York Convention for lack of personal jurisdiction is appropriate as a matter of constitutional due process.

[9] "'The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards.' *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004).[5] The New York Convention creates two different review regimes for

4. Reported in Yearbook XXXIII (2008) pp. 1089-1102 (US no. 633).
5. Reported in Yearbook XXIX (2004) pp. 1262-1302 (US no. 482).

arbitral awards depending on whether a recognition or enforcement action is brought in the country in which, or under the law of which, the award was made or in another country. *Gulf Petro Trading Co.*, 512 F.3d at 746. The first is deemed to have '*primary* jurisdiction over the award', whereas the second has '*secondary* jurisdiction'. Id. (citation omitted). A court of primary jurisdiction is 'free to set aside or modify an award in accordance with [the country's] domestic arbitral law and its full panoply of express and implied grounds for relief'. Id. (alteration in original) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)).[6] For courts with secondary jurisdiction 'Article V [of the New York Convention] enumerates the [seven] exclusive grounds on which a court … may refuse recognition and enforcement of an award'. Id."

(….)

[10] The Court quoted Art. V of the New York Convention and continued: "Personal jurisdiction is not listed as a ground on which confirmation may be denied. Nevertheless, the fact that a treaty and its implementing legislation do not specify that a petition may be dismissed for lack of personal jurisdiction is not dispositive. No less than subject matter jurisdiction – which is a ground to deny enforcement under the New York Convention – personal jurisdiction 'is "an essential element of the jurisdiction of a district … court", without which the court is "powerless to proceed to an adjudication"'. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999)[7] (quoting *Emp'rs Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382, 57 S.Ct. 273, 81 L.Ed. 289 (1937)) (omission in original). Personal jurisdiction 'represents a restriction on judicial power … as a matter of individual liberty'. Id. at 584 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)). Requiring a court to have personal jurisdiction over a party as a matter of constitutional due process 'protects an individual's liberty interest in not being subject to the binding judgment of a forum with which he has established no meaningful "contacts, ties, or relations"'. *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 498 (5th Cir. 2012) (quoting *Int'l Shoe Co.*, 326 U.S. at 319). A party's contacts with a forum must be sufficient for the party to 'reasonably anticipate being haled into court there'. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

[11] "Even though the New York Convention does not list personal jurisdiction as a ground for denying enforcement, the Due Process Clause requires that a court dismiss an action, on motion, over which it has no personal jurisdiction. See

6. Reported in Yearbook XXIII (1998) pp. 1058-1067 (US no. 261).
7. Reported in Yearbook XXV (2000) pp. 934-946 (US no. 312).

Pervasive Software, Inc., 688 F.3d at 220-221. Because the New York Convention, through its implementing legislation, is an exercise of presidential and congressional power, whereas personal jurisdiction is grounded in constitutional due process concerns, there can be no question that the Constitution takes precedence. *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1947) ('The treaty-making power does not extend "[s]o far as to authorize what the [C]onstitution forbids".' (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 33 L.Ed. 642 (1890))). Congress could no more dispense with personal jurisdiction in an action to confirm a foreign arbitral award than it could under any other statute. See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1122 (9th Cir. 2002)[8] (citing *United States v. Buckland*, 277 F.3d 1173, 1179 (9th Cir. 2002) (en banc)) (interpreting statute to require personal jurisdiction because dispensing with such a requirement would raise question of statute's constitutionality). Regardless of Congress's intent in failing explicitly to include a personal jurisdiction requirement, a court is not thereby relieved of its responsibility to enforce those constitutional protections that guard a party from appearing in a forum with which it has no contacts.

[12] "Those circuits that have considered this issue agree. *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Rep.*, 582 F.3d 393, 397-398 (2d Cir. 2009)[9] (confirmation proceeding under New York Convention requires personal or *quasi in rem* jurisdiction over parties); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178-179 (3d Cir. 2006)[10] (observing that 'the New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien'); *Base Metal Trading, Ltd. v. OJSC 'Novokuznetsky Aluminum Factory'*, 283 F.3d 208, 212 (4th Cir. 2002)[11] ('[W]hile the [New York] Convention confers subject matter jurisdiction over actions brought pursuant to the Convention, it does not confer personal jurisdiction when it would not otherwise exist.'); *Glencore Grain*, 284 F.3d at 1121; see also *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-1305 (11th Cir. 2000);[12] *Emp'rs Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 941-943 & n. 1 (7th Cir. 1999)[13] (requiring personal jurisdiction in dispute arising under Inter-American Convention on International Commercial Arbitration, but observing that result would be the same under New York Convention).

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8. Reported in Yearbook XXVII (2002) pp. 922-935 (US no. 399).
9. Reported in Yearbook XXXIV (2009) pp. 1186-1197 (US no. 679).
10. Reported in Yearbook XXX (2005) pp. 762-770 (US no. 484).
11. Reported in Yearbook XXVII (2002) pp. 902-908 (US no. 397).
12. Reported in Yearbook XXVI (2001) pp. 978-990 (US no. 345).
13. Reported in Yearbook XXV (2000) pp. 1191-1202 (US no. P8).

[13] "The *Glencore Grain* court provided the most complete analysis for why suits under the New York Convention are still constrained by personal jurisdiction. As here, the plaintiff in that case argued that, because personal jurisdiction was not listed as one of the New York Convention's seven defenses to recognition and enforcement of a foreign arbitral award, dismissal for lack of personal jurisdiction was improper. 284 F.3d at 1120-1121. The court rejected that argument as misunderstanding a court's obligation to have jurisdiction over both the character of the controversy and the parties. Id. at 1121. As the court explained, jurisdiction over subject matter comes from Article III, Section 2, Clause 1 of the Constitution, as well as through congressionally-conferred statutory grants of jurisdiction, while personal jurisdiction is based exclusively on the Due Process Clause. Id. (quoting *Ins. Corp. of Ir.*, 456 U.S. at 701-702). Consequently, it was irrelevant that the New York Convention and its implementing legislation lacked an explicit personal jurisdiction requirement. Id. ('We hold that neither the [New York] Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.').

[14] "We are not persuaded that First Investment's argument that a party's 'substantive rights' are unaffected by a confirmation proceeding overcomes the constitutional concerns here implicated. First Investment contends that because it is only seeking to confirm an award, not enforce it, the Fujian Entities' rights are not implicated, and dismissal on personal jurisdiction grounds is improper.

[15] "First Investment misunderstands the significance of confirming an award. Before the New York Convention, a party seeking to enforce an arbitration award outside the jurisdiction in which it was rendered might have to petition a domestic court for permission. *Oriental Commercial & Shipping Co., (U.K.) v. Rosseel, N.V.*, 769 F.Supp. 514, 516 (S.D.N.Y. 1991).[14] With the advent of the New York Convention, a party may now directly seek enforcement in a foreign jurisdiction by applying for an enforcement order by that jurisdiction's courts. Id. But this has also opened the door to a party wholly avoiding the New York Convention by converting the confirmation of an award into a court judgment that may be enforced abroad as a foreign judgment. Id. at 516 n. 3; see also *Waterside Ocean Navigation Co. v. Int'l Navigation, Ltd.*, 737 F.2d 150, 154 (2d Cir. 1984)[15] ('[W]e have held that the [New York] Convention applies only to the enforcement of a foreign arbitral award and not to the enforcement of foreign

14. Reported in Yearbook XVII (1992) pp. 696-703 (US no. 122).
15. Reported in Yearbook XI (1986) pp. 568-572 (US no. 61).

judgments confirming foreign arbitral awards.' (citation and internal quotation marks omitted)).

[16] "Accordingly, although confirming an award may be a 'summary proceeding', it is inaccurate to say that a party's rights are not affected. Confirming an award makes it enforceable in the jurisdiction in which it was confirmed. Confirmation may result in a party losing the opportunity to raise defenses to enforcement that it might have raised at the confirmation stage. See *Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc.*, 157 F. Supp. 2d 245, 249-251 & n. 8 (S.D.N.Y. 2001)[16] (holding foreign court judgment confirming arbitral award enforceable although doing so might preclude party from raising defenses to confirmation it could have previously raised under New York Convention). Confirming an award also makes it possible that a party, armed with a court judgment, will seek to enforce the award as a foreign judgment elsewhere. This may, for example, permit a party to circumvent the New York Convention's three-year statute of limitations. See *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 29 F.3d 79, 80-82 (2d Cir. 1994)[17] (holding that decree by foreign court rejecting application to annul an arbitral award was an enforceable foreign judgment even where statute of limitations for enforcing award under New York Convention had run). It may also permit an enforcing party to entirely avoid the New York Convention's Art. V defenses. *Ocean Warehousing B.V.*, 157 F.Supp.2d at 249 ('The Convention defenses simply do not apply to [a state law] proceeding seeking recognition and enforcement of a foreign judgment, even if that judgment was based on a foreign arbitral award.'); cf. *Schlumberger Tech. Corp. v. United States*, 195 F.3d 216, 220 (5th Cir. 1999)[18] (noting that 'defenses to confirming a foreign arbitral award are broader than those available when enforcing domestic judgments under full faith and credit').[19]

[17] "First Investment is thus incorrect that a confirmation proceeding does not affect a party's rights. Moreover, even if we agreed with First Investment's argument, this would do nothing to alleviate the constitutional protections that

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16. Reported in Yearbook XXVI (2001) pp. 1123-1130 (US no. 362).
17. Reported in Yearbook XVIII (1993) pp. 524-529 (US no. 133).
18. Reported in Yearbook XXV (2000) pp. 1067-1073 (US no. 327).
19. "Tellingly, counsel for First Investment was exceedingly hesitant at oral argument to explain why First Investment opted to bring only a confirmation action in the United States. Counsel repeatedly declined to answer why First Investment initiated a confirmation proceeding in the United States, as opposed to the United Kingdom, where the arbitration took place and where the Fujian Entities presumably had property, notwithstanding First Investment's assertion that establishing an alter ego relationship with the PRC would allow First Investment to seize China's ocean-going vessels or touring pandas."

enable a party to defend itself against being called into court in a jurisdiction with which the party has no contacts."[20]

3. Alter Ego Theory

[18] "First Investment's final argument against dismissal of the Fujian Entities for lack of personal jurisdiction is that the Fujian Entities were alter egos of the PRC. First Investment contends that because a court need not establish personal jurisdiction over a foreign sovereign, it was also error to dismiss that foreign sovereign's alter egos for lack of jurisdiction. As did the district court, we assume, without deciding, that a foreign sovereign cannot raise a personal jurisdiction defense as it is not a 'person' under the Due Process Clause. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96-97, 352 U.S.App.D.C. 284 (D.C. Cir. 2002) (reasoning that foreign states, like States of the Union, are not 'persons' under the Fifth Amendment); see also *Frontera Res. Azer. Corp.*, 582 F.3d at 399 (adopting reasoning in *Price*). Accordingly, if First Investment successfully establishes that either of the Fujian Entities were alter egos of the PRC then it would be improper for the district court to dismiss that party for lack of personal jurisdiction.

[19] "*First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (Bancec) 'remains the seminal case

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20. "We also reject any argument that the Fujian Entities were on notice that they might be haled into court in the United States, having willingly submitted to arbitration in the United Kingdom. The D.C. Circuit considered, and rejected, a similar argument in *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 337 U.S.App.D.C. 7 (D.C. Cir. 1999) [reported in Yearbook XXI (1996) pp. 751-758 (US no. 197)]. There, a contractor sought to enforce an arbitration award against Qatar and argued that, by agreeing to arbitrate in France, a party to the New York Convention, Qatar impliedly waived its sovereign immunity and any due process objections related to personal jurisdiction. Id. at 122, 125. The court disagreed and held that a party's agreement to arbitration in a jurisdiction could only be understood as waiving jurisdictional arguments for that jurisdiction. Id. at 126. As that court observed by analogy to the Full Faith and Credit Clause:

'It is implausible that a defendant in Connecticut who agreed to arbitrate … in New York, and thereby implicitly waived any objection to personal jurisdiction … in New York … also waived its objection to personal jurisdiction in such an action brought in California merely because the [F]ull [F]aith and [C]redit [C]lause would make a valid New York judgment enforceable in the courts of California.'

Id."

on the circumstance under which American courts may disregard the separate status of instrumentalities created by foreign governments'. *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1381 (5th Cir. 1992) (King, J.); see also *GSS Grp.*, 680 F.3d at 816 ('*Bancec* is the exclusive means for determining whether a foreign, state-owned corporation is a "person" for Fifth Amendment purposes.'). Under *Bancec*, 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status'. 462 U.S. at 627. 'A plaintiff can over come [sic] that presumption, however, in certain circumstances by demonstrating that the instrumentality is the agent or alter ego of the foreign state.' *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006). While not establishing any 'mechanical formula', the *Bancec* Court did list a non-exhaustive list of factors to consider in determining whether the presumption in favor of an entity's separate juridical identity had been overcome. 462 U.S. at 633. '[W]e look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government.' *Walter Fuller*, 965 F.2d at 1382 (citing *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 178, 181 (5th Cir. 1989)).[21] Finally, we consider the equitable principles discussed in *Bancec*, 'particularly the principle of disregarding the corporate form in instances where respecting it would lead to injustice'. Id. First Investment argues that the district court did not sufficiently heed *Bancec's* instruction that an instrumentality should not be considered a separate legal entity when doing so would result in

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21. "Subsequently, this court has also instructed district courts to consider 'those factors normally explored in the context of parent-subsidiary alter ego claims'. *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 360 n. 11 (5th Cir. 2003) ('*Bridas I*'). These include whether: (1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities. Id.

A court can also consider '(1) whether the directors of the "subsidiar" act in the primary and independent interest of the "parent"; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arms length'. Id. Finally, a court can also consider: (1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. Id."

fraud or injustice. First Investment further contends that the district court improperly emphasized the need for a foreign state to exercise control over an instrumentality's daily activities without fully considering the totality of the circumstances. Applying the considerations in *Bancec* to each of the Fujian Entities we conclude that the district court did not err in determining that First Investment has not overcome the presumption in favor of FSIGC and Mawei's separate juridical identity."

a. FSIGC

[20] "The district court considered declarations by Wang Darong and Lin Jiang, each a partner in a separate Chinese law firm. The Wang and Lin declarations established that FSIGC was wholly-owned by the PRC, and that a branch of the PRC appoints FSIGC's board of directors and senior management personnel, and exercises the rights of a shareholder. The Wang and Lin declarations also conceded, however, that FSIGC possessed operational and managerial authority. The district court also considered the declaration of the vice-director of FSIGC's legal department, who stated that FSIGC's employees were paid by FSIGC, not the PRC; FSIGC filed independent financial statements; the PRC did not provide any funding apart from that raised by selling shares; FSIGC's directors acted in the best interest of the company; FSIGC was responsible for its own debts, which were not paid or guaranteed by the PRC; FSIGC dealt with the PRC in arms-length transactions; and FSIGC managed its own daily operations apart from the PRC.

[21] "There is no question that this evidence, considered alone, would not satisfy *Bancec's* standard for finding an alter ego relationship between a foreign state and its instrumentality. As we have previously determined, the mere fact that a government owns 100 percent of a company's stock is not sufficient to establish control. Id. at 1382 & n. 11. The declarations also provide no indication that FSIGC's officers were acting in the PRC's interests and controlling FSIGC's day-to-day operations on the PRC's behalf. Nor do the declarations evidence any injustice that would flow from respecting FSIGC's corporate form.

[22] "First Investment's only argument in response is that the district court did not consider the declaration of Evan Breibart. That declaration shows that First Investment encountered many obstacles in confirming its arbitral award in China. These include the PRC's London and Athens embassies following the PRC's instructions not to authenticate documents necessary to initiate a confirmation proceeding in China. A formal protest by the Greek Deputy Foreign Minister led to the documents being authenticated, but delays continued. Following commencement of the confirmation proceeding in China, First Investment's

attorney and interpreter, as well as an employee of the Greek consulate, were denied entry into the hearing without explanation. First Investment was instead provided with a student interpreter from a local university who could not provide an adequate interpretation of the hearing. Finally, Wang, whose declaration First Investment submitted to the district court, later stated that he would be moving to China's Fujian province, and that, as a result, it would be 'inconvenient for him if the declaration was used in an enforcement proceeding against PRC state owned assets'. Nearly all the Chinese experts First Investment has approached since then have refused to provide a declaration in First Investment's support for fear of negative repercussions by the PRC.

[23] "Whatever this evidence says about the PRC's hostility towards foreign entities, it does not demonstrate the level of control necessary to overcome the presumption in favor of FSIGC's separate identity. The Breibart declaration does not show that the PRC exercised control over FSIGC. None of the allegations even relate to FSIGC's management, but instead relate to actions by the PRC's embassies and courts. First Investment's allegations fall far short of the type of control necessary to establish an alter ego relationship. See, e.g., *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411, 419-420 (5th Cir. 2006) (*Bridas II*) (alter ego relationship established where government manipulated undercapitalized corporation to repudiate contract, paid arbitration costs, diverted corporation's revenues into state oil and gas fund, and changed law to prevent seizure of corporation's assets); *S & Davis Int'l, Inc.*, 218 F.3d at 1299-1300 (corporation was alter ego of government ministry where corporation was wholly owned by government, ministry ordered corporation to breach contract, and ministry failed to submit evidence that corporation was independent entity, including papers of incorporation, status of employees as public or private servants, or separation of assets).

[24] "Nor has First Investment presented equitable considerations sufficient to disregard FSIGC's corporate identity. For First Investment to meet this prong it is not sufficient for it merely to point out an injustice that would result from an adverse decision. Rather, First Investment must show how the PRC manipulated FSIGC's corporate form to perpetuate a fraud or injustice. See *Bridas II*, 447 F.3d at 417 (imposition of export ban was exercise of sovereign powers that may have constituted a wrong to plaintiff, but 'was not a wrong based on misuse of the corporate organizational form'). Here, First Investment has failed to show that the PRC used FSIGC's corporate form to manipulate circumstances in such a way as to do something it otherwise would not have been able to do. First Investment has also not shown that the PRC is shielding FSIGC from an adverse arbitral award because the real burden of such an award would fall on the PRC. The only

evidence First Investment puts forward is that the PRC is FSIGC's sole shareholder. As already stated, this is insufficient to establish an alter ego relationship. *Hester*, 879 F.2d at 181. Were we to accept First Investment's argument we would effectively wipe out the presumption of separateness. Following First Investment's logic, anytime a foreign sovereign owned the majority of shares in a company, and took any action that assisted that company, it would provide grounds for ignoring that company's separate juridical identity. See id. (describing 100 percent ownership and appointment of board of directors as characteristics of a 'typical government instrumentality').

[25] "Nor is the PRC committing a fraud against First Investment. Although the PRC may have delayed initiation of the confirmation proceeding, First Investment ultimately did bring such an action in China. Moreover, the Chinese court provided a reasoned opinion that denied enforcement on the ground that the panel's third arbitrator did not approve the final draft.

[26] "Accordingly, the district court correctly concluded that there did not exist an alter ego relationship between FSIGC and the PRC, and properly dismissed FSIGC for lack of personal jurisdiction."

b. Mawei

[27] "Evidence of the PRC's control over Mawei is even more attenuated than that over FSIGC and is also dependent on there being an alter ego relationship between FSIGC and the PRC. The aforementioned Wang and Lin declarations only show that FSIGC directly owns 56.21% of Mawei's total share capital. FSIGC also effectuated Mawei's reconstruction and the two companies share senior management personnel. Just as the PRC's 100% ownership of FSIGC is insufficient to establish the necessary degree of control under *Bancec*, so too is FSIGC's majority share ownership of Mawei not enough to demonstrate that the PRC, through FSIGC, controlled Mawei and create an alter ego relationship. See *Walter Fuller*, 965 F.2d at 1382 & n. 11. For reasons already discussed, First Investment has also not shown that the PRC manipulated Mawei's corporate form to commit a fraud or injustice. As with FSIGC, the district court did not err in dismissing Mawei for lack of personal jurisdiction after concluding that there was no alter ego relationship between Mawei and the PRC."[22]

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22. "The district court also denied jurisdictional discovery because First Investment failed to allege facts that, if true, would establish jurisdiction. First Investment does not raise this issue on appeal. Accordingly, we need not consider it. We only note, in passing, that even were we to consider the district court's discovery rulings we would find no error. A district court's discovery rulings are reviewed for abuse of discretion. *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000). The allegations discussed above fall far short of the 'specific facts' we have required for

II. SUBJECT MATTER JURISDICTION

[28] "Pursuant to the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. Sect. 1604, a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' unless one of several statutorily defined exceptions applies. The district court correctly recognized, and the parties do not dispute, that the only potentially applicable exception is Sect. 1605(a)(6)'s arbitration exception. Under that provision, foreign states are considered to have waived their sovereign immunity in cases

> 'to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate.…'

28 U.S.C. Sect. 1605(a)(6).

[29] "The PRC was not, however, a party to the arbitration agreement between First Investment and the Fujian Entities. The district court thus considered whether the PRC could be bound to the arbitration agreement through the Fujian Entities. For the same reasons it concluded that the Fujian Entities were not alter egos of the PRC, the district court concluded that the PRC could not be bound to the agreement. Accordingly, the district court held that the arbitration exception in Sect. 1605(a)(6) did not apply and that it lacked subject matter jurisdiction over First Investment's petition against the PRC.

[30] "We review a district court's dismissal for lack of subject matter jurisdiction de novo. *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012). First Investment raises subject matter jurisdiction as an issue on appeal, but does not further discuss it. Nevertheless, we understand First Investment's argument on subject matter jurisdiction to be identical to its personal jurisdiction argument. Thus, if First Investment can establish an alter ego relationship between the Fujian Entities and the PRC then the PRC can be bound to the arbitration agreement to which the Fujian Entities are a party. See *Bridas II*, 447

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allowing discovery into a foreign sovereign's activities. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 n. 17 (5th Cir. 1992)."

F.3d at 413, 415 (corporation that was foreign state's alter ego could bind non-signatory foreign state to arbitration agreement).

[31] "As discussed, supra, First Investment cannot meet *Bancec's* standard for establishing an alter ego relationship. Having raised no other ground on which to find subject matter jurisdiction over the PRC, this conclusion is fatal to First Investment's petition. Accordingly, we affirm the district court's dismissal of the PRC for lack of subject matter jurisdiction."[23]

III. CONCLUSION

[32] "For the foregoing reasons, the district court's judgment is affirmed in all respects."

23. "Because we affirm the district court's decision that First Investment has failed to establish an alter ego relationship between the Fujian Entities and the PRC we do not reach the Fujian Entities' arguments that we should dismiss First Investment's appeal for insufficient briefing or because consideration of an alter ego theory is inappropriate at a confirmation proceeding.

787. United States Court of Appeals, Seventh Circuit, 18 March 2013, Nos. 12-2308 and 12-2623

Parties:	Plaintiff/Appellant: Johnson Controls, Incorporated (US) Defendant/Appellee: Edman Controls, Incorporated (British Virgin Islands)
Published in:	Available online at <http://caselaw.findlaw.com/us-7th-circuit/1625896.html>; 2013 U.S. App. LEXIS 5583
Articles:	III; V; V(1)(*c*)
Subject matters:	– 1975 Panama Convention – 1958 New York Convention applied to setting aside of award (by enforcement court) – excess of authority of arbitrators (no) – attorney's fees
Topics:	¶ 704A; [2]-[5] = ¶ 104; [4] = ¶ 501; [6]-[11] = ¶ 512; [12]-[17] = ¶ 301

Summary

The Court of Appeals affirmed the district court's decision not to vacate and to enforce an award rendered in Miami, finding that the sole arbitrator did not exceed his authority. The district court applied Chapter 1 of the FAA, on domestic arbitration; the Court of Appeals held that either Chapter 2 (implementing the 1958 New York Convention) or Chapter 3 (implementing the 1975 Panama Convention) applied instead, depending on whether defendant was considered a British Virgin Islands or a Panama company. There was no excess-of-authority ground to vacate the award under either Convention. The district court's awarding of attorney's fees on the basis of a loser-pays contractual provision was correct.

Johnson Controls, Incorporated (Johnson), a Wisconsin manufacturer of building management systems and equipment, concluded an exclusive distribution contract with Edman Controls, Incorporated (Edman) to distribute Johnson products in Panama. The contract provided that any dispute arising from the

parties' agreement would be resolved by arbitration in the United States with the application of Wisconsin law. The losing party would be responsible for the prevailing party's attorney's fees.

At the time the agreement was signed, Johnson was aware that Edman would distribute its products by contracting with two Panamanian subsidiaries, collectively, Pinnacle. Edman would operate as an intermediary and delegate the direct responsibility of delivering the products to Pinnacle.

A dispute arose between the parties when Johnson attempted to sell its products directly to Panamanian developers in 2009. In August 2010, Edman initiated arbitration against Johnson as provided for in the exclusive distribution contract, claiming (1) tortious interference with Edman's contractual relations with its customers; (2) unjust enrichment; (3) breach of duties of good faith and fair dealing arising out of the contract; and (4) tortious interference with Pinnacle's contractual relations. A sole arbitrator was appointed; the arbitration took place in Florida. The arbitrator dismissed the Pinnacle claim on the ground that he was not authorized to address matters concerning "relationships enjoyed by either of Edman's subsidiary corporations"; he then concluded that Edman had suffered its own damages, independent of whatever damage Pinnacle suffered, and awarded Edman a total of US$ 733,341.64, exclusive of attorney's fees.

Johnson sought to vacate the award in the United States District Court for the Eastern District of Wisconsin, relying on Sect. 10(a)(4) of the Federal Arbitration Act (FAA) which provides that an award may be vacated if "the arbitrators exceeded their powers". Edman sought to confirm the award. In decisions of 11 May 2012 and 26 June 2012, the district court ruled in Edman's favor and confirmed the award. Johnson had argued that the arbitrator had addressed claims that Edman had brought on behalf of Pinnacle and in doing so had disregarded a Wisconsin rule under which Edman lacked standing to assert Pinnacle's claims. The district court rejected this argument noting that the arbitrator had expressly dismissed Edman's effort to recover for Johnson's interference with Pinnacle's contractual relations. In doing so, he had cited Wisconsin law throughout his decision and had not disregarded the parties' contractual choice of law.

The district court also addressed the "loser pays" provision for attorney's fees. Edman's agreement with its lawyer provided for a contingency fee of 33.3 percent of the award. Based on two affidavits submitted by Edman's experts and noting Johnson's silence, the court decided that the contingent fee was commercially reasonable. It reduced the requested costs by US$ 17,521.25 and awarded US$ 39,958.80 in fees. Johnson appealed.

The United States Court of Appeals for the Seventh Circuit, before Posner, Wood and Tinder, CJJ, in an opinion by Wood, affirmed the judgment of the district court.

The Court of Appeals first noted that although arbitration is supposed to be a procedure through which a dispute can be resolved privately, with the narrowest of exceptions for court intervention, losers sometimes cannot resist the urge to try for a second bite at the apple.

Both parties had based their arguments on Chapter 1 of the FAA, rather than Chapter 2 which implements the 1958 New York Convention or Chapter 3 which implements the 1975 Panama Convention. Both Conventions provide for the domestic enforcement of foreign arbitral awards provided that the award "involves property located abroad, envisages performance or enforcement abroad, or has some reasonable other relation with one or more foreign states". The award at issue would fall either under the New York Convention or the Panama Convention, depending on whether Edman was considered a British company (the British Virgin Islands being a British Overseas Territory) or a Panamanian company.

Chapters 2 and 3 FAA state that a Convention award may be vacated only on the grounds specified in the applicable Convention. The court noted that this could be significant as these grounds differ slightly from those in Chapter 1 FAA. In the view of the court, it was not clear whether a party may bring an action under Chapter 1 to vacate an award issued by an arbitrator in a US jurisdiction but governed by one of these Conventions. As this was not a close case, however, the court did not consider the issue.

The Court of Appeals remarked that it is not easy to overturn an arbitral award. Manifest disregard of the law is not a ground unless the award orders the parties to do something they could not otherwise do legally. None of the grounds for vacating the award in Sect. 10 FAA or Art. V of the New York Convention were present here. Johnson had argued that the arbitrator had exceeded his powers when he found, allegedly contrary to Wisconsin law, that Edman had standing to bring claims on behalf of Pinnacle. However, the arbitrator had in fact refused to grant Edman standing to assert Pinnacle's claims; his decision to allow Edman to assert claims only for its own damages was consistent with the applicable Wisconsin law.

Johnson's argument that the breach did not hurt Edman because all of the lost profits and investment were suffered by Pinnacle also failed. The arbitrator had properly looked at the evidence and facts in making his decision that the losses did not stop with Pinnacle.

The Court of Appeals reviewed the district court's award of attorney's fees for abuse of discretion. Johnson argued that the district court should have used the court's preferred "lodestar" method for setting the fee award. The court noted that the fees were shifted pursuant to a contractual arrangement and that the applicable standard was "commercial reasonableness". The district court's analysis supported its determination that a 33.3 percent contingent fee was common for commercial arbitration cases in Florida. Johnson had not disclosed its own fees nor provided any evidence that the contingent fee was atypical. Therefore, the district court did not abuse its discretion in concluding that Edman was entitled to a 33.3 percent contingent fee.

In closing, the Court of Appeals commented on Edman's request for sanctions for a frivolous appeal under Federal Rule of Appellate Procedure 38. The court did not grant sanctions because the fee-shifting clause already assured that Edman would not bear the costs of the appeal, but added that challenges to commercial arbitral awards bear a high risk of sanctions; also, attempts to obtain judicial review of an arbitrator's decision undermine the integrity of the arbitral process.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345079-n>.

Excerpt

[1] "Although arbitration is supposed to be a procedure through which a dispute can be resolved privately, with the narrowest of exceptions for court intervention, losers sometimes cannot resist the urge to try for a second bite at the apple. That is what has happened here. [Johnson] and [Edman] entered into an agreement giving Edman the exclusive rights to distribute Johnson's products in Panama. When it appeared that Johnson was not living up to its promise, Edman invoked the agreement's arbitration clause. The arbitrator ultimately concluded that Johnson had breached the agreement and that Edman was entitled to damages. Rather than accept that result, Johnson filed this suit, in which it seeks to vacate or modify the arbitral award. Edman responded with a motion to confirm. The district court ruled in Edman's favor, and Johnson now appeals." (....)

I. 1958 NEW YORK CONVENTION AND 1975 PANAMA CONVENTION

[2] "Before addressing the merits of Johnson's claims, we think it worth highlighting a point about arbitral procedure. Both parties in this case based their arguments on Chapter 1 of the [Federal Arbitration Act – FAA], rather than Chapters 2 or 3 of that statute. Chapter 1 codifies the original Federal Arbitration Act of 1925, 43 Stat. 883; it applies to all domestic awards and to all other awards not otherwise covered by another legal instrument. But the FAA does not stop with Chapter 1. Chapter 2 implements the [1958 New York Convention]. See 9 U.S.C. Sect. 201. Chapter 3 implements the [1975 Panama, or Inter-American Convention]. The United States is a party to both of those Conventions.

[3] "Chapter 2 of the New York Convention and Chapter 3 of the Panama Convention provide for domestic enforcement of foreign arbitral awards. Any commercial agreement or arbitration that 'involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states' is governed by the New York or Panama Convention, when both or all countries concerned are parties to the relevant Convention. 9 U.S.C. Sect. 202; see also *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir. 1995)[1] ('[A]ny commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and

1. Reported in Yearbook XXI (1996) pp. 759-766 (US no. 198).

has no reasonable relationship with one or more foreign states, falls under the Convention.'). Very few foreign awards fall outside the reach of one or the other Convention. The New York Convention now has 148 state-parties, see <www.newyorkconvention.org/new-york-convention-countries/contracting-states> (last visited 13 March 2013), and the Panama Convention has 19, see <www.oas.org/juridico/english/sigs/b-35.html> (last visited 13 March 2013). This award almost certainly falls under either the New York or the Panama Convention, depending on whether Edman is considered a British company (the British Virgin Islands are a British Overseas Territory) or a Panamanian company. If it is the former, then the New York Convention applies; if the latter, then pursuant to 9 U.S.C. Sect. 305, the Panama Convention governs.

[4] "Chapters 2 and 3 of the FAA state that a Convention award may be vacated only on the grounds specified in the applicable Convention. 9 U.S.C. Sects. 202, 302.[2] This could be important in some cases, because the Convention grounds for vacatur are slightly different from those in Chapter 1 of the FAA. Compare 9 U.S.C. Sect. 10(a), with New York Convention Art. V, and Panama Convention Art. 5; see also George A. Bermann, *'Domesticating' the New York Convention: The Impact of the Federal Arbitration Act*, 2 J. Int'l Disp. Settlement, no. 2, 317-332 (2011), available at <http://jids.oxfordjournals.org/content/2/2/317.full#xref-fn-7-1> (last visited 13 March 2013)....[3]

[5] "It is not clear whether a party may bring an action under Chapter 1 to vacate an award issued by an arbitrator in a US jurisdiction, but governed by the Convention. Id. If it made any difference to our case, we would need to decide whether the district court erred by allowing this action to proceed under Chapter 1 of the FAA, or if the party who might have been advantaged by analysis under the proper Convention might have waived its arguments. But, as we explain

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2. 9 U.S.C. Sect. 202 reads in relevant 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. 302 reads:

> "Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention."

3. *Note General Editor*: The texts of these provisions as set out in the Appendix to this opinion are not reproduced here.

below, we do not regard this as a close case, and so we can save further consideration of that issue for another day."

II. EXCESS OF AUTHORITY AS GROUND FOR VACATUR

[6] "We already have alluded to the reasons why Johnson believes that this arbitral award should be vacated: the way in which the award took account of Pinnacle's injuries; the arbitrator's alleged refusal to follow Wisconsin law; and the approach the district court took to the fee award. Johnson acknowledges, and Edman emphasizes, that it is difficult to overturn an arbitral award. We uphold an award so long as 'an arbitrator is even *arguably* construing or applying the contract and acting within the scope of this authority'. *Local 15, Int'l Bhd. of Elec. Workers v. Exelon Corp.*, 495 F.3d 779, 782-783 (7th Cir. 2007) (emphasis added) (internal quotation marks omitted). We will not overturn an award because an arbitrator 'committed serious error', or the decision is '"incorrect or even whacky"'. Id. (quoting *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006)); see also *Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) ('[T]hinly veiled attempts to obtain appellate review of an arbitrator's decision … are not permitted under the FAA…. Factual or legal errors by arbitrators – even clear or gross errors – do not authorize courts to annul awards.') (internal quotation marks omitted).

[7] "In the context of labor awards, we have said that the only time when we will disrupt an award is if we find the arbitrator 'effectively dispenses his own brand of industrial justice' because 'there is no possible interpretive route to the award'. *Local 15, Int'l Bhd. of Elec. Workers*, 495 F.3d at 783 (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001)); *Ganton Techs., Inc. v. UAW, Local 627*, 358 F.3d 459, 462 (7th Cir. 2004)).

[8] "The same approach applies to commercial arbitration. Indeed, in two commercial cases we have held that even 'manifest disregard of the law is not a ground on which a court may reject an arbitrator's award' unless it orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix prices). *Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011); *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

[9] "This is not a case in which one can find any of the circumstances singled out in Sect. 10 of the FAA (or, for that matter, Art. V of the New York Convention or Art. 5 of the Panama Convention) as something that justifies a

refusal to recognize or enforce an arbitral award. Johnson argues that the arbitrator exceeded his powers when he found, allegedly contrary to Wisconsin law, that Edman had standing to bring claims on behalf of Pinnacle. This argument alludes to Sect. 10(a)(4) of the FAA, which permits vacatur of an award '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'. But nothing so dramatic happened here. At worst, the arbitrator overlooked or misapplied one Wisconsin decision holding that plaintiffs' interest in corporations that were sisters to a mismanaged corporation did not support their standing to sue the parties responsible for mismanaging the victimized corporation. *Krier v. Vilione*, 2009 WI 45, 317 Wis.2d 288, 766 N.W.2d 517, 520 (Wis. 2009). A proper reading of this case, Johnson argues, would have required the arbitrator to reject Edman's standing to assert any claims for Pinnacle's damages.

[10] "There are two incurable shortcomings to Johnson's argument. First, it is factually wrong. It assumes that the arbitrator granted Edman standing to assert the claims of Pinnacle, when in fact the arbitrator refused to do precisely that. Second, because the arbitrator permitted Edman to assert claims only for its own damages, and not Pinnacle's, the arbitrator's decision can be understood as consistent with *Krier*. The *Krier* court noted that 'standing is satisfied when a party has a personal stake in the outcome', id. at 304, and Edman certainly had a personal stake in the enforcement of its contract with Johnson.

[11] "Since the arbitrator denied Edman standing to assert Pinnacle's claims, Johnson can contest only the finding that Edman itself was injured by the breach. Johnson contends that the breach did not hurt Edman because all of the lost profits and investment were actually suffered by Pinnacle. But the losses did not stop with Pinnacle. The direct purchaser from Johnson was Edman; Pinnacle was performing downstream services for Edman. Para. 8.a of the agreement makes this clear when it provides that '[t]he relationship between [Johnson] and [Edman] is solely that of seller and buyer'. The extent to which Edman stood to profit as an intermediary depended on how effectively it could distribute Johnson's products, through whatever distribution agents it saw fit to use. Pinnacle's profits provided a critical indicator of the value of the arrangement to Edman. The arbitrator properly looked at this evidence, along with other facts, and came to a conclusion. This was precisely what he was authorized to do, and even if some might question his conclusions, that is no reason to set aside the award."

III. ATTORNEY'S FEES

[12] "Finally, we come to the question of attorney's fees. We review the district court's decisions on this aspect of the case only for abuse of discretion. *Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 550 (7th Cir. 1999). Johnson's primary objection relates to the court's decision not to use the lodestar method for setting the fee award. Because we have held that this is the preferable methodology to use for awards under 42 U.S.C. Sect. 1988 (the civil rights statute providing for attorney's fees for the prevailing party), see *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 639 (7th Cir. 2011), Johnson reasons that it must be used here as well.

[13] "This argument neglects the distinction between attorney's fees shifted by statute and those shifted by contract. It is true that we have required lodestar analysis for statutory fee-shifting schemes. Id. at 639 ('*In Title VII actions* … [t]he lodestar approach forms the "centerpiece" of attorneys' fee determinations, and it applies even in cases where the attorney represents the prevailing party pursuant to a contingent fee agreement.') (emphasis added). Fees shifted by contract are a different matter. Because fee-shifting occurs as a result of the parties' *ex ante* private ordering, we have held that fees shifted pursuant to a contractual provision 'require reimbursement for commercially-reasonable fees no matter how the bills are stated'. *Matthews v. Wisconsin Energy Corp., Inc.*, 642 F.3d 565, 572 (7th Cir. 2011) (citations omitted). The inquiry into commercial reasonableness 'does not require courts to engage in detailed, hour-by-hour review of a prevailing party's billing records'. Id. (upholding a contractual fee-shifting award even though the 'request lacked any description of the work performed').

[14] "There is less need to police the reasonableness of fees shifted pursuant to a contract because the parties to a contract expressly consent to and define the terms of the fee shifting. If the parties do not want to pay an opposing party's contingent fee, they are free to write an agreement under which the prevailing party will be obliged only to pay fees calculated in accordance with the lodestar method. On the other hand, contracting parties may want to preserve their ability to rely on a contingent fee arrangement to litigate a breach of the contract and have those fees reimbursed if they prevail. We see no reason to curtail parties' ability to define the terms of their fee arrangements with lawyers. This is quite different from a statutory obligation to pay the opponent's fees, where the party responsible for the fees does not consent to the arrangement and has no say in determining how fees will be calculated.

[15] "In *Matthews* we explained that the commercial reasonableness of an award pursuant to a contractual fee shift should be determined with reference to 'the aggregate costs in light of the stakes of the case and opposing party's litigation strategy'. Id. at 572. The district court's analysis supports its determination that the 33.3 percent contingent fee here was commercially reasonable. Edman submitted affidavits from two experts stating that a one-third contingent fee is common for commercial arbitration cases in Florida, where the arbitration took place. And the court noted that 'commercially reasonable' contingent fees may be higher than a commercially reasonable lodestar rate because a contingent arrangement may include a premium that captures the attorney's upfront investment as well as the risk of losing the case. Johnson declined to disclose the fees it incurred (a sum that it presumably believed was reasonable) for the purpose of comparing Edman's contingent fees to its own expenses. Nor did Johnson provide any evidence showing Edman's 33 percent contingent fee is higher than the fee typically charged for comparable work in the relevant area and therefore unreasonable. Id. The court did not abuse its discretion in concluding that Edman was entitled to a 33.3 percent contingent fee."

IV. SANCTIONS

[16] "In closing, we comment on Edman's request for sanctions under Federal Rule of Appellate Procedure 38 against Johnson. Rule 38 authorizes sanctions for appeals that the court determines are frivolous. An appeal is frivolous 'if the appellant merely restates arguments properly rejected by the district court that are unsupported by a reasoned colorable argument for altering the district court's judgment'. *Smeigh v. Johns Manville, Inc.*, 643 F.3d 554, 565 (7th Cir. 2011). Although we have decided to deny Edman's motion, this is largely because the fee-shifting clause in the contract already assures that Edman will not bear the costs of this appeal.

[17] "We note, however, that challenges to commercial arbitral awards bear a high risk of sanctions. See *Flexible Mfg.*, 86 F.3d at 101 (imposing sanctions). Attempts to obtain judicial review of an arbitrator's decision undermine the integrity of the arbitral process. Because of Johnson's appeal, Edman has been deprived not only of the value of the distributorship it expected to have for Panama, but also part of the value of the arbitration to which both parties agreed.

[18] "The judgment of the district court is affirmed."

788. United States District Court, Northern District of Illinois, Eastern Division, 21 March 2013, Case No. 12-CV-3542

Parties:	Petitioner: Universal Forum of Cultures Barcelona 2004, S.L., in Liquidation (nationality not indicated) Respondent: Council for a Parliament of the World's Religions (nationality not indicated)
Published in:	Available online at <http://docs.justia.com/cases/federal/district-courts/illinois/ilndce/1:2012cv03542/268851/31>; 2013 U.S. Dist. LEXIS 39719
Articles:	III; V; V(1)(*a*); V(1)(*c*)
Subject matters:	– existence of arbitration agreement because of renewal of contract (*novatio*) – competence-competence regarding existence, validity of arbitration agreement – applicable law to existence, validity of arbitration agreement – excess of authority of arbitrators (no) – failure to attempt mediation before arbitration is issue for arbitrators – enforcement proceeding is summary proceeding
Topics:	[6]-[12] = ¶ 506 + ¶ 507 (novation); [13]-[20] = ¶ 512; [21]-[25] = ¶ 301

Summary

A Spanish award was confirmed. The court had jurisdiction because the award met the four requirements for being deemed to fall under the 1958 New York Convention: valid arbitration agreement; arbitration in a signatory country; commercial relationship; at least one party not a US citizen. Defendant disputed that there was a valid arbitration agreement because of an alleged novation. The "threshold matter" of the existence and validity of the arbitration agreement is for the court, not the arbitrator, to decide; the court therefore applied Illinois law and found that the parties had concluded a valid arbitration agreement and that there was no novation as the later agreement merely modified the payment terms

under the first agreement (defendant in fact relied on that first agreement in the arbitration). The arbitrator did not exceed his authority by finding that he had jurisdiction and ignoring a mediation requirement in the arbitration clause: procedural issues are for the arbitrator to decide and such decision was within the arbitrator's authority.

In June 2003, Universal Forum of Cultures Barcelona 2004, S.L. (the Forum), the Council for a Parliament of the World's Religions (the Council) and the UNESCO Centre of Catalonia (the Centre) agreed to hold an "international interreligious event" in Barcelona, Spain, called the "2004 Parliament of the World's Religions" (the Parliament). On 4 June 2003, the parties executed a Memorandum of Understanding (MOU) governing their relationship. According to the MOU, the Forum and the Council were responsible for all policy matters, procedures, operations, programming and funding of the Parliament. Para. 20 of the MOU, entitled "Conflict negotiation process", provided:

> "This Agreement is governed by Spanish Law. In the event that conflicts, disagreements, misunderstandings, or differences cannot be resolved through the normal and established channels of communication and authority, the following two-step process would [sic] be undertaken:
>
> (i) Three principal Executive officers of the Council, [the Forum], and the Centre would seek to mediate these matters to the satisfaction of all parties; and if unsuccessful,
> (ii) The parties accept the institutional arbitration of the Court of Arbitration of Barcelona, of the Catalan Association for Arbitration, which is in charge of appointing the arbitrator or arbitrators and the administration of the arbitration. The parties herein agree to comply with the arbitration decision. The parties agree that the Arbitration will be according to Law."

Shortly after the Parliament's event ended, a dispute arose between the Forum and the Council in respect of the sums the Council owed the Forum. From September 2004 through January 2005, the parties exchanged several offers and counteroffers. On 31 January 2005, the Forum sent to the Council a two-page letter setting out the Council's outstanding debt of US$ 565,159 and proposing a payment schedule (the 2005 Letter Agreement). On 28 March 2005, the Council signed and accepted the 2005 Letter Agreement.

The Council failed to make all the payments set forth in the 2005 Letter Agreement. On 10 February 2009, the Forum made a demand for payment on

the outstanding debt of US$ 238,592.52. The Council made a partial payment of US$ 25,000 in November 2009 but made no further payments.

On 20 May 2010, the Forum commenced arbitration proceedings in the Arbitration Court of Barcelona as provided for in the MOU. In its submission, the Council acknowledged the existence of the arbitration agreement in the MOU, but argued that the mediation step of para. 20 had not been satisfied. On 9 September 2011, a sole arbitrator issued an award in the Forum's favor in the total amount of US$ 276,196.22. On 9 May 2012, the Forum filed a petition to confirm the award in the United States.

The United States District Court for the Northern District of Illinois, Eastern Division, per John W. Darrah, US DJ granted confirmation. The court first dealt with the "threshold matter" of determining if it had jurisdiction under the Federal Arbitration Act (FAA), which incorporates the 1958 New York Convention (in Chapter 2) and vests federal district courts with original jurisdiction over actions "falling under the Convention". An arbitral award "falls under" the Convention when: (1) there is an agreement in writing to arbitrate; (2) the agreement provides for arbitration in a Convention signatory; (3) the legal relationship is commercial; and (4) one party to the agreement is not an American citizen. The Council claimed that there was no arbitration agreement in writing because the MOU had been novated by the 2005 Letter Agreement, which did not contain an arbitration clause.

The court applied US law, because "gateway" issues of the existence and validity of the arbitration agreement are for the court, not the arbitrator, to decide. Under Illinois law principles that govern the formation of contracts, the court must ascertain whether the basic ingredients of a contract – offer, acceptance and consideration – are present. As all these elements were present in the MOU, the court concluded that there was a valid arbitration agreement in writing.

As to the Council's contention that the MOU had been replaced by the 2005 Letter Agreement, the district court noted that the Council did not raise this argument in the arbitration, where on the contrary it acknowledged that the MOU was the relevant contract and that it contained a valid arbitration agreement. In fact, the Council relied on the MOU, since its objection to arbitration was based on the mediation provision in para. 20 of the MOU. Also, the 2005 Letter Agreement did not express an intent to create a new contract that would replace the MOU; rather, it simply modified the MOU's payment terms.

The district court then denied the Council's argument that that the arbitrator acted beyond the scope of the submissions because he erroneously decided on his

own jurisdiction and ignored the mediation requirement in the arbitration clause. The court reasoned that procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the court but for the arbitrator to decide. The present question of whether there was a mediation precondition was a procedural question and was therefore for the arbitrator to decide. As a consequence, the arbitrator did not act beyond the scope of the submission to arbitration. The court added that in fact the arbitrator thoroughly examined and rejected the Council's argument that the parties had to mediate before proceeding to arbitration.

The district court last denied the Council's request for an evidentiary hearing, noting that confirmation proceedings are summary proceedings and finding that the factual and legal disputes allegedly requiring such hearing were the same questions resolved in the discussion above.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345080-n>.

Excerpt

[1] "[The Forum] has filed a petition to confirm a foreign arbitral award in its favor and against [the Council]. The Council has moved to dismiss that petition pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, to refuse to confirm the foreign arbitral award. The Forum has filed a cross-motion to confirm the foreign arbitral award. For the reasons discussed below, the Council's motions are denied; and the foreign arbitral award in the Forum's favor is confirmed."

I. BACKGROUND

(….)

[2] "On 20 May 2010, the Forum convened an arbitration proceeding in the Arbitration Court of Barcelona, invoking the arbitration clause contained in para. 20 of the MOU. In its submission to the Arbitration Court on 24 June 2010, the Council acknowledged the existence of the arbitration agreement in the MOU, but argued that the mediation step of para. 20 had not been satisfied. Both parties requested that the Arbitration Court appoint a sole arbitrator, and Carlos Valls Martinez was appointed. The Council was represented by two Barcelona-based attorneys.… On 8 April 2011, the initial arbitration proceedings commenced, in the presence of the reporting magistrate of the Arbitration Court of Barcelona, the arbitrator, and the Forum, but without the appearance of the Council.

[3] "On 27 April 2011, the Forum submitted its Request for Arbitration outlining its claims and demands. In its Response to the Request, the Council acknowledged that the MOU 'effectively included in its clause 20 a valid arbitration agreement', but repeated its objection that the arbitration clause was not in effect because the 'first phase' of mediation had not taken place and, for that reason, requested that the MOU be declared null and invalid. The Council further requested that the arbitrator 'declare the lack of competence of this Arbitration Court … since the [Forum] has failed to comply with the measures agreed upon which were to be pursued prior to proceeding to arbitration'.

[4] "On 9 September 2011, the arbitrator issued an award in the Forum's favor in the total amount of US$ 276,196.22 (the Award).[1] The arbitrator also issued

1. "The award was comprised of the following: (1) award on the principal claim in the amount of US$ 213,592.52; (2) award of interest in the amount of US$ 22,488.65; (3) award of attorney fees in the amount of US$ 15,211.34; and (4) award of arbitrator fees in the amount of US$ 24,903.70."

a lengthy decision, in which he analyzed and rejected the Council's objection regarding the mediation phase of the MOU. On 9 May 2012, the Forum filed its petition to confirm the foreign arbitral award with this Court."

II. DISCUSSION

[5] "The Federal Arbitration Act (the FAA), 9 U.S.C. Sect. 201 et seq, incorporates into federal law the [1958 New York Convention]. See *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 588 (7th Cir. 2001) (*Slaney*).[2] The FAA provides for the enforcement of foreign arbitration agreements and awards and vests federal district courts with original jurisdiction over actions 'falling under the Convention'. 9 U.S.C. Sect. 203; see also *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir. 2004) (*Czarina*).[3] Under the FAA, a party to an arbitration may seek confirmation of a foreign arbitral award in a district court within three years of the award. 9 U.S.C. Sects. 203, 207."

1. The "Agreement in Writing" Prerequisite

[6] "As a threshold matter, a district court must determine if it has jurisdiction under the FAA to enforce an arbitral award. An arbitral award 'falls under' the Convention and the FAA so as to grant jurisdiction when: (1) there is 'an agreement in writing' to arbitrate; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) there was a commercial legal relationship; and (4) one party to the agreement is not an American citizen. 9 U.S.C. Sect. 202; Convention, Arts. II, III, IV, 9 U.S.C. Sect. 201 (historical and statutory notes); see also *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002);[4] *Czarina*, 358 F.3d at 1291. Consequently, an arbitration award will not be enforced if a party fails to satisfy the Convention's 'agreement-in-writing prerequisite'. *Czarina*, 358 F.3d at 1291.

[7] "Whether an 'agreement in writing' to arbitrate exists is determined under state contract law. See *First Options v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)[5] ('When deciding whether the parties agreed to arbitrate … courts generally … should apply ordinary state-law principles that

2. Reported in Yearbook XXVI (2001) pp. 1091-1102 (US no. 359).
3. Reported in Yearbook XXIX (2004) pp. 1200-1208 (US no. 476).
4. Reported in Yearbook XXVII (2002) pp. 600-612 (US no. 364).
5. Reported in Yearbook XXII (1997) pp. 278-286.

govern the formation of contracts.'); see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (*Howsam*)[6] (stating that 'a gateway dispute about whether the parties are bound by a given arbitration clause raises "a question of arbitrability" for a court to decide'). Consequently, the parties' contract is examined under Illinois, and not Spanish, law. Under Illinois law, the analysis starts by 'addressing whether the "basic ingredients" of a contract – offer, acceptance, and consideration – are present'. *Carey v. Richards Bldg. Supply Co.*, 367 Ill. App. 3d 724, 856 N.E.2d 24, 27, 305 Ill. Dec. 492 (Ill. App. 2d Dist. 2006).

[8] "In this case, the parties appear to agree that the MOU is a valid agreement. However, the Council argues that the 2005 Letter Agreement was either an 'accord and satisfaction' that replaced the MOU or a contract under the doctrine of merger that superseded the MOU agreement. The Council contends there is no 'agreement in writing' to arbitrate because the 2005 Letter Agreement does not contain an arbitration clause and, as such, the Court does not have jurisdiction over the Forum's petition.

[9] "This is the first time the Council has raised this argument. In the underlying arbitration, the Council never claimed that the 2005 Letter Agreement, as opposed to the MOU, was the governing contract between the parties. Rather, in direct contrast, the Council acknowledged that the MOU was the relevant contract and had 'a valid arbitration agreement'. Indeed, the Council *relied* on the MOU because its objection to the arbitration was based entirely on the mediation language found in para. 20 of the MOU.

[10] "The Council's reliance on the MOU in the underlying arbitration belies its newly raised assertion that the 2005 Letter Agreement is the governing contract. There is no evidence that the parties intended to extinguish or supersede the MOU when they executed the 2005 Letter Agreement. See, e.g., *Grundstad v. Ritt*, 166 F.3d 867, 871 (7th Cir. 1999) ('Under Illinois law, all the parties to the original agreement must assent to a novation, that is, to the substitution of a new debt or obligation for a previous debt or obligation.'); *Thomas v. Frederick J. Borgsmiller, Inc.*, 155 Ill. App. 3d 1057, 508 N.E.2d 1235, 1238, 108 Ill. Dec. 658 (Ill. App. 5th Dist. 1987) ('The essential elements of a novation are: (1) a previous, valid obligation; (2) a subsequent agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract.').

[11] "The 2005 Letter Agreement contains no mention of an intent to create a new contract that would replace the MOU. Rather, the 2005 Letter Agreement

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6. Reported in Yearbook XXIX (2004) pp. 232-237.

simply modifies the payment terms of the MOU – a modification that appears to be solely to accommodate the Council's difficulty in paying its debt to the Forum.

[12] "Therefore, because the MOU contains a valid arbitration clause, the MOU clearly satisfies the Convention's 'agreement in writing' prerequisite."[7]

2. Excess of Authority

[13] "Since the MOU 'falls under' the Convention to satisfy the jurisdictional prerequisite, the analysis next turns to whether the arbitral award should be confirmed.

[14] "The purpose of the Convention is to effectuate arbitration proceedings and their enforcement in international contracts and to unify the standards by which arbitration agreements are observed and arbitral awards are enforced. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).[8] To this end, the FAA mandates that the confirming district 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 … Convention'. [9] U.S.C. Sect. 207. Thus, the arbitral award must be enforced unless the party opposing enforcement proves one of the enumerated defenses under Art. V of the Convention. See *Slaney*, 244 3d at 588; *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2003).[9]

[15] "Art. V(1)(*c*) of the Convention provides that an award will not be enforced if the party furnishes proof that the award 'contains decisions on matters beyond the scope of the submission to arbitration'. The Council claims that the arbitrator acted 'beyond the scope of the submissions' because he

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7. "The Forum argues that the Council waived this argument by failing to raise it in the underlying arbitration. See, e.g., *Ganton Techs. v. UAW, Local 627*, 358 F.3d 459, 462 (7th Cir. 2004) ('The failure to pose an available argument to the arbitrator waives that argument in collateral proceedings to enforce or vacate the arbitration award) (citation omitted); *National Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960-961 (7th Cir. 1993) ('Permitting parties to keep silent during arbitration and raise arguments in enforcement proceedings would undermine the purpose of arbitration') (citation omitted); see also *Slaney*, 244 F.3d at 591 ('Slaney could not sit back and allow the arbitration to go forward, and only after it was all done … say: oh by the way, we never agreed to the arbitration clause. That is a tactic that the law of arbitration, with its commitment to speed, will not tolerate.') (quotation omitted). However, because the MOU contains a valid arbitration agreement that falls under the Convention, the waiver argument does not need to be addressed."
8. Reported in Yearbook I (1976) pp. 203-204 (US no. 4).
9. Reported in Yearbook XXVIII (2003) pp. 908-964 (US no. 404).

'erroneously made his own decision as to his jurisdiction to conduct the arbitration' and 'ignored the … arbitration clause requiring mediation of the matter'. The Council allots roughly one page in its opening brief and less than two pages in its reply brief to this argument.

[16] "The Council has failed to carry its burden of proving this defense.

[17] "In *Howsam*, the Supreme Court held that 'procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide'. 537 U.S. at 84 (emphasis in original) (internal quotations omitted). Therefore, 'questions such as whether prerequisites to arbitration have been met, or questions of waiver, delay or other defenses to arbitrability, should be determined by the arbitrator'. *Lumbermens Mutual Casualty Co. v. Broadspire Mgmt Servs.*, 623 F.3d 476, 480 (7th Cir. 2010) (*Lumbermens*); see also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898 (U.S. 1964) (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration).

[18] "In this case, whether the MOU requires mediation before arbitration is a 'procedural question over a precondition to arbitration' that is for the arbitrator to decide. See *Lumbermens*, 623 F.3d at 483. Consequently, the arbitrator did not act 'beyond the scope of the submission to arbitration'. Instead, in a discussion of approximately twenty pages, the arbitrator thoroughly examined and rejected the Council's argument that the parties had to mediate before proceeding to arbitration.

[19] "Specifically, the arbitrator studied and relied upon the language of the MOU, which provides that 'the parties *would seek* to mediate these matters to the satisfaction of all parties' before submitting to arbitration (emphasis added).[10] The arbitrator concluded that this language meant that mediation was not a mandatory step but, rather, that the parties only had to attempt it. According to the arbitrator, the Forum had 'complied with its obligation to attempt to engage in mediation' and had sent a letter to the Council that requested mediation. In contrast, the arbitrator found that the Council had failed to attempt to mediate and instead had 'thrown up obstacles through its response and stalling tactics', including possibly manipulating a key document. The arbitrator further concluded that the Council's mediation objection 'was solely intended to delay due compliance with its payment obligation'.

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10. "In its briefs, the Council selectively, and disingenuously, quotes the MOU as requiring the parties 'to mediate the matters', instead of the more accurate statement that the parties 'would seek to mediate the matters'."

[20] "Because the arbitrator properly decided a procedural question related to a condition of arbitration under the MOU, the Council has failed to establish a defense to the arbitral award."

3. Request for Evidentiary Hearing

[21] "Lastly, in its reply to the Forum's cross-motion, the Council contends that the Court should order discovery and hold an evidentiary hearing. The Council alleges that there are two 'factual disputes': (1) a factual dispute regarding the 'arbitrability of the parties' various agreements'; and (2) a factual dispute regarding the applicability of Spanish law. Neither of these alleged 'factual' disputes warrants additional discovery nor an evidentiary hearing.

[22] "Confirming a foreign arbitral award is a 'summary proceeding that merely makes what is already a final arbitration award a judgment of the court'. *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997) (internal quotation omitted). Thus, the scope of judicial action upon an award is 'very limited'. Id. (internal quotation omitted).

[23] "Evidentiary hearings regarding confirmation of foreign arbitral awards involve issues such as misconduct or bias of the arbitrator that 'cannot be gauged on the face of the arbitral record alone'. *Legion Ins. Co. v. Insurance General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (*Legion*) (finding that no hearing was required to confirm arbitration award). Indeed, '[t]o permit time-consuming, costly discovery simply to replicate the substance of the arbitration would thwart its goal'. Id. at 543.

[24] "The Council has not alleged any factual disputes that go beyond the arbitral record. See *Legion*, 822 F.2d at 543. Regarding the alleged dispute of arbitrability, the Council has merely rehashed its argument regarding whether the MOU is the governing contract. Further, the Council claims that whether Spanish law applies presents a factual dispute, but this is a question of law. Both of these alleged 'disputes' have been addressed and resolved in the discussion above.

[25] "Consequently, there is no need for additional discovery or an evidentiary hearing."

III. CONCLUSION

[26] "In light of the foregoing analysis, it is ordered that: the Council's Motion to Dismiss is denied; the Forum's Cross-Motion to Confirm Foreign Arbitral

Award is granted; and the clerk of the court is directed to enter judgment in favor of the Forum confirming the arbitral award and to close the case."

789. United States District Court, District of Columbia, 26 March 2013, Civil Action No. 08-2026 (PLF)

Parties:	Plaintiff: Continental Transfert Technique Limited (Nigeria) Defendant: Federal Government of Nigeria et al.
Published in:	Available online at <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv2026-63>; 2013 U.S. Dist. LEXIS 41874
Articles:	III
Subject matters:	– availability of post-award, pre-judgment interest – rate of post-award, pre-judgment interest – currency of award
Topics:	¶ 307

Summary

The court granted the plaintiff's application for conversion, because the value of the currencies of the award had declined with respect to the US dollar. It also granted post-award, prejudgment interest; the court may grant such interest in actions under the New York Convention but must exercise discretion in a manner consistent with the underlying award.

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 522-525 (US no. 696) and at pp. 472-474 (UK no. 91), and in Yearbook XXXVI (2011) at pp. 488-490 (US no. 747).

On 25 May 1999, Continental Transfert Technique Limited (Continental) entered into a contract with the Federal Government of Nigeria to produce computer-compatible identification cards. The contract was governed by substantive Nigerian law and provided for arbitration of disputes under the procedural law of Nigeria.

A dispute arose between the parties and, in 2007, Continental commenced arbitration against the Federal Government of Nigeria and certain Nigerian state entities (collectively, Nigeria), claiming that Nigeria had failed to perform its

obligations under the contract. On 14 August 2008, an arbitral tribunal rendered an award in favor of Continental as to some claims and in favor of Nigeria as to others. The arbitrators found that once damages owed to Nigeria were set against those owed to Continental, Nigeria was liable to Continental in the amount of approximately NGN 29.7 million. Nigeria was also ordered to pay 95 percent of the costs of the arbitration.

Nigeria applied for annulment of the award. The application was denied by the Nigerian Federal High Court, Lagos Division.

In turn, Continental sought enforcement of the award in United Kingdom and the United States. In the UK, the High Court entered judgment for Continental in the terms of the award (the confirmation decision) and subsequently, on 30 March 2010, granted a stay of enforcement on the condition that Nigeria provide security. This decision is reported in Yearbook XXXV (2010) pp. 472-474 (UK no. 91).

Following the English confirmation decision, Continental amended its complaint in the US proceedings: along with enforcement of the award, it sought enforcement of the confirmation decision pursuant to the District of Columbia's Uniform Foreign-Money Judgments Recognition Act (UFMJRA). On 23 March 2010, the United States District Court for the District of Columbia refused to adjourn enforcement of the award pending the annulment action in the Nigerian courts. This decision is reported in Yearbook XXXV (2010) pp. 522-525 (US no. 696).

On 3 August 2011, the District of Columbia granted enforcement of the award and held that the English confirmation decision was enforceable under the UFMJRA. Continental applied to amend this decision under Rule 60(a) of the Federal Rules of Civil Procedure (FRCP), requesting: (i) conversion of the sums awarded by the arbitrators in English pounds and Nigerian naira into US dollars; (ii) post-award, prejudgment interest on the award; and (iii) post-judgment interest on the entire amount. The court held that while Continental was entitled to correction of the award in respect of post-judgment interest under Rule 60(a), it could not seek a correction to include conversion and prejudgment interest under that Rule. However, these requests may be heard by the court as motions brought under another FRCP rule, Rule 59(e). The court therefore requested additional briefing.

By the present decision, the District of Columbia, per Paul L. Friedman, US DJ, granted Continental's application for conversion and prejudgment interest under Rule 59(e) FRCP.

The court reasoned that conversion at judgment, at the party's request, is the norm, rather than the exception. Continental's motion also met the Rule 59(e)

standard that correction "prevent manifest injustice": since the value of the British pound and the Nigerian naira had declined with respect to the US dollar, refusing to convert the award into dollars would effectively reduce the value of the award. The court applied the exchange rate at the date of the award since on that date both Nigeria's obligation to pay and Continental's right to have the award confirmed under the 1958 New York Convention arose.

Post-award, prejudgment interest is available in actions to confirm arbitral awards under the New York Convention. However, the district court's discretion in this matter must be exercised in a manner consistent with the underlying award. The court held that since in the present case the award was silent on post-award interest (though granting pre-award interest), granting post-award, prejudgment interest was consistent with the award. This motion also met the Rule 59(e) standard: without prejudgment interest, Continental would not be fully reimbursed – a result that would reward Nigeria for its delay and failure to pay. The court applied the prime rate interest to prejudgment interest.

A detailed report of this decision is available online at </www.kluwerarbitration.com/CommonUI/document.aspx?id=1345081-n>.

Excerpt

[1] "This matter is before the Court on a motion by plaintiff [Continental] to amend the Court's Order and Judgment of 3 August 2011.[1] In an earlier Opinion, the Court granted the motion in part and held the remainder of the motion in abeyance pending supplemental briefing. See *Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 850 F.Supp.2d 277 (D.D.C. 2012). The Court now grants the remainder of Continental's motion in part and denies it in part. An Amended Judgment accompanies this Opinion [footnote omitted].

[2] "Background on this case and the pending motion can be found in the Court's earlier opinions and will not be repeated here except as follows.[2]

[3] "Continental initiated this action under the Federal Arbitration Act, 9 U.S.C. Sects. 201 et seq. (FAA) – which codifies the [1958 New York Convention] – to confirm a 2008 arbitral award that it obtained in the United Kingdom against the defendants (collectively, Nigeria). Continental also sought to enforce, under the District of Columbia's Uniform Foreign-Money Judgments Recognition Act, D.C. Code Sects. 15-381 et seq. (UFMJRA), a 2009 judgment by the United Kingdom's High Court of Justice that confirmed the arbitral award as final and enforceable.

[4] "In an Order and Judgment dated 3 August 2011, the Court granted Continental's motion for summary judgment. The Order and Judgment stated simply that the arbitral award was confirmed in its entirety and that the judgment issued by the High Court of Justice was enforceable under the UFMJRA. See Order and Judgment (3 Aug. 2011). Continental promptly moved to amend the Order and Judgment under Rule 60(a) of the Federal Rules of Civil Procedure in order to, in its words, 'correct the judgment to reflect the amount of [US]$ 423,184,115.29 plus applicable post-judgment interest'. This motion, the Court explained, comprised 'three distinct requests'. *Continental Transfert Technique Limited v. Federal Government of Nigeria*, 850 F.Supp.2d at 281. First, Continental was requesting that the portions of its arbitral award granting certain sums in foreign currencies be converted into US dollars, at the exchange rates that were in place on the date of the award. Second, Continental was seeking post-award, prejudgment interest on the arbitral award, at an interest rate of eighteen

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1. Reported in Yearbook XXXVI (2011) pp. 488-490 (US no. 747).
2. "See *Continental Transfert Technique Limited v. Federal Government of Nigeria*, 850 F.Supp.2d 277 (D.D.C. 2012); *Continental Transfert Technique Limited v. Federal Government of Nigeria*, 800 F.Supp.2d 161 (D.D.C. 2011) [reported in Yearbook XXXVI (2011) pp. 488-490 (US no. 747)]; *Continental Transfert Technique Limited v. Federal Government of Nigeria*, 697 F.Supp.2d 46 (D.D.C. 2010) [reported in Yearbook XXXV (2010) pp. 522-525 (US no. 696)]."

percent. Third, Continental was requesting postjudgment interest on the entire amount. See id. at 281-282.

[5] "The Court concluded that Continental was entitled under Rule 60(a) to correction of the Order and Judgment in order to include an award of postjudgment interest as mandated by statute, but that its first two requests could not be granted under that Rule. *Continental Transfert Technique Limited v. Federal Government of Nigeria*, 850 F.Supp.2d at 282-288. Although those requests did not fall within the purview of Rule 60(a), the Court determined that because Continental filed its motion within the time limit required for a motion to alter or amend the judgment under Rule 59(e), the Court might be able to treat the motion as one brought under that Rule. The parties, however, had not briefed the question of whether the stringent standards of Rule 59(e) were met, nor had they adequately briefed the underlying questions of whether Continental was entitled in the first place to prejudgment interest or conversion of its award into US currency. The Court therefore held those two requests in abeyance, id. at 284, 286, and directed the parties to file supplemental memoranda addressing the following questions:

(1) whether Continental was entitled at the time of judgment to conversion of its foreign-currency awards into US dollars at the specified exchange rates;
(2) whether Continental's request for such conversion after judgment satisfies the requirements of Rule 59(e) for altering or amending a judgment;
(3) whether Continental was entitled at the time of judgment to prejudgment interest at a rate of eighteen percent; and
(4) whether Continental's request for such interest after judgment satisfies the requirements of Rule 59(e) for altering or amending a judgment.

[6] "The parties have filed their supplemental memoranda. In view of their arguments, the applicable law, and the entire record in this case, the Court concludes that Continental was entitled at the time of judgment to part of the relief it has requested, and that it has met the standards for obtaining that relief under Rule 59(e)."

I. CONVERSION OF AWARD INTO US DOLLARS

1. Entitlement to Conversion

a. Continental is entitled to conversion

[7] "In the proposed order that it submitted with its motion for summary judgment, Continental requested that the portions of its arbitral award providing for amounts in British pounds and Nigerian naira be converted into US dollars. Conversion of such foreign currency amounts into dollars at judgment is the norm, rather than the exception. *Elite Entertainment, Inc. v. Khela Bros. Entertainment Inc.*, 396 F.Supp.2d 680, 694 (E.D. Va. 2005) ('[C]ourts … agree that entering judgment in a foreign currency is strongly disfavored.'). Traditionally, even when a losing defendant's obligation was denominated in a foreign currency, most American courts 'assumed that American judgments must be entered in dollars', an assumption that likely rested in part 'on the now repealed Sect. 20 of the Coinage Act of 1792'. *Competex, S.A. v. Labow*, 783 F.2d 333, 337 (2d Cir. 1986); see, e.g., *Int'l Silk Guild v. Rogers*, 262 F.2d 219, 224, 104 U.S. App. D.C. 330 (D.C. Cir. 1958) ('Once the District Court found Asahi Japan obligated to pay the Guild Y 80,323.09, it was confronted with the problem of converting the yen into dollars, for American courts are permitted to render judgments only in dollars.') (citing Sect. 20). While that rule no longer holds sway as an absolute proposition, see, e.g., *Mitsui & Co., Ltd. v. Oceantrawl Corp.*, 906 F.Supp. 202, 203-204 (S.D.N.Y. 1995), most judgments still are entered in US dollars. See *Elite Entertainment, Inc. v. Khela Bros. Entertainment Inc.*, 396 F.Supp.2d at 694; Restatement (Third) of the Foreign Relations Law of the United States Sect. 823(1) (1987) ('Restatement') ('Courts in the United States ordinarily give judgment on causes of action arising in another state, or denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.').

[8] "According to the Restatement, 'a judgment in a foreign currency should be issued only when requested by the judgment creditor'. Restatement Sect. 823 cmt. b. Here, Continental made no such request – quite the opposite. Moreover, the values of the British pound and the Nigerian naira have declined relative to the dollar in recent years. Refusing to convert Continental's award into dollars, therefore, would effectively reduce the value of the award.[3] That result would run counter to the Restatement's direction that when a decision is made to convert the foreign currency into US dollars, the choice of conversion rate should be animated by the need 'to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation'. Restatement Sect. 823(2). Entering judgment in the now-depreciated naira and pound, when

3. "The naira's drop, in particular, along with the size of the award, means that tens of millions of dollars hinge on whether the award is converted and, if so, at what exchange rate."

Continental specifically requested a dollar amount, finds no support in the case law and is contrary to the sensible policies articulated in the Restatement.

[9] "The Court therefore concludes that Continental was entitled, as it requested, to conversion of the foreign currency portions of its arbitral award into dollars. See *G.E. Transport S.P.A. v. Republic of Albania*, 693 F.Supp.2d 132, 139-140 (D.D.C. 2010)[4] (adopting Restatement approach and converting portion of arbitral award that was stated in Euros into dollars)."

b. Rate of conversion

[10] "The more intricate question is what exchange rates to use in converting the naira and pound into dollars. Answering this question requires selecting the proper date for which the corresponding exchange rates prevailing on that date should be employed. Two options emerge from a pair of Supreme Court decisions, both authored by Justice Oliver Wendell Holmes, *Hicks v. Guinness*, 269 U.S. 71, 46 S.Ct. 46, 70 L.Ed. 168 (1925), and *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926). The rule applied in *Hicks* is often referred to as the 'breach day' rule, while that of *Deutsche Bank* is referred to as the 'judgment day' rule. *ReliaStar Life Ins. Co. v. IOA Re, Inc.*, 303 F.3d 874, 883 (8th Cir. 2002).

[11] "Under the 'breach day' rule, the applicable exchange rate is the one that was in effect on the date that the defendant breached its obligations to the plaintiff. Id. (citing *Hicks v. Guinness*, 269 U.S. at 80). And in the context of international arbitration awards, one judge of this Court has concluded that the defendant is deemed to have breached its obligation on the date the arbitral award issued, which is when the defendant's obligation arose. *G.E. Transport S.P.A. v. Republic of Albania*, 693 F.Supp.2d at 140; cf. *S.A.R.L. Aquatonic - Laboratories v. Marie Katelle, Inc.*, No. 06-0640, 2007 U.S. Dist. LEXIS 61682, 2007 WL 2410373, at *2 (D. Ariz. 21 Aug. 2007) (using date of foreign judgment as 'breach date' in action to enforce that judgment). The reasoning is that it is the New York Convention, by way of the Federal Arbitration Act, that gives rise to the plaintiff's entitlement to judgment, not any underlying transgression by the defendant that the parties contested during the arbitration itself. Using this approach, the breach date here would be 14 August 2008, the date of Continental's arbitral award.

[12] "Under the 'judgment day' rule, by contrast, the exchange rate to be applied is the one prevailing on the date that the court enters judgment for the plaintiff. *ReliaStar Life Ins. Co. v. IOA Re, Inc.*, 303 F.3d at 883 (citing *Deutsche Bank*

4. Reported in Yearbook XXXV (2010) pp. 519-521 (US no. 695).

Filiale Nurnberg v. Humphrey, 272 U.S. at 519-520). Here, that would be almost three years later than under the 'breach day' rule, 3 August 2011, the date of this Court's Order and Judgment.

[13] "The Restatement on Foreign Relations Law counsels that in selecting between the 'breach day' rule and the 'judgment day' rule, intervening currency fluctuations should be taken into account for equitable reasons: 'If, in a case arising out of a foreign currency obligation, the court gives judgment in dollars, the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.' Restatement Sect. 823(2); see Restatement Sect. 823 cmt. c. ('In general, if the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of injury or breach.'). Thus, in order to prevent a party either from being penalized or from receiving a windfall as a result of currency fluctuations, 'the date used for conversion should depend on whether the currency of obligation has appreciated or depreciated relative to the dollar'. Restatement Sect. 823 cmt. c.

[14] "Unless the interests of justice require otherwise, the 'breach day' rule applies if the foreign currency has depreciated in value. Id.; see id. cmt. d; see generally *Siematic Mobelwerke GmbH & Co. KG v. Siematic Corp.*, 669 F.Supp.2d 538, 541-543 (E.D. Pa. 2009) (surveying the case law applying the Restatement).

[15] "Judge Urbina followed the Restatement approach in *G.E. Transport S.P.A. v. Republic of Albania*, 693 F.Supp.2d at 139-140, converting a portion of an arbitral award from Euros into dollars using the exchange rate in effect on the date of the arbitral award because the Euro had depreciated since then. See also *McKesson Corp. v. Islamic Republic of Iran*, 116 F.Supp.2d 13, 38 (D.D.C. 2000) (relying on Sect. 823 of the Restatement to answer a different question regarding exchange rates), rev'd in part on other grounds, *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 348 U.S. App. D.C. 160 (D.C. Cir. 2001).

[16] "Continental urges the Court to follow *G.E. Transport*, adopt the Restatement approach, and use the exchange rates for the pound and naira that were in effect on the date of the arbitral award.

[17] "The flexibility endorsed by the Restatement, however, arguably is in conflict with the approach dictated by both *Hicks* and *Deutsche Bank*. See Carolyn B. Lamm, 'Enforcement of Judgments', in 5 Business and Commercial Litigation in Federal Courts Sect. 57:37 (Robert L. Haig ed., 3d ed. 2011) (contrasting the 'flexible approach' of the Restatement with the rules derived from those two decisions). Rather than equitably responding to currency fluctuations in order to ensure that a creditor is made whole, *Hicks* and *Deutsche Bank* direct courts to

'look[] to the jurisdiction in which the plaintiff's cause of action arose to determine which rule is applicable'. *In re Good Hope Chem. Corp.*, 747 F.2d 806, 811 (1st Cir. 1984).

[18] "Under these precedents, it has been held, the 'breach day' rule applies if 'at the time of breach the plaintiff has a cause of action arising in this country under American law', while the 'judgment day' rule applies if the defendant's obligation 'arises entirely under foreign law'. Id.; accord *ReliaStar Life Ins. Co. v. IOA Re, Inc.*, 303 F.3d at 883; *Elite Entertainment, Inc. v. Khela Bros. Entertainment Inc.*, 396 F.Supp.2d at 694. While *Hicks* and *Deutsche Bank* are very old decisions, as Continental is quick to point out, the principles they established have been applied twice by our circuit. See *Bamberger v. Clark*, 390 F.2d 485, 487-489, 129 U.S. App. D.C. 70 (D.C. Cir. 1968); *Reissner v. Rogers*, 276 F.2d 506, 511, 107 U.S. App. D.C. 260 (D.C. Cir. 1960). Nigeria therefore maintains that *Hicks* and *Deutsche Bank* must be followed here rather than the Restatement, and that those cases require application of the 'judgment day' rule, because this case 'does not involve a breach of contract which occurred in the United States'.

[19] "Unfortunately for Nigeria, the Court is not persuaded that this case presents any conflict between the *Hicks/Deutsche Bank* approach and the Restatement approach. In the Court's view, both point toward use of the 'breach day' rule. As noted, 'the judgment day rule applies only when the obligation arises entirely under foreign law. If, however, at the time of breach the plaintiff has a cause of action arising in this country under American law, the breach day rule applies.' *Siematic Mobelwerke GmbH & Co. KG v. Siematic Corp.*, 669 F.Supp.2d at 542 (quoting *In re Good Hope Chem. Corp.*, 747 F.2d at 811); see *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 322 (6th Cir. 2011) ('[I]f the cause of action arises under US law, then the conversion date is the date of injury').

[20] "Unlike *Deutsche Bank* and the D.C. Circuit cases applying the 'judgment day' rule in reliance on it, this is not an action in which a plaintiff has come to a United States court to adjudicate rights arising under foreign law. Rather, this action arises under the Federal Arbitration Act and the Uniform Foreign-Money Judgment Recognition Act. The FAA implements the New York Convention by allowing international arbitral awards to be enforced in United States courts, 9 U.S.C. Sect. 201, and it provides that '[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States'. 9 U.S.C. Sect. 203.

[21] "While the original dispute between Continental and Nigeria may have involved questions of Nigerian law – which their contract specified would govern any disputes that were referred to arbitration – Continental's right of action here derives entirely from US law, namely the right to have an arbitral award that

meets certain criteria be confirmed by a United States district court. Under the FAA and the New York Convention, the confirming court does not adjudicate the underlying legal disputes between the parties or even review the arbitrator's conclusions. Instead, the court 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.A. Sect. 207; see *DRC, Inc. v. Republic of Honduras*, 774 F.Supp.2d 66, 71-72 (D.D.C. 2011)[5] (explaining entitlement to confirmation of arbitral awards under the FAA); *Global Distressed Alpha Fund I LP v. Red Sea Flour Mills Co. Ltd.*, 725 F.Supp.2d 198, 201-203 (D.D.C. 2010) (same).

[22] "Therefore, regardless of the circumstances that led Continental and Nigeria to submit to arbitration initially, Continental's cause of action in this Court arises exclusively under United States law; the 'breach day' rule therefore applies. See *In re Good Hope Chem. Corp.*, 747 F.2d at 811-812; *ReliaStar Life Ins. Co. v. IOA Re, Inc.*, 303 F.3d at 883; *Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., Ltd.*, 643 F.2d 376, 381 (5th Cir. 1981); *Conte v. Flota Mercante del Estado*, 277 F.2d 664, 670-671 (2d Cir. 1960); cf. *Reissner v. Rogers*, 276 F.2d at 511 ('[W]e have applied th[e] so-called "judgment day rule" in converting into dollars *a foreign currency claim created by foreign law*.') (emphasis added).

[23] "Because Continental had a cause of action under US law as soon as the arbitral award issued, the 'breach day' rule applies.[6]

[24] "In this case, where the foreign currency has depreciated significantly since the date of the arbitral award, following the Restatement's guidance would result in the same outcome as the application of *Hicks* and *Deutsche Bank*. Using the 'breach day' rule will more fully 'make the creditor whole' and 'avoid rewarding a debtor who has delayed in carrying out the obligation'. Restatement Sect. 823(2). There is no indication of gamesmanship by Continental or any attempt to profit from currency fluctuations; nor will Continental receive a 'windfall'

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5. Reported in Yearbook XXXVI (2011) pp. 461-463 (US no. 739).

6. "Although at least two courts have employed *Deutsche Bank*'s 'judgment day' rule in this context, their decisions are not persuasive. In *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F.Supp. 1, 14 (S.D.N.Y. 1973) [reported in Yearbook I (1976) p. 201 (US no. 1)], the court cited *Deutsche Bank* in selecting the 'judgment day' rule, but the court provided no analysis and the issue does not appear to have been contested. In *Laminoirs-Trefileries-Cableries de Lens, S. A. v. Southwire Co.*, 484 F.Supp. 1063, 1070 (N.D. Ga. 1980) [reported in Yearbook VI (1981) pp. 247-248 (US no. 32)], the court applied the 'judgment day' rule in reliance on a formulation recited in a First Circuit opinion that the circuit later expressly disavowed in favor of a focus on the underlying cause of action. See *In re Good Hope Chem. Corp.*, 747 F.2d at 810 ('In [the earlier case] we merely acquiesced in a formulation advanced by one side without effective opposition from the other. The issue was never litigated.')."

under the 'breach day' rule. See id. cmt. c. Continental simply will receive a judgment that reflects the true value in dollars of the arbitral award at the time it issued, instead of one whose value has eroded as a result of Nigeria's success in delaying its confirmation. See *Ventas, Inc. v. HCP, Inc.*, 647 F.3d at 323 ('Setting the currency conversion rate as of the date of injury … prevents bad faith attempts to, for instance, delay the entry of judgment to engage in currency speculation.').

[25] "In sum, the Court concludes that under *Hicks*, *Deutsche Bank*, and the Restatement it is appropriate to convert Continental's foreign currency award using the exchange rates prevailing on the date of the 'breach', which in the context of an arbitral award confirmation means the day that the award issued, here 14 August 2008. The parties agree on the exchange rates that were in effect on that date.… Using those rates, the naira and pound amounts provided in the arbitral award translate into $ 249,971,903.24 and $ 303,384.60, respectively. When combined with the portion of the award that already was stated in dollars, $ 247,500.00 (representing Continental's arbitration costs), the total is $ 250,522,787.84."

2. Rule 59(e) Standard

[26] "Even though Continental was entitled to conversion of the foreign currency portions of its arbitral award into dollars at the time of judgment, that does not automatically mean it may obtain such relief in a postjudgment motion under Rule 59(e). A motion to alter or amend the judgment under that Rule 'need not be granted unless the Court finds that there is 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice"'. *MDB Comm'ns, Inc. v. Hartford Cas. Ins. Co.*, 531 F.Supp.2d 75, 79 (D.D.C. 2008) (quoting *Ciralsky v. Central Intelligence Agency*, 355 F.3d 661, 671, 359 U.S. App. D.C. 366 (D.C. Cir. 2004)).

[27] "In this case, the Court agrees with Continental that granting its request is necessary to prevent a manifest injustice, satisfying Continental's burden under Rule 59(e).[7]

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7. "Nigeria briefly makes the meritless contention that the Court cannot or should not consider Continental's Rule 60(a) motion under Rule 59(e). 'A post-judgment motion', however, 'may be treated as made pursuant to either Fed.R.Civ.P. 59 or 60 – regardless of how the motion is styled by the movant – depending on the type of relief sought.' *Mays v. U.S. Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997); accord *Companion Health Services, Inc. v. Kurtz*, 675 F.3d 75, 87 (1st Cir. 2012) ('[A]lthough styled as a motion under Rule 60(a) … . [we] consider the motion to have been filed pursuant to Rule 59(e)[.]') (internal citation and quotation marks omitted); *Matthew v. Unum Life*

[28] "The proposed order that Continental submitted with its summary judgment motion awarded Continental a dollar amount corresponding to the combined value of its arbitral award after conversion into US currency. As explained above, the presumption is that a United States judgment will convert monetary amounts denominated in a foreign currency into dollars, just as Continental requested. Nigeria raised no objection to this aspect of Continental's motion for summary judgment and presented no authority weighing against it. Nevertheless, the Court's Order and Judgment merely stated that the arbitral award was confirmed, ignoring the specific terms of Continental's proposed order. Part of the value, however, of requiring every motion to be accompanied by a proposed order (as Local Civil Rule 7(c) of this Court does) is that it puts the Court and opposing counsel on notice of precisely what the party is seeking. The Court's failure to address Continental's specific request before entering judgment counsels in favor of amending that judgment now, if failure to do so would harm Continental.

[29] "As to that harm, because the values of the naira and the pound have depreciated relative to the dollar since the date of the arbitral award, denying Continental's conversion request – or granting it but using the exchange rates in place on the date of the Order and Judgment – would significantly diminish the real value of Continental's judgment. It also would reward Nigeria both for failing to make good on its payment obligations and for delaying confirmation of the award. Nigeria has protracted these proceedings at every stage, first by failing to appear, and then by attempting to dismiss the case and forestall confirmation of the award through arguments that the Court has consistently found meritless, sometimes 'border[ing] on the frivolous'. *Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 697 F.Supp.2d at 55; see also *Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 800 F.Supp.2d at 164-165."

3. Conclusion

[30] "Given Continental's request for a judgment in US currency, the established presumption in favor of such a request, Nigeria's failure to object earlier, and the fact that refusing Continental's request now would reward Nigeria's dilatory tactics and avoidance of its obligations, the Court will grant

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Ins. Co. of Am., 639 F.3d 857, 863 & n. 4 (8th Cir. 2011) (affirming district court's consideration of Rule 60(a) motion under Rule 59(e)); *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989) ('The nomenclature the movant uses is not controlling.')"

Continental's request for conversion of its award into the dollar amount stated above, in order to prevent a manifest injustice."

II. PREJUDGMENT INTEREST

1. Entitlement to Prejudgment Interest

a. Availability under 1958 New York Convention

[31] "'Unlike most other countries, the United States has no federal statute governing awards of prejudgment interest on international arbitral awards.' *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998).[8] Because actions under the New York Convention 'arise under the laws and treaties of the United States', see 9 U.S.C. Sect. 203, 'as in other federal question cases, whether to award prejudgment interest falls within the district court's discretion'. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 665 F.3d 1091, 1103 (9th Cir. 2011);[9] accord *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d at 1446-1447; *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 153-154 (2d Cir. 1984).[10]

[32] "Where prejudgment interest is available, the question of whether to award it 'is subject to the discretion of the court and equitable considerations'. *Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d 43, 54, 326 U.S. App. D.C. 375 (D.C. Cir. 1997) (quoting *Motion Picture Ass'n of Amer., Inc. v. Oman*, 969 F.2d 1154, 1157, 297 U.S. App. D.C. 154 (D.C. Cir. 1992)). 'The purpose of such awards is to compensate the plaintiff for any delay in payment resulting from the litigation.' Id.; see *Motion Picture Ass'n of Amer., Inc. v. Oman*, 969 F.2d at 1157 ('[I]nterest compensates for the time value of money, and thus is often necessary for full compensation.').

[33] "The circuits that have recognized the availability of prejudgment interest in actions to confirm arbitral awards under the New York Convention have reasoned that in light of 'the widely accepted, remedial purpose of pre-judgment interest – which is to 'compensat[e] the injured party for the loss of the use of money he would otherwise have had', 'a presumption exists in favor of such interest'. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic*

8. Reported in Yearbook XXIV (1999) pp. 819-831 (US no. 276).
9. Reported in Yearbook XXXVII (2012) pp. 350-354 (US no. 757).
10. Reported in Yearbook XI (1986) pp. 568-572 (US no. 61).

of Iran v. Cubic Defense Sys., Inc., 665 F.3d at 1102 (quoting *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1550 (9th Cir. 1989)). Therefore, 'absent any reason to the contrary', prejudgment interest 'should normally be awarded when damages have been liquidated by an international arbitral award'. *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d at 1447; accord *Waterside Ocean Navigation*, 737 F.2d at 153-154; see *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 U.S. Dist. LEXIS 8046, 1992 WL 122712, at *8 (D.D.C. 29 May 1992)[11] ('Courts have consistently allowed prejudgment interest in actions brought to confirm arbitral awards.'). Without a presumption in favor of such interest, 'the losing party in the arbitration has an incentive [to] withhold payment – a result contrary to the purposes of the Convention.' *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 665 F.3d at 1103.

[34] "The circuits that have spoken to this issue have also emphasized, however, that a district court's discretion to grant prejudgment interest 'must be exercised in a manner consistent with the underlying arbitration award'. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 665 F.3d at 1103. Where, as here, an arbitral award grants pre-award interest but is 'silent' on whether a party should recover post-award interest – i.e., prejudgment interest – granting such prejudgment interest is consistent with the award. Id.; *Waterside Ocean Nav. Co., Inc. v. Int'l Nav. Ltd.*, 737 F.2d at 154.

[35] "In this case, the Court concludes that an award of prejudgment interest is justified in order to compensate Continental for the loss of its use of the money owed to it by Nigeria during the period between the issuance of the arbitral award and this Court's Order and Judgment. See *G.E. Transport S.P.A. v. Republic of Albania*, 693 F.Supp.2d at 140 (finding prejudgment interest warranted in action confirming arbitral award under New York Convention); *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, 1992 U.S. Dist. LEXIS 8046, 1992 WL 122712, at *8 (same).

[36] "Because Continental's arbitral award remained silent about the matter of post-award interest, a grant of post-award (prejudgment) interest is consistent with the award. Such interest should run from 28 August 2008 (the date that payment on the arbitral award was due), until 3 August 2011 (the date of this Court's Order and Judgment confirming the award)."

b. Rate of interest

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11. Reported in Yearbook XVIII (1993) pp. 566-574 (US no. 138).

[37] "The next question is what rate of interest should apply to Continental's prejudgment interest award. Like the decision about whether to grant such interest at all, the 'decision on how to compute prejudgment interest is discretionary with the district court'. *G.E. Transport S.P.A. v. Republic of Albania*, 693 F.Supp.2d at 140 (quoting *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450, 318 U.S. App. D.C. 6 (D.C. Cir. 1996)); see *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F.Supp.2d 216, 265 (D.D.C. 2008) (citing *Forman v. Korean Air Lines Co.*, 84 F.3d at 450).

[38] "This circuit has observed that 'the prime rate, i.e., the rate that banks charge for short-term unsecured loans to credit-worthy customers, is an appropriate measure of prejudgment interest'. *Oldham v. Korean Air Lines Co., Ltd.*, 127 F.3d at 54 (citing *Forman v. Korean Air Lines Co., Ltd.*, 84 F.3d at 450); see Memorandum Order at 2-3, *G.E. Transport S.P.A. v. Republic of Albania*, 693 F.Supp.2d 132 (D.D.C. 2010) (applying prime rate in action confirming arbitral award under New York Convention).

[39] "Another option sometimes employed by courts in setting prejudgment interest is to borrow the rate of interest from the postjudgment interest statute, 28 U.S.C. Sect. 1961, which calls for a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of judgment. See, e.g., *Sarhank Group v. Oracle Corp.*, No. 01-1285, 2004 U.S. Dist. LEXIS 2493, 2004 WL 324881 (S.D.N.Y. 19 Feb. 2004)[12] (using federal postjudgment rate from 28 U.S.C. Sect. 1961 for prejudgment interest in arbitral confirmation under the Convention); *In Matter of Arbitration Between P.M.I. Trading Ltd. v. Farstad Oil, Inc.*, No. 00-7120, 2001 U.S. Dist. LEXIS 227, 2001 WL 38282 (S.D.N.Y. 16 Jan. 2001)[13] (same); see also *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F.Supp.2d at 265 (accepting analysis of plaintiffs' damages expert and applying average annual Treasury Bill Rate, but noting that the higher prime rate 'also would have been justified').

[40] "Although setting the rate of prejudgment interest is within a district court's discretion, our circuit has indicated a preference – all else being equal – for the use of the prime rate rather than the statutory postjudgment interest rate. See *Forman v. Korean Air Lines Co., Ltd.*, 84 F.3d at 450 ('Indeed, we think the Seventh Circuit is correct – that the prime rate is not merely as appropriate as the Treasury Bill rate, but more appropriate[.]') (citing *In the Matter of Oil Spill by the Amoco Cadiz Off the Coast of France*, 954 F.2d 1279, 1332 (7th Cir. 1992));

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12. Reported in Yearbook XXIX (2004) pp. 1218-1226 (US no. 479).
13. Reported in Yearbook XXVI (2001) pp. 1103-1111 (US no. 360).

see *In the Matter of Oil Spill*, 954 F.2d at 1332 (stating that 'a court should use the "prime rate" "because it best approximates 'the market rate', which 'is what the victim must pay – either explicitly if it borrows money or implicitly if it finances things out of cash on hand – and [is] the rate the wrongdoer has available to it'"').

[41] "Because the Court discerns no particular circumstances here that weigh in favor of the postjudgment interest rate – particularly since application of that rate would be lower than application of the prime rate and thus disadvantage Continental and reward Nigeria for delaying payment of the award – the Court will utilize the prime rate. Based on the information made available by the Federal Reserve, it appears that the average daily prime rate during the period from 28 August 2008 through 3 August 2011, was 3.375 percent. See Board of Governors of the Federal Reserve System, Selected Interest Rates (Daily) - H.15, Historical Data, <www.federalreserve.gov/releases/h15/data.htm>.[14]

[42] "Continental argues that a prejudgment interest rate of eighteen percent should be employed instead, because that is the rate the arbitral panel used to calculate pre-award interest on the amounts owed by Nigeria. The arbitral panel's selection of an eighteen percent interest rate appears to have been based on lending rates in Nigeria during the time period preceding the award. The evidence provided to the panel on that score has not been provided to this Court. More importantly, as Continental itself points out, post-award, prejudgment interest determinations rest not in the discretion of the arbitral panel but in the discretion of this Court. And Continental offers absolutely no authority, nor any reasoning, to explain why the interest rate used by an arbitral panel for pre-award interest should be mimicked by a United States district court when granting post-award, prejudgment interest. The Court therefore will follow the customary practice in arbitration confirmation proceedings under the New York Convention by setting the prejudgment interest rate with reference to the general standards governing prejudgment interest under US law. As explained above, in this circuit those standards lead to the prime rate in this case.

[43] "Using the average prime rate of 3.375 percent for the period between 28 August 2008 and this Court's Order and Judgment of 3 August 2011, with interest compounded annually, prejudgment interest on Continental's award comes to $ 25,588,853.12. The total judgment in favor of Continental,

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14. "By contrast, were the Court to borrow the interest rate from the postjudgment interest statute, that rate would be 2.23 percent, which was the weekly average one-year constant maturity Treasury yield for the calendar week preceding 11 August 2008. See Board of Governors of the Federal Reserve System, Selected Interest Rates (Daily) - H.15, Historical Data, <www.federalreserve.gov/releases/h15/data.htm>."

therefore, including prejudgment interest, would have been $ 276,111,640.96 if the Court had granted prejudgment interest at that time.[15]

[44] "A spreadsheet attached to a declaration in support of Continental's motion appears – without explanation – to compound interest monthly at Continental's requested rate of eighteen percent, resulting in the ballooning of Nigeria's obligation into the $ 423,184,115.29 that Continental seeks. There is no support for a monthly compounding of interest, and the Court rejects that approach. Thus, even if the Court were to accept Continental's unsupportable request for a prejudgment interest rate of eighteen percent, it would compound it annually, not monthly. That would yield prejudgment interest of $ 156,352,691.29 and a total judgment of $ 406,875,479.13."

2. Entitlement to Prejudgment Interest under Rule 59(e)

[45] "Again, the fact that Continental was entitled to prejudgment interest at the time of the Court's Order and Judgment does not, without more, mean that Continental can obtain that interest through a postjudgment motion. But the same considerations that warrant granting Continental's first request (for conversion of its arbitral award into dollars) also apply here. In fact, Continental's position is even stronger with respect to prejudgment interest, because Continental has unequivocally made known its desire for such interest throughout these entire proceedings, requesting it in the complaint, the amended complaint, and at summary judgment. Without prejudgment interest, Continental will not be fully reimbursed for its loss of the funds owed to it by Nigeria under the arbitral award – a result that would reward Nigeria for its delay and failure to pay. Granting such interest now is necessary to prevent a manifest injustice, and the Court therefore will include it in an Amended Order and Judgment."

III. CONCLUSION

[46] "For the foregoing reasons, the Court holds that Continental is entitled to an amendment of the Court's Order and Judgment of 3 August 2011.

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15. "The Court has used the formula M = P(1 + i)n, where 'P' is Continental's principal award (250,522,787.84), 'i' is the rate of interest (3.375), and 'n' is the number of years that interest ran (2.93 years). Compounding prejudgment interest annually is standard practice. See, e.g., *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F.Supp.2d at 265; Memorandum Order at 3, *G.E. Transp. S.P.A. v. Republic of Albania*, 693 F.Supp.2d 132 (D.D.C. 2010)."

[47] "The Court therefore will enter an Amended Order and Judgment against Nigeria in the amount of $ 276,111,640.96 plus postjudgment interest. To repeat, that sum was derived by converting the portions of Continental's arbitral award that were stated in British pounds and Nigerian naira into US dollars, using the exchange rates that were in place on the date of the award. Prejudgment interest was then added to this amount at an annually compounded rate of 3.375 percent, which was the average prime rate during the period from the date that payment was due on the arbitral award to the date this Court entered judgment (28 August 2008 to 3 August 2011). Continental also will be awarded postjudgment interest under 28 U.S.C. Sect. 1961, beginning from 3 August 2011. An Amended Order and Judgment will issue this same day."

790. United States District Court, Central District of Illinois, Urbana Division, 3 May 2013, Case No. 12-CV-227

Parties:	Plaintiffs: (1) Archer-Daniels-Midland Company (US); (2) ADM Latin America, Inc. (nationality not indicated) Defendant: Regis Paillardon (France)
Published in:	Available online at: <https://docs.google.com/gview?url=http://docs.justia.com/cases/federal/district-courts/illinois/ilcdce/2:2012cv02227/56040/24/0.pdf?1367664175&chrome=true>
Articles:	I; V(1)(*c*); V(2)(*b*)
Subject matters:	– 1958 New York Convention applied to setting aside of award – excess of authority of arbitrators (no) – public policy and illegal contract – public policy and foreign exchange regulations – 1975 Panama Convention
Topics:	¶ 104; [4] = ¶ 704(A); [9]-14] = ¶ 512; [15]-[20] = ¶ 524 (illegal contract; Venezuelan foreign exchange regulations)

Summary

The court dismissed a petition to set aside an award, applying the 1958 New York Convention and the Federal Arbitration Act (FAA). It was unnecessary to determine whether the award could be vacated only on the grounds in the Convention, or also on the grounds for vacatur in the FAA, because the grounds for annulment raised by plaintiffs failed: the arbitrator had not exceeded his authority and the award did not violate public policy because a supervening illicit "causa" did not make the joint venture agreement at hand void. Moreover, the Venezuelan currency regulation that had been violated had been repealed, indicating that is was not a "well defined" and "dominant" public policy.

Archer-Daniels Midland Company (ADM), an Illinois agricultural company, established a joint venture by means of a Joint Venture Agreement (JVA), the object of which was to sell ADM commodities in Venezuela. The JVA established a new entity, ADM de Venezuela, C.A. (ADMV) for marketing purposes. Originally Dr. Jorge Fermandez and his wife, Elizabeth Fernandez, (the Fernandez parties) held half the shares and ADM held the other half. ADM subsequently transferred its interest in ADMV to a wholly-owned subsidary, ADM Latin America, Inc. (ADM Latin).

The JVA provided that the business would be conducted by ADM Latin on a "nonexclusive" basis, and no provision obliged ADM Latin to sell ADM commodities and products to Venezuelan customers with the assistance of ADMV. ADMV did not make any sales; it merely facilitated the sales of ADM Latin. A second agreement, the Commission Agreement (CA), governed the distribution of profits generated by sales ADM Latin made to Venezuelan customers with the assistance of ADMV whereby ADM Latin was to pay the Fernandez parties 50 percent of ADM Latin's profits arising from the conduct of the business. ADMV Latin sent commission payments directly to the Fernandez parties.

Both agreements contained merger clauses stating that they set forth the entire agreement and understanding between the parties. The JVA provided for arbitration under the Commercial Rules of the American Arbitration Association (AAA) in Miami, Florida. The arbitrator was to apply "the law that a Venezuelan court would apply". The JVA also provided that the agreement would continue in force indefinitely unless terminated earlier by the shareholders "at any time by a writing signed by each of them". The CA provided that it would stay in effect as long as the JVA and that it was governed by the law of Delaware.

In May 1999, Regis Paillardon, the General Manager of ADMV and the Director of Operations in Venezuela of ADM International Ltd., acquired a 10 percent share of ADMV by purchasing Elizabeth Fernandez's interest. Because of Paillardon's position, he did not collect any profits for his 10 percent share and from 1999 to 2005, ADM paid commissions to the Fernandez parties. In 2005, Paillardon purchased Dr. Fernandez's shares and became ADM Latin's sole joint partner and succeeded to Dr. Fernandez's rights under the CA. He resigned from ADM International Ltd. and began to receive his share of the profits. In November 2007, Paillardon sold 20 percent of his 50 percent interest to Olivier Terrase, reducing his share of the profits to 40 percent.

Over the lifespan of the joint venture, it made gross sales of over US$ 1 billion and Paillardon's share of the profits was in excess of US$ 21 million during the four years that he was entitled to a share.

In 2009, ADM began raising questions about the joint venture's arrangements for paying commissions to brokers that were used by customers and undertook a "due diligence" investigation of the brokers. As of April 2009, no further third-party "commission" payments were to be approved pending further review and new sales that were to include brokerage commissions were stopped. In May, ADM froze all activities of the joint venture and in June, while the due diligence was still going on, ADM unilaterally terminated the JVA. ADM refused to pay Paillardon the share of the profits of the joint venture he was still owed from January to June 2009.

On 18 December 2009, Paillardon filed a lawsuit against ADM Latin in the United States District Court for the Central District of Illinois. Paillardon subsequently voluntarily dismissed the suit and initiated AAA arbitration. Paillardon claimed the amounts owed him and asserted claims relating to the joint venture. ADM asserted numerous legal and factual defenses. The arbitration entailed numerous submissions and extensive hearings. The sole arbitrator – in a fifty-five page award discussing the terms of the JVA, the applicable Venezuelan law and the opinions of the parties' legal experts – ruled in favor of Paillardon. The award concluded that the JVA was the governing agreement, the CA and ADMV were instrumentalities in the implementation of the JVA and the law deriving from the linkage was the law of Venezuela. The arbitrator found that ADM unilaterally terminated the JVA and breached the provision which allowed ADMV shareholders to terminate the JVA "at any time by a writing signed by each of them". He concluded that ADM was liable for the damages caused to Paillardon. The total award was US$ 34,551,881.52 plus interest and included the unpaid share of the profits, an amount for Paillardon's share of the bad debt reserves, and over U$ 31 million in lost profits that would have been received over a period of ten years. On 27 August 2012, ADM filed a petition to vacate the award.

The United States District Court for the Central District of Illinois, Urbana Division, per Michael P. McCluskey, DJ, denied the petition to vacate the award.

ADM relied on the grounds in the 1958 New York Convention and the Federal Arbitration Act (FAA) for vacating the award, arguing that (1) the arbitrator exceeded his authority by ignoring the parties' express rights and obligations under the JVA; (2) the award contravened the law and public policy of both Venezuela and the United States by condoning unlawful behavior; and (3) the arbitrator failed to address two critical ADM defenses.

The district court noted that Venezuela is a signatory to the New York Convention and it was undisputed that the New York Convention applied in this case. It noted further that Chapter 2 of the FAA states that a Convention award

may be vacated only on the grounds specified in the New York Convention, referring to the recent Seventh Circuit decision in *Johnson Controls* (reported in this volume at pp. 514-517 (US no. 787)). Paillardon argued that grounds for vacating an award found in the FAA but not in the Convention could not be relied on to vacate the award. As had been held in *Johnson Controls*, the district court noted that it was not clear whether a party may bring an action under Chapter 1 of the FAA to vacate an award issued in a US jurisdiction, but governed by the Convention. The district court further followed the reasoning in *Johnson Controls* that the grounds for vacating an award are extremely limited and an award will be vacated only in rare instances. In addition, the FAA and the Convention recognize a public policy exception, but an award will not be vacated unless it violates an explicit, well-defined and dominant public policy.

ADM argued that the arbitrator had exceeded his authority in concluding that ADM had breached the JVA and was liable for damages to Paillardon because the JVA did not require it to make sales through the joint venture and the unilateral termination could not possibly have caused a US$ 31 million loss to Paillardon. It asserted that the award was not based on the contract, but rather on the arbitrator's "own sense of equity".

The court noted that because this was an international arbitration, there was a legitimate question regarding whether exceeding authority was a proper basis for vacating the award. However, it was not necessary to decide this issue as it was not shown that the arbitrator had exceeded his authority. The arbitrator had not based his decision on non-contractual grounds. After hearing all the arguments, the arbitrator had accepted the damages calculation by Paillardon which assumed that if the unilateral termination had not taken place, ADM would have continued to do business through the joint venture. There was no inconsistency between a determination that ADM had discretion to stop performing and a determination that such discretion would not have been exercised if the JVA had not been unilaterally terminated. Nor had the arbitrator failed to interpret the JVA.

The district court also rejected ADM's argument that the arbitrator had exceeded his authority by failing to address two of its defenses. The fact that ADM would have liked a more comprehensive discussion of its defenses was not a basis for vacating the award. Both sides had presented voluminous evidence and, based on that evidence, the arbitrator made his determination. The court noted that case law provided limited scope for court review of an arbitration award and found no basis for vacating the award.

The district court also rejected ADM's argument that the award violated public policy. In the arbitration, ADM had argued that the JVA was null and void

because Paillardon's conduct rendered its *causa* illicit due to his violation of exchange-control and criminal laws of Venezuela. Until 2003, ADM Latin required its Venezuelan customers to pay in US dollars which they obtained by exchanging bolivares on the private market. New legislation in 2003 enacted currency control legislation and created the Commission for the Administration of Currency Exchange. ADM Latin's customers were able to apply to the Commission and exchange bolivares for US dollars at an extremely preferential rate offered to importers of food commodities. ADM presented evidence that some transactions included the commissions for the customer's broker, although the regulation stated that the price and commissions should be set forth separately. Paillardon asserted that ADM knew of this practice and that ADM's controller had written that "ADM's legal and accounting departments had looked at the practice and concluded that it was legal". The arbitrator had considered ADM's argument and rejected it, concluding that a supervening illicit *causa* did not make the JVA null and void. He found that the acknowledged practice of factoring the broker's commission in the invoice was legal and bound ADM Latin to pay the brokers as agreed. The court also noted that Paillardon had presented evidence to the arbitrator that the currency regulation had been repealed in September 2011 and that the regulation could not represent a "well defined" and "dominant" public policy of Venezuela because it had been repealed. Based on the applicable case law, the district court concluded that the enforcement of the award would not violate public policy.[1]

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345082-n>.

1. *Note General Editor*. On 4 June 2013, the plaintiffs filed an appeal of the decision with the United States Court of Appeals for the Seventh Circuit. This appeal was pending at the time of publication.

Excerpt

I. THE AWARD

[1] "On 9 July 2012, the Arbitrator issued his fifty-five-page Final Award. The Arbitrator ruled in favor of Paillardon on some of his claims. In reaching his decision, the Arbitrator thoroughly discussed the terms of the JVA and CA and the parties' dealings with each other. He also thoroughly discussed the applicable Venezuelan law and included a discussion of the opinions of the parties' legal experts. The Arbitrator concluded that the JVA and CA were linked by the actual intent of the parties, which was the implementation of the business. He also concluded that the governing agreement was the JVA and the CA and ADMV were instrumentalities in the implementation of the JVA. The Arbitrator noted that ADM had stated that the CA described how profits relating to ADMV would be allocated and concluded that the CA served as an instrumentality through which ADM Latin paid the local partners, including Paillardon, the agreed share of profits. The Arbitrator concluded that, since the controlling agreement was the JVA, the law applicable to the legal consequences deriving from the linkage was the law of Venezuela. The Arbitrator rejected ADM's defense that the damages claimed by Paillardon arose from the CA and that this agreement did not allow for the rights and remedies that Paillardon sought. The Arbitrator also rejected ADM's defense that the JVA was not enforceable because it had an illegal purpose. The Arbitrator stated that 'ADM failed to prove its defenses'. The Arbitrator stated that, after considering ADM's defenses, he concluded that ADM was in breach of the JVA. The Arbitrator stated that ADM unilaterally terminated the JVA and breached the provision which allowed ADMV shareholders to terminate the JVA 'at any time by a writing signed by each of them'. The Arbitrator concluded that ADM was liable for the damages caused to Paillardon. The Arbitrator, however, rejected Paillardon's tort claims and declined to award Paillardon moral damages

[2] "The Arbitrator concluded that ADM owed Paillardon [US]$ 3,163,085.60 for the unpaid balance of his share of ADM Latin's profits for the fiscal year which ended 30 June 2009. The Arbitrator also concluded that ADM owed Paillardon $ 388,795.92 for his share of the bad debt reserve. In addition, the Arbitrator concluded that Paillardon's lost profits 'should be calculated from the stream of future profits that can reasonably be expected had the JVA not been wrongfully terminated'. The Arbitrator accepted Paillardon's expert's calculations, which quantified lost profits to be the value of earnings Paillardon would have received over a period of ten years, which he calculated to be $ 31

million. The total award was $ 34,551,881.52, plus interest. The Arbitrator also concluded that ADM was responsible for the costs of the arbitration."
(....)

II. MOTION TO VACATE

1. Standard

[3] "ADM has argued that this court should vacate the Arbitrator's award for failing to meet the standards set out in the New York Convention and because it fails to meet the standards found in the Federal Arbitration Act (FAA). ADM insists that the award should be vacated because: (1) the Arbitrator exceeded his authority by ignoring the parties' express rights and obligations under the JVA; (2) the award contravenes the law and public policy of both Venezuela and the United States by condoning unlawful behavior; and (3) the Arbitrator wholly failed to address two critical ADM defenses.
[4] "Chapter 1 of the FAA codifies the original Federal Arbitration Act of 1925; it applies to all domestic awards and to all other awards not covered by another legal instrument. *Johnson Controls, Inc. v. Edman Controls, Inc.*, – F.3d –, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *3 (7th Cir. 2013).[2] The FAA also includes Chapter 2 which implements the [1958 New York Convention]. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *3, citing 9 U.S.C. Sect. 201. Chapter 3 implements the Inter-American Convention on International Commercial Arbitration of 30 January 1975, known as the Panama Convention. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *3. Venezuela is a signatory to the New York Convention and it is undisputed that the New York Convention applies in this case.
[5] "Chapter 2 of the FAA states that a Convention award may be vacated only on the grounds specified in the New York Convention. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *4, citing 9 U.S.C. Sect. 202. The Seventh Circuit recently stated that '[t]his could be important in some cases, because the Convention grounds for vacatur are slightly different from those in Chapter 1 of the FAA'. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *4. As ADM has recognized, arbitration awards under the New York Convention may be vacated if one of the following grounds

2. Reported in this Yearbook XXXVIII (2013) at pp. 514-517 (US no. 787).

exists: (1) the parties to the agreement were under some incapacity, or the agreement is not valid under the law chosen by the parties or, if no law is chosen, the law of the country where the award was made; (2) the party against whom the award is invoked was not given proper notice or was unable to present his case; (3) the award falls outside the scope of the submission to arbitration; (4) the composition of the arbitral authority or procedure was not in accordance with the parties' agreement or the law of the country where the arbitration occurred; or (5) the award is not yet binding or has been set aside by a competent authority. New York Convention, Art. V. In addition, recognition and enforcement of an arbitral award may also be refused if the competent authorities in the country where recognition and enforcement is sought finds that: (1) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (2) recognition or enforcement of the award would be contrary to the public policy of that country. New York Convention, Art. V. The FAA provides that an arbitration award may be vacated if: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) 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) 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. 9 U.S.C. Sect. 10(a).

[6] "Paillardon has argued that the New York Convention applies in this case and that grounds for vacating an arbitration award available under the FAA but not identified in the Convention cannot be relied on to vacate a Convention award. The Seventh Circuit has recognized that it is not clear whether a party may bring an action under Chapter 1 of the FAA to vacate an award issued in a US jurisdiction, but governed by the New York Convention. See *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *4.

[7] "In any case, '[a]ttempts to obtain judicial review of an arbitrator's decision undermine the integrity of the arbitral process'. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *7. Therefore, the 'grounds for overturning an arbitration award are extremely limited'. *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008). Where the parties have bargained for the arbitrator's construction of their agreement, 'courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances'. *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000). Courts uphold an arbitration

award so long as 'an arbitrator is even *arguably* construing or applying the contract and acting within the scope of this authority'. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *4 (emphasis in original), quoting *Local 15, Int'l Bhd. of Elec. Workers v. Exelon Corp.*, 495 F.3d 779, 782-783 (7th Cir. 2007). An award should not be overturned because an arbitrator 'committed serious error' or the decision is 'incorrect or even whacky'. *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *4, quoting *Local 15, Int'l Bhd. of Elec. Workers*, 495 F.3d at 782-783. 'A reviewing court will enforce the arbitrator's award so long as it "draws its essence from the contract", even if the court believes that the arbitrator misconstrued its provisions.' *United Food & Commercial Workers, Local 1546 v. Ill. Am. Water Co.*, 569 F.3d 750, 754 (7th Cir. 2009), quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). 'An arbitrator's decision draws its essence from the contract if it is based on the arbitrator's interpretation of the agreement, correct or incorrect though that interpretation may be.' *United Food*, 569 F.3d at 754. Further, arbitrators do not exceed their authority by failing 'to discuss every issue that the parties contested'. See *Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011); see also *Halim*, 516 F.3d at 564 (an arbitrator does not exceed his power 'by not explaining his award in greater detail').

[8] "In addition, although the New York Convention and the FAA recognize a public policy exception to enforcement of an arbitration award, an award will not be vacated on these grounds unless enforcement of the award would violate public policy. See *E. Associated Coal Corp.*, 531 U.S. at 62-63; *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001). Importantly, the United States Supreme Court has made it clear that 'any such public policy must be '"explicit", "well defined", and "dominant"'. *E. Associated Coal Corp.*, 531 U.S. at 62, quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). It must be 'ascertained by reference to positive law and not from general considerations of supposed public interests'. *E. Associated Coal Corp.*, 531 U.S. at 63; see also *Local 15, Int'l Bhd. of Elec. Workers*, 495 F.3d at 784. Moreover, even when a public policy violation has been asserted, the arbitrator's resolution of this issue is conclusive as to the parties to the arbitration. See *Baxter Int'l, Inc. v. Abbott Labs.*, 315 F.3d 829, 832 (7th Cir. 2003)."

2. Excess of Authority

[9] "ADM first insists that the Arbitrator exceeded his authority when he concluded that ADM breached the JVA and was liable for damages to Paillardon. ADM argues that, because the JVA stated that sales through the joint venture would be made on a 'nonexclusive' basis and the Arbitrator found that ADM Latin had 'unfettered discretion' regarding whether sales would be made through the joint venture, there is absolutely no basis for awarding damages for breach of the JVA. ADM takes issue with the Arbitrator's conclusion that 'ADM breached the JVA by unilaterally terminating it and stopping the performance of the Business'. ADM has argued, stridently, that it could not have breached the JVA by stopping the performance of the Business because the JVA did not require it to make sales through the joint venture. ADM also argues that, for the same reason, its unilateral termination of the JVA could not possibly have caused a $31 million loss to Paillardon. ADM asserts that the Arbitrator's award is not based on the contract but rather the Arbitrator's 'own sense of equity', citing *Arch of Ill. v. Dist. 12, United Mine Workers of Am.*, 85 F.3d 1289, 1292 (7th Cir. 1996). This court first notes that, because this was an international arbitration to which the New York Convention applies, there is a legitimate question regarding whether exceeding authority is even a proper basis for vacating the Arbitrator's award. However, like the court in Johnson Controls, Inc., this court concludes that it does not need to decide this issue because it is clear that ADM has not shown that the Arbitrator exceeded his authority. See *Johnson Controls, Inc.*, 2013 U.S. App. LEXIS 5583, 2013 WL 1098411, at *4.

[10] "Before a court can reject an award because of language in an arbitrator's opinion, the opinion must 'unambiguously reflect that the arbitrator based his decision on noncontractual grounds'. *Arch of Ill.*, 85 F.3d at 1293. In this case, the Arbitrator discussed the contract at issue and reached a conclusion that ADM breached the JVA by unilaterally terminating it and owed damages to Paillardon. This court concludes that there is no basis for concluding that the Arbitrator exceeded his authority in issuing his award. After hearing all the evidence, the Arbitrator accepted the damages calculations presented by Paillardon, which assumed that, if the unilateral termination had not taken place, ADM would have continued to do business through the joint venture. The Arbitrator expressly found that there was no support for ADM's contention that, if the unilateral termination had not taken place, it would have stopped all transactions involving brokers. The Arbitrator found that 'ADM was prepared to continue transactions with brokers' after the due diligence had been completed and written contracts signed. This court agrees with Paillardon that there is no inconsistency between a determination that ADM had discretion to stop performing and a determination

that such discretion would not have been exercised if the JVA had not been unilaterally terminated.

[11] "ADM obviously strongly disagrees with the award, but agreed to binding arbitration in the JVA. This court, like the court *Arch of Ill.*, a case relied upon by ADM, 'cannot say with certainty that the arbitrator's own words demonstrate that he failed to interpret the [JVA']. See *Arch of Ill.*, 85 F.3d at 1293. Another case relied upon by ADM stated that '[i]t is only when the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract … that the award can be said not to draw its essence from the [parties' agreement]'. *United Food*, 569 F.3d at 755, quoting *Ethyl Corp. v. United Steelworkers of Am. AFL-CIO-CLC*, 768 F.2d 180, 184-185 (1985) (emphasis in original). This court concludes that, based upon this standard, ADM has not shown that the Arbitrator's award did not draw its essence from the JVA. As in United Food, the award must stand because the Arbitrator 'interpreted the agreement' and 'reached a conclusion', thereby providing 'exactly what the parties bargained for'. See *United Food*, 569 F.3d at 755. In addition, Paillardon is correct that it 'was for the arbitrator to decide who breached the agreement' and 'what damages were recoverable as a consequence'. See *Flexible Mfg. Sys. Pty., Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996). Once the Arbitrator did so, 'that was the end of it'. See *Flexible Mfg. Sys.*, 86 F.3d at 100.

[12] "This court also agrees with Paillardon that ADM's argument that the Arbitrator exceeded his authority by failing to address two defenses raised by ADM is without merit. The Arbitrator acknowledged ADM's 'mercantile mandate' defense and stated that 'ADM failed to prove its defenses'. The Arbitrator also rejected ADM's argument that Delaware rather than Venezuelan law applied, thereby eliminating ADM's purported mitigation defense. The fact that ADM would have liked a more comprehensive discussion of its defenses is not a basis for vacating the award. See *Affymax, Inc.*, 660 F.3d at 285; *Halim*, 516 F.3d at 564[.]

[13] "As the Seventh Circuit stated in a case relied upon heavily by ADM:

> 'When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc. – conduct to which the parties did not consent when they included an arbitration clause in their contract.'

Wise v. Wachovia Sec., Inc., 450 F.3d 265, 269 (7th Cir. 2006). Therefore, in the typical case involving the interpretation of a contract, 'the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all … for only then were they exceeding the authority granted to them by the contract's arbitration clause'. *Wise*, 450 F.3d at 269 (citations omitted). The court in Wise stated that, if the plaintiffs in that case had presented overwhelming evidence in support of their position and the defendant responded with a bare denial, a court may infer that, in entering an award in favor of the defendant, the arbitrators had 'a corrupt motive or at least that they had exceeded the powers granted to them by the arbitration clause'. *Wise*, 450 F.3d at 269. The court determined that was not the situation before it and affirmed the district court's decision to confirm the arbitrators' award. *Wise*, 450 F.3d at 270.

[14] "This court concludes that *Wise* supports Paillardon's position rather than ADM's. This is not a situation where ADM presented overwhelming evidence in support of its position and Paillardon responded with a bare denial. Both sides presented voluminous evidence and, based upon the evidence presented, the Arbitrator determined that Paillardon was entitled to damages for breach of contract. Based upon the case law regarding the limited scope of court review of an arbitration award, including the decision in Wise, this court finds no basis for vacating the award in this case."

3. Public Policy

[15] "This court also agrees with Paillardon that ADM's arguments that enforcement of the award would violate public policy are baseless. This court agrees with Paillardon that, during the arbitration, ADM's witnesses conceded that ADM found no evidence of improper payments to brokers. Therefore, at the arbitration, ADM argued that the JVA was null and void because Paillardon's conduct rendered its *causa* illicit due to his violation of exchange-control and criminal laws of Venezuela. This court agrees with Paillardon that this argument was first made during the arbitration proceedings, long after the termination of the JVA.

[16] "ADM's argument was based upon a change in Venezuelan law in 2003. From the time the JVA was in effect, ADM Latin required its Venezuelan customers to pay in US dollars, it would not accept Venezuelan bolivares. From 1999 to 2003, the customers could simply exchange their bolivares for dollars through the private market. However, in 2003, Venezuela enacted currency exchange control regulations and established a government agency, the

Commission for the Administration of Currency Exchange (known as CADIVI), to administer the country's currency exchange system. CADIVI closely rationed US dollars, but it offered an extremely preferential exchange rate to importers of certain products, including food commodities. Obtaining US dollars from CADIVI at this preferential rate could cost half as much as obtainingUS dollars on the black market. Due to this preferential exchange rate, after 2003, ADM Latin's Venezuelan customers almost exclusively used CADIVI to pay for their purchases. In order to exchange bolivares for US dollars through CADIVI, customers were required to submit a number of different documents, including invoices listing that sales price and other particulars of the transaction, including any commission. Once CADIVI authorized the exchange, the customer's bolivares would be converted to US dollars, which would then be paid to ADM's US bank account. ADM presented evidence that some of these transactions included the commission for the customer's broker in the purchase price, which would allow the customer to receive the CADIVI preferential exchange rate for food sales on the inflated amount, which it would then pay to ADM Latin. ADM Latin would keep only the actual purchase price and route the commission amount to the broker when it received an invoice identifying the customer's broker. By April 2009, Paillardon used this third party payment arrangement in sales accounting for over half of ADM Latin's Venezuela profits. CADIVI Administrative Ruling No. 085 set forth the requirements for documentation to be submitted by importers (the Venezuelan customers). This regulation stated that the price and commissions should be separately set forth in the documentation submitted to CADIVI for review.

[17] "ADM presented evidence from an expert on Venezuelan law, Pedro Luis Planchart-Pocaterra (Planchart), that the JVA became illicit because Paillardon agreed to build monies to be paid to customer brokers into the sales price of the commodity or freight and then directed representatives of ADMV to create local invoices that did not specifically reference the customer's broker fee. Planchart concluded that this violated Venezuelan law, namely, the criminal provisions of the Law Against Illegal Foreign Exchange Transactions.

[18] "In response, Paillardon pointed out that the preparation of customer invoices that included the commissions of brokers that the customer later submitted to CADIVI was not secretly made by Paillardon; instead, ADM had knowledge of it. Paillardon noted that ADM was fully aware each time that the commission of the brokers was added to the price charged to the customers as the commission was explicitly documented in the trade slips that were approved by ADM each time a sale involving brokers was made. Additionally, in the sales transactions involving brokers, ADM took on the contractual responsibility for

paying the brokers. Paillardon pointed out that, on 22 April 2009, ADM's controller wrote that 'it was a long-standing practice for ADM to prepare such invoices, that it was known that invoices were being submitted to CADIVI, and that *ADM's legal and accounting departments had looked at the practice and concluded it was legal*'. (Emphasis in Arbitrator's Final Award.)

[19] "The Arbitrator carefully and thoroughly considered ADM's argument and found the claim unwarranted. The Arbitrator noted that Planchart did not provide supporting Venezuelan authorities for his opinion. The Arbitrator concluded that a supervening illicit *causa* did not make the JVA null and void. The Arbitrator stated that it was his opinion that the sales involving brokers and CADIVI did not violate the criminal law of Venezuela and, even if they did, the JVA was not illicit. The Arbitrator further concluded that ADM did not demonstrate that the invoices including the brokers' commissions violated the CADIVI regulations and specifically stated that 'CADIVI regulations were not violated'. The Arbitrator stated that the acknowledged practice of factoring the brokers' commission in the invoice was legal and bound ADM Latin to pay the brokers, as agreed.

[20] "This court also notes that Paillardon presented evidence to the Arbitrator that Ruling 085 was repealed in a new ruling on 23 September 2011. Paillardon has persuasively argued that the regulation could not represent a 'well defined' and 'dominant' public policy of Venezuela since it has been repealed. Based upon the applicable case law, this court has no trouble concluding that ADM has not shown that enforcement of the Arbitrator's award would violate public policy. The Arbitrator's determination that there was no violation of law is conclusive on the parties to the arbitration. See *Baxter Int'l, Inc.*, 315 F.3d at 832. This court therefore agrees with Paillardon that the award does not require either ADM or Paillardon to take any actions that violate any rule of positive law, or even in any way assist in the commission of an illegality.

[21] "Finally, ADM has thrown in a brief argument that the Arbitrator decided this case due to an 'evident partiality'. This court concludes that this argument is completely baseless and requires no further discussion."

(….)

791. United States Court of Appeals, Second Circuit, 3 June 2013, No. 12-593-cv

Parties:	Petitioner/Appellant: VRG Linhas Aereas S.A. (Brazil) Respondents /Appellees: (1) MatlinPatterson Global Opportunities Partners II L.P. (US); (2) MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (US)
Published in:	Available online at <http://caselaw.findlaw.com/us-2nd-circuit/1633154.html>; 2013 U.S. App. LEXIS 11074
Articles:	V; V(1)(*a*); V(2)(*a*)
Subject matters:	– arbitrability to be decided by arbitrator/court – applicable law to "questions of arbitrability" – party to arbitration agreement – scope of arbitration clause – incorporation of ICC arbitration rules evidence that arbitrability is to be decided by arbitrator
Topics:	¶ 507 (non-signatory) + ¶ 519; [3] = ¶ 501 + ¶ 503

Summary

The Court of Appeals remanded the case on the confirmation of an ICC award to the district court (which had denied confirmation) for a determination whether the non-signatory party agreed to arbitration and, if it did, whether the question of whether the dispute fell within the scope of the arbitration agreement was for the arbitrators or the court to decide. Arbitrability of the subject matter of a dispute is to be decided under the law of the country where enforcement is sought (Art. V(2)(a) of the 1958 New York Convention) – here, US law – and so is the logically prior question of who shall decide whether the dispute should be referred to arbitration ("arbitrability"). The district court must determine first whether the court or the arbitrator was to decide arbitrability – taking into account that arbitrability is to be determined by the arbitral tribunal if the parties clearly and unmistakably expressed their intention that is does so. Only if the court finds that it must decide on arbitrability, it will examine whether the dispute is to be arbitrated. The district court here had not asked the

initial question of who was to decide the scope of the parties' agreement: only if it was the tribunal should the award be confirmed.

By a Share Purchase and Sale Agreement of 28 March 2007 (the Agreement), the Brazilian airline Gol Linhas Aereas Inteligentes S.A. (Gol), through its subsidiary GTI, acquired VRG Linhas Aereas S.A. (VRG) from Varig Logistica S.A. and Volo de Brasil S.A., two indirect subsidiaries of the New York private equity funds MatlinPatterson Global Opportunities Partners II L.P. and MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (collectively, MatlinPatterson). The Agreement was written in Portuguese and signed by all of the mentioned entities except MatlinPatterson. Its Sect. 14 provided for International Chamber of Commerce (ICC) arbitration of disputes. Six Addenda to the Agreement were executed; in Addendum 5, signed by MatlinPatterson, GTI and Gol, MatlinPatterson agreed not to compete with VRG or invest in any of its competitors in the passenger airline market for three years (the non-compete agreement). Addendum 5 did not contain an arbitration clause.

A dispute arose over an adjustment in the purchase price under the Agreement; in December 2007, VRG initiated arbitration against MatlinPatterson under Sect. 14 of the Agreement. In September 2010, the ICC arbitral tribunal confirmed its jurisdiction and awarded in favor of VRG, unanimously holding MatlinPatterson liable for damages resulting from fraudulent misrepresentations it made during the sale of VRG.

In January 2011, VRG sought to confirm the award in the United States District Court for the Southern District of New York under the 1958 New York Convention. MatlinPatterson argued that the arbitral tribunal lacked jurisdiction because there was no arbitration agreement between MatlinPatterson and VRG. The parties disputed whether the signatories to Addendum 5, including MatlinPatterson, had agreed to incorporate the arbitration clause provided in Sect. 14 of the main Agreement. Their dispute turned on divergent translations of the phrase that appeared at the end of Addendum 5, describing the one-page document as "*aditando os termos do Contrato*", translated by VRG as "amending" or by MatlinPatterson as "supplementing" the terms of the main Agreement.

The district court denied confirmation, ruling that even if MatlinPatterson had agreed to arbitrate disputes over its non-compete agreement with VRG, it had not agreed to arbitrate what the district court described as "an entirely different issue [arising] under an agreement that it did not sign".

By the present decision, the United States Court of Appeals for the Second Circuit, before Calabresi, Lynch and Chin, CJJ, in an opinion by Calabresi, vacated the decision of the district court and remanded the case so that the district court could decide first whether the parties agreed to arbitrate and,

second, whether the court or the arbitral tribunal should determine the scope of the arbitration agreement.

The Court of Appeals noted that under the New York Convention a foreign award is to be confirmed unless one of the seven grounds for refusal is present. The opposing party has a heavy burden to prove these grounds, given the strong public policy in favor of international arbitration. In particular, Art. V(2)(*a*) provides that recognition may be refused if the subject matter of the difference is not capable of settlement by arbitration under the law of the country in which enforcement is sought – here, US law. The law applicable to *whether* a dispute is arbitrable also applies to the logically prior question of *who* shall decide whether the dispute should be arbitrated.

The court referred to the Supreme Court decision in *First Options of Chicago*, where the Court held that a court must first decide whether the parties clearly and unmistakably committed to arbitrate questions regarding the scope of their arbitration agreement; if the answer is no, the court must then determine whether the parties' dispute falls within the scope of the arbitration agreement.

In the present case, the district court had not asked the initial question of who – the court or the arbitrators – was to decide the scope of the parties' agreement. It had held that even if MatlinPatterson had agreed to arbitrate disputes over its non-compete provision, the arbitration agreement did not extend to disputes over the purchase price of VRG. In doing so, the district court decided the scope of an arbitration agreement, whose existence it assumed arguendo, instead of determining whether the parties actually reached an agreement to arbitrate, and if so, whether they had clearly indicated their intention to arbitrate questions of the agreement's scope.

On remand the district court was instructed to apply the Court of Appeal's precedent that an ICC arbitration clause unambiguously commits to arbitration any questions about arbitrability of particular disputes. However, if the district court determined that MatlinPatterson had not agreed to the terms of Sect. 14, that would compel it to deny the confirmation of the award on the grounds that MatlinPatterson never consented to submit disputes to arbitration.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345083-n>.

Excerpt

I. DISCUSSION

[1] "On appeal, VRG argues that the district court usurped the Arbitral Tribunal's role when it decided that the scope of the parties' arbitration agreement – assuming there was one – did not extend to the dispute at hand. The question of *who* is to decide whether a dispute is arbitrable is one that must necessarily precede the question of *whether* a dispute is arbitrable. We therefore vacate the district court's judgment and remand so that it may decide, in the first instance and on the particular facts of this case, who – the court or the Arbitral Tribunal – has the power to determine the scope of the alleged arbitration agreement between VRG and MatlinPatterson. As we describe more fully below, this power – to determine the scope of any agreement to arbitrate – is to remain with the district court unless the parties agreed to an arbitration clause that clearly and unmistakably assigns such questions to arbitration.

(….)

[2] "We review a district court's legal interpretations of the New York Convention as well as its contract interpretation *de novo*; findings of fact are reviewed for clear error. See *Fishoff v. Coty Inc.*, 634 F.3d 647, 652 (2d Cir. 2011); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 659 (2d Cir. 2005);[1] *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 89 (2d Cir. 2005).[2]

[3] "Under the New York Convention, as implemented and codified at 9 U.S.C. Sect. 207, a party may petition a United States district court to confirm a foreign arbitral award that the party received within the previous three years. The court is to confirm the award unless it finds one of the seven grounds for refusal offered in Art. V of the Convention. 'Given the strong public policy in favor of international arbitration', the party seeking to avoid summary confirmance of an arbitral award has the heavy burden of proving that one of the seven defenses applies. *Encyclopaedia Universalis*, 403 F.3d at 90.

[4] "Among its provided defenses, the Convention allows courts to refuse to recognize a foreign arbitral award if '[t]he subject matter of the difference is not capable of settlement by arbitration under the law of' the county in which enforcement is sought. New York Convention Art. V(2)(*a*), 10 June 1958, 21 U.S.T. 2517. Whether a given dispute is arbitrable – and the resulting award

1. Reported in Yearbook XXX (2005) pp. 1158-1164 (US no. 523).
2. Reported in Yearbook XXX (2005) pp. 1136-1143 (US no. 520).

enforceable – is therefore a question to be decided under United States arbitration law. So too is the logically prior question of who shall decide a dispute's arbitrability. See *Sarhank Grp.*, 404 F.3d at 661.

[5] "The Supreme Court helpfully distinguished these inquiries from each other, and from yet a third question, in *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)[3]. As the *First Options* Court explained, the three questions involve: (1) the merits of the dispute; (2) whether the dispute is to be arbitrated – the so called 'question of arbitrability'; and (3) whether a court or an arbitrator is to decide the question of arbitrability. In regard to Question Three, *First Options* holds that questions of arbitrability are to be sent to arbitration if and only if the parties clearly and unmistakably expressed their intention to do so.[4] Id. at 945; see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002).[5]

[6] "Of course, a court asked to confirm an arbitral award must take the three *First Options* questions in reverse order, since Question Three asks who will answer Question Two (the question of arbitrability), and Question Two in turn asks who will answer Question One (the decision on the merits). See *Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran*, 445 F.3d 121, 122 (2d Cir. 2006) (describing the 'issue of *who* will decide the arbitrability question' as 'preliminary' to the question 'whether the claims *must* be arbitrated'). Thus a court must begin by deciding whether the parties before it clearly and unmistakably committed to arbitrate questions regarding the scope of their arbitration agreement. If – but only if – the answer is no, the court must then proceed to determine on its own whether the parties' dispute falls within the scope of their agreement to arbitrate.

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3. Reported in Yearbook XXII (1997) pp. 278-286.
4. "We have previously noted that '"[q]uestions of arbitrability" is a term of art covering disputes about [1] whether the parties are bound by a given arbitration clause as well as disagreements about [2] whether an arbitration clause in a concededly binding contract applies to a particular type of controversy'. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011) (quotation marks and alterations omitted) [reported in Yearbook XXXVI (2011) pp. 451-457 (US no. 737)]. Both disputes – about which parties and which types of controversy the clauses of an arbitration agreement encompass – are ones over the arbitration agreement's *scope*. 'Those issues should be decided by the courts unless there is clear and unmistakable evidence from the arbitration agreement that the parties intended that they be decided by the arbitrator.' Id. (quotation marks and alterations omitted). The more basic issue, however, of whether the parties agreed to arbitrate in the first place is one only a court can answer, since in the absence of any arbitration agreement at all, 'questions of arbitrability' could hardly have been clearly and unmistakably given over to an arbitrator."
5. Reported in Yearbook XXIX (2004) pp. 232-237.

[7] "The instant case shows how this initial question can sometimes prove determinative, however 'narrow' or 'arcane' it might be. *First Options*, 514 U.S. at 942, 945. Had the district court found that MatlinPatterson and VRG clearly and unmistakably agreed to arbitrate questions of arbitrability, the district court's work would then have been done. Since the Arbitral Tribunal has already decided that the parties' dispute falls within the scope of their arbitration agreement, the district court would have had to defer to the Arbitral Tribunal's answer not only to that question but also, consequently, to the Tribunal's ruling on the merits. Barring any other defenses, the district court would have been required to recognize and enforce the Tribunal's award.

[8] "On the record before us, however, it does not seem that the district court ever asked the initial question of who is to decide the scope of the parties' arbitration agreement. The district court held that *even if* MatlinPatterson had agreed to arbitrate disputes over its noncompete provision – a question the court said it did not 'have to get drawn into' – the parties' arbitration agreement surely did not extend to disputes over the purchase price of VRG. In so holding, the district court decided the scope of an agreement whose existence it assumed arguendo, instead of determining whether the parties *actually* reached an agreement to arbitrate and, if so, whether it included a clear and unmistakable intention to arbitrate questions concerning the agreement's scope. By vacating and remanding, we give the district court the opportunity to make this determination in the first instance.

[9] "On remand, the district court's task should be simplified by this Court's prior holding in *Shaw Group Inc. v. Triplefine International Corp.*, 322 F.3d 115, 122 (2d Cir. 2003),[6] in which we held that an arbitration clause subjecting disputes to the rules and procedures of the ICC International Court of Arbitration clearly and unmistakably commits to arbitration any questions about the arbitrability of particular disputes. Sect. 14 of the Agreement does exactly this. Therefore, if the district court determines that MatlinPatterson agreed to the terms of Sect. 14, our precedent compels the conclusion that MatlinPatterson thereby clearly and unmistakably committed questions of scope to the arbitrators. Because the Arbitral Tribunal has already determined that the subject matter of this dispute falls within the scope of Sect. 14, the district court's finding would require it to confirm the arbitral award.

[10] "If, on the other hand, the district court determines that MatlinPatterson did *not* agree to the terms of Sect. 14, no further analysis would be necessary. Such a finding would compel the denial of VRG's petition to confirm the award

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6. Reported in Yearbook XXIX (2004) pp. 1051-1059 (US no. 463).

on the grounds that MatlinPatterson never consented to submit disputes – whether about arbitrability or anything else – to arbitration.

[11] "In analyzing whether MatlinPatterson agreed to the terms of Sect. 14, the district court does not necessarily need to discern that agreement in unambiguous contract language. 'When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally … should apply ordinary … principles that govern the formation of contracts,' *First Options*, 514 U.S. at 944, including the consideration of extrinsic evidence to resolve ambiguities in contractual language.[7] In the present case, the district court might – we do not say will – find it necessary to consider extrinsic evidence as it carries out its primary task on remand: determining whether MatlinPatterson agreed to be bound by the arbitration clause in the Agreement."

II. CONCLUSION

[12] "Because the district court has not yet determined whether the parties in this case agreed to an arbitration clause that clearly and unmistakably entrusted questions of arbitrability to the Arbitral Tribunal rather than to the court, its judgment is vacated and the case remanded in order to provide the district court an opportunity to make this determination in the first instance, and, consistent with this opinion, to conduct whatever further proceedings may be required."

7. "The parties are in agreement that the standard principles of contract interpretation are no different under Brazilian law than under our own."

792. United States District Court, Southern District of New York, 6 August 2013, 10 Civ. 6147 (PAC)

Parties:	Petitioner: Yukos Capital s.a.r.l. (Luxembourg) Respondent: OAO Samaraneftegaz (Russian Federation)
Published in:	Available online at <http://docs.justia.com/cases/federal/district-courts/new_york/nysdce/1:2010cv06147/366751/128>
Articles:	IV(1); V(1)(*b*); V(2)(*b*)
Subject matters:	– proper notice – estoppel (collateral) – burden of proof – review of merits of award (no) – public policy and foreign tax fraud – narrow concept of public policy
Topics:	[13] + [33] = ¶ 503; [14]-[27] = ¶ 509; [28] + [34]-[39] = ¶ 524 (foreign tax fraud); [29] + [31]-[33]= ¶ 502

Summary

An ICC award rendered in New York was granted enforcement. The findings of a Russian court that defendant did not receive notice of the arbitration did not support collateral estoppel, because there was insufficient identity of issues: the Russian court applied Russian law while the district court had to ascertain any violation of due process in light of US domestic standards. Under these standards, defendant failed to prove, on the facts of the case, that it was denied the opportunity to be heard in a meaningful manner. There was no violation of public policy: the alleged illegality of the loans that were the subject matter of the award, as part of a tax evasion scheme, was an issue on the merits that was to be (and was) decided in arbitration; nor could defendant identify a well-defined and dominant public policy against foreign tax evasion, in light of the narrow construction of Art. V(2)(b) of the 1958 New York Convention.

In July 2004, Yukos Capital s.a.r.l. (Yukos Capital), a subsidiary of Yukos Oil, and OAO Samaraneftegaz (Samaraneftegaz) executed two loan agreements in which Yukos Capital extended a total of RUR 2,415,890,000 to Samaraneftegaz (the Loans). At the time, Samaraneftegaz was also a wholly-owned subsidiary of Yukos Oil. The addenda to the Loans contained a clause for International Chamber of Commerce (ICC) arbitration of disputes.

A dispute arose between the parties when Samaraneftegaz failed to make any payments on the Loans. On 12 January 2006, Yukos Capital commenced ICC arbitration against Samaraneftegaz as provided for in the addenda to the Loans. In the initial stages of the proceedings, the ICC sent notices to Samaraneftegaz at Samaraneftegaz's corporate address in Samara, Russian Federation. On 6 April 2006, ZAO Yukos Exploration and Production (Yukos EP) – which was at the time Samaraneftegaz's management company – informed the ICC on behalf of Samaraneftegaz that it disputed the validity of the arbitration agreement. Following receipt of the 6 April 2006 letter, the ICC sent notices (and eventually a copy of the award) to Yukos EP's address, with the sole exception of a revised version of the Terms of Reference, which was sent to Samaraneftegaz's corporate address on 24 October 2006.

By an award of 15 August 2007, rendered in New York, an ICC tribunal ordered Samaraneftegaz to pay Yukos Capital the outstanding RUR 2,415,980,000.00 due under the Loans, contractual interest in the amount of RUR 664,821,971.00, interest at a rate of 9 percent on the award until payment, US$ 435,000 for arbitration fees and costs, and US$ 284,474.54 for Yukos Capital's legal costs and expenses.

While the ICC arbitration was pending, Neft-Aktiv, a Russian company, acquired all the shares of Samaraneftegaz in May 2007 and became Samaraneftegaz's sole shareholder. In July 2007, Neft-Aktiv sued Samaraneftegaz and Yukos Capital in the *Arbitrazh* (Commercial) Court in Samara to invalidate the Loans, claiming that the Loans were sham transactions concealing an illegal transfer of funds (the Loans annulment action). On 28 July 2009, the Samara court adjourned the Loans annulment action pending the criminal trial of two former executives of Yukos Oil, in connection with their misappropriation of funds from Yukos subsidiaries, including Samaraneftegaz.

By a petition of 9 August 2010, Yukos Capital sought enforcement of the ICC award in the Samara *arbitrazh* court. On 22 February 2011, the court denied the request on the grounds that Samaraneftegaz was not given notice of important stages of the arbitration. The court found that Samaraneftegaz did not receive any notices after 13 March 2006 because notice to Yukos EP was not notice to Samaraneftegaz.

On 8 February 2012, the Samara *arbitrazh* court rendered a decision in the Loans annulment action, invalidating Yukos Capital's loans to Samaraneftegaz. On 20 July 2012, the Eleventh *Arbitrazh* Court of Appeal affirmed this decision. On 8 July 2013, the Supreme *Arbitrazh* Court denied supervisory review of the case.

Yukos Capital also sought enforcement of the ICC award in the United States.

By the present decision, the United States District Court for the Southern District of New York, per Paul A. Crotty, US DJ, granted enforcement, holding that Samaraneftegaz failed to meet the "heavy" burden of proving its due process and public policy objections.

The court first dismissed Samaraneftegaz's argument that the court should apply the doctrine of collateral estoppel to the *arbitrazh* court's determination that Samaraneftegaz did not receive notice of the arbitration. First, Samaraneftegaz did not dispute that it received all notices up to 13 March 2006 and that it received the 24 October 2006 Terms of Reference; since these facts were not at issue, there was no need to defer to the findings of the *arbitrazh* court on this point, leaving aside the fact that it was unclear whether the Russian court actually decided this issue. Second, as to the post-13 March 2006 notices, there was insufficient identity of issues to support collateral estoppel, because the Russian court's decision was based on Russian law, while in the present case the inquiry was whether Samaraneftegaz was duly informed in accordance with US domestic due process standards.

The district court then found that under such standards Samaraneftegaz did not prove that it did not have the opportunity to be heard in a meaningful manner. Samaraneftegaz received several separate notices of the commencement of the arbitration, including the Terms of Reference, but chose not to appear. The ICC could reasonably believe that Yukos EP was Samaraneftegaz's representative; if that was not the case, it was Samaraneftegaz's responsibility to inform the ICC of any changes. The allegation that no one at Samaraneftegaz spoke enough English to understand the notices sent by the ICC in English was unpersuasive, since Samaraneftegaz consented to arbitrate in English.

Samaraneftegaz further argued that enforcement would violate public policy as it would give effect to Russian tax fraud since the Loans were a mechanism to return Samaraneftegaz's own funds that were part of Yukos Capital's tax evasion scheme.

The district court disagreed, noting that the validity of the Loans was an issue of the merits that was for the arbitrators to decide and could not be reviewed by the enforcement court. It was irrelevant whether this issue was actually litigated

in the arbitration, since it was at any event submitted to the arbitrators in the Terms of Reference.

Further, even if the court were to consider the substance of this defense, Samaraneftegaz did not meet its burden to define a well-defined and dominant public policy against foreign tax evasion, in light of the narrow construction of Art. V(2)(*b*) of the 1958 New York Convention.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345084-n>.

Excerpt

[1] "[Yukos Capital] seeks enforcement of an arbitration award issued in its favor against [Samaraneftegaz] by the International Court of Arbitration of the International Chamber of Commerce (ICC) in New York. On 25 September 2012, the parties cross-moved for summary judgment. Samaraneftegaz argues that the Court should grant preclusive effect to a Russian court's refusal to enforce the award, and challenges the award on the grounds that it did not receive adequate notice of the arbitration proceeding, and that enforcement would violate domestic public policy. For the reasons discussed below, the Court grants summary judgment to Yukos Capital and denies Samaraneftegaz's motion for summary judgment."

I. BACKGROUND

[2] "On 24 July 2012, the Court found that it had personal jurisdiction over Samaraneftegaz. See 2012 U.S. Dist. LEXIS 104702, 10 Civ. 6147 Dkt. No. 100 (S.D.N.Y. 2012). The court assumes familiarity with the procedural history and the relevant facts as set forth in the Court's previous order. Id. at 1-2 n. 1, 3-5. Briefly summarized, and supplemented for the purposes of the parties' pending motions, the facts are:

– Yukos Capital is a Luxembourg-based subsidiary of Yukos Oil Company (Yukos Oil).
– Samaraneftegaz was also a wholly-owned subsidiary of Yukos Oil from 2001 until May 2007, when Neft-Aktiv acquired the shares of Samaraneftegaz at an auction. Samaraneftegaz is now a subsidiary of OJSC Oil Company Rosneft, a Russian state-controlled oil company."

1. The July 2004 Loan Agreements

[3] "In July 2004, Samaraneftegaz and Yukos Capital executed two loan agreements in which Yukos Capital extended a total of RUR 2,415,980,000 to Samaraneftegaz (the 'Loans'). The addenda to the Loans submitted all relevant disputes to arbitration before the ICC. It is undisputed that Samaraneftegaz failed to make any payments on the Loans, including interest when due and principal upon notice of default."

2. The Arbitration Proceedings

[4] "On 12 January 2006, Yukos Capital requested arbitration at the ICC to settle the outstanding Loans. The ICC notified Samaraneftegaz by letter dated 20 January 2006 that Yukos Capital had demanded arbitration, forwarded a copy of the Request for Arbitration, and reported that its Answer would be due within thirty days. The notice was sent to Samaraneftegaz's corporate address at 50 Volzhsky Prospect, Samara, 443071, Russian Federation. Throughout the initial stages of the arbitration, the ICC continued to send notices to this address.[1]
[5] "Samaraneftegaz does not dispute its receipt of these notices:

– 7 February 2006 letter: the ICC reminded Samaraneftegaz that its Answer would be due on 22 February;
– 15 February 2006 letter: the ICC requested Samaraneftegaz's comments on Yukos Capital's proposal that the panel consist of a single arbitrator instead of three;
– 28 February 2006 letter: the ICC notified Samaraneftegaz that, since it failed to submit its Answer, Yukos Capital's Request would be submitted to the ICC Court to determine jurisdiction. The ICC also informed Samaraneftegaz that Yukos Capital nominated John Kerr as a co-arbitrator;
– 13 March 2006 letter: the ICC forwarded a copy of Kerr's acceptance, his statement of independence, and his CV.

Samaraneftegaz did not respond to any of these letters.
[6] "On 6 April 2006, ZAO Yukos Exploration and Production (Yukos EP), on behalf of Samaraneftegaz, informed the ICC that it would not bear any of the costs of the arbitration because it disputed the validity of the arbitration provisions. At the time, Yukos EP was Samaraneftegaz's management company by virtue of a delegation of powers agreement. Yukos EP's letterhead contained a mailing address and fax number different than Samaraneftegaz's corporate address. On 12 May 2006, Yukos EP again contested the ICC's jurisdiction. After the 6 April 2006 letter, with one notable exception discussed below, the ICC sent notices and a copy of the award to Yukos EP's fax number and mailing address, and stopped sending notices to Samaraneftegaz's corporate address.[2]

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1. "This was the address noted in Yukos Capital's demand for arbitration to the ICC."
2. "The ICC gave notices that it had overruled Samaraneftegaz's jurisdictional challenge; confirmed Kerr as co-arbitrator, appointed Dr. Ivan Zykin as a co-arbitrator on behalf of Samaraneftegaz; appointed a chairperson for the tribunal; set 5 September 2006 as the date for the Terms of Reference hearing; sent a draft of the Terms of Reference; set 18 January 2007 as the date of the

[7] "The exception occurred when the ICC sent a revised version of the Terms of Reference directly to Samaraneftegaz's corporate address on 24 October 2006. The letter was sent via registered mail against return receipt. It set forth the procedural history of the arbitration proceeding to date and identified Yukos EP as Samaraneftegaz's representative. Samaraneftegaz did not sign the revised Terms. In fact, Samaraneftegaz never filed any written or oral submissions on the merits.

[8] "In its 15 August 2007 award, the tribunal ordered Samaraneftegaz to pay Yukos Capital the outstanding RUR 2,415,980,000.00 due under the Loans, contractual interest in the amount of RUR 664,821,971.00, interest at a rate of 9 percent on the award until payment, US$ 435,000 for arbitration fees and costs, and US$ 284,474.54 for Yukos Capital's legal costs and expenses."

3. The Russian Enforcement and Neft-Aktiv Actions

[9] "In July 2007, more than a year after the commencement of arbitration, Neft-Aktiv, Samaraneftegaz's sole shareholder, sued Samaraneftegaz and Yukos Capital in Russian court in Samara to invalidate the Loans. In its claim, Neft-Aktiv argued that the Loans were 'sham transaction[s] intended to conceal the actual relations between the parties in the form of an illegal transfer [by] OJSC Samaraneftegaz of its funds in favor of Yukos Capital s.a.r.l. and subsequent return of the abovementioned amounts to OJSC Samaraneftegaz in the form of a loan'. Yukos Capital participated in the proceeding. On 28 July 2009, the court adjourned the proceeding pending the criminal trial of Khodorkovsky and Lebedev, former executives of Yukos Oil, in connection with their misappropriation of funds from Yukos' subsidiaries, including Samaraneftegaz.[3] Yukos Capital was not a party to this criminal proceeding.

[10] "On 9 August 2010, Yukos Capital filed a petition with the *Arbitrazh* [Commercial] court in Samara for enforcement of the arbitration award. In its ruling issued on 22 February 2011, the court refused to enforce the award on the grounds that 'Samaraneftegaz was not given notice of the important stages of the progress of the [arbitration]'. The court found that Samaraneftegaz did not receive any notices after 13 March 2006 because notice to Yukos EP was not

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evidentiary hearing in New York; approved the Terms of Reference, provided the schedule of the evidentiary hearing; and solicited a post-hearing brief from Yukos EP."

3. "As noted in the text of the *Neft-Aktiv* opinion, the sentences of Khodorkovsky and Lebedev came into effect on 27 December 2010."

notice to Samaraneftegaz. The court also refused to enforce the award on the grounds that doing so would violate Russian public policy.

[11] "On 8 February 2012, the Russian court in Samara issued a decision in Neft-Aktiv's favor, invalidating Yukos Capital's loans to Samaraneftegaz. Specifically, the court determined that 'the loans advanced by Yukos Capital s.a.r.l. were financed from funds taken away earlier from OJSC Samaraneftegaz in the course of implementation of transfer pricing mechanisms'. In reaching this conclusion, the court cited the sentence issued in connection with the Khodorkovsky and Lebedev convictions, and two civil tax cases against Yukos Oil. Yukos Capital appealed this decision to the Eleventh *Arbitrazh* Court of Appeal, which affirmed the trial court's judgment on 20 July 2012. Yukos Capital later unsuccessfully filed a cassation appeal. On 8 July 2013, the Supreme *Arbitrazh* Court denied supervisory review of the case, thus precluding further review in Russia."

II. DISCUSSION

[12] "A court with jurisdiction 'shall' confirm an award falling under the [1958 New York Convention] unless there are statutory grounds for refusal of recognition. 9 U.S.C. Sect. 207. The only two grounds that Samaraneftegaz identifies are: (1) that it 'was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case' (Art. V(1)(*b*)); and (2) '[t]he recognition or enforcement of the award would be contrary to the public policy of [the United States]' (Art. V(2)(*b*)).

[13] "In opposing enforcement of the award, Samaraneftegaz bears the burden of proof, and the burden is a heavy one. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).[4] As discussed earlier, Samaraneftegaz argues that the Court should refuse to enforce the ICC's arbitration award for two reasons: (1) Samaraneftegaz did not receive adequate notice of the arbitration at critical stages; and (2) the Court's enforcement of the award would violate US public policy by condoning the tax evasion scheme that Yukos Capital is alleged to have effectuated through the underlying loans."

1. Due Process

a. Collateral estoppel

4. Reported in Yearbook XXX (2005) pp. 1136-1143 (US no. 520).

[14] "First, Samaraneftegaz argues that the Court should apply the doctrine of collateral estoppel to the *Arbitrazh* court's determinations that Samaraneftegaz did not receive specific notices.

[15] "Collateral estoppel

> 'applies when (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits'.

Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 400 (2d Cir. 2011) (quotation omitted).[5]

[16] "Issue preclusion applies to judgments issued by courts of foreign countries. *Alfadda v. Fenn*, 966 F.Supp. 1317, 1325 (S.D.N.Y. 1997). Recognition of the judgments of foreign courts, however, is not a matter of obligation, but comity. *Gordon & Breach Science Publrs. S.A. v. Am. Inst. of Physics*, 905 F.Supp. 169, 178-179 (S.D.N.Y. 1995). 'The decision to grant comity is a matter within a court's discretion and the burden of proof to establish its appropriateness is on the moving party.' *Maersk, Inc. v. Neewra, Inc.*, 2010 U.S. Dist. LEXIS 69863, at *29 (S.D.N.Y. 9 July 2010) (quotation omitted).

[17] "Samaraneftegaz does not contend that the Court should defer to the *Arbitrazh* court's legal conclusion that the notice was inadequate because, as Samaraneftegaz acknowledges, 'the ultimate issue of the adequacy of notice was governed by Russian law in the prior action and by US law here'. Instead, Samaraneftegaz relies on collateral estoppel to bar Yukos Capital from re-litigating Samaraneftegaz's receipt of certain notices.

[18] "The Court exercises its discretion in declining to grant such findings any preclusive effect. First, Samaraneftegaz does not dispute in this proceeding that it received all of the ICC's notices up until and including the 13 March 2006 letter. Similarly, Samaraneftegaz does not dispute its receipt of the 24 October 2006 Terms of Reference. Since these facts are not at issue, there is no need to defer to the *Arbitrazh* court on the subject. Even if Samaraneftegaz were to dispute receiving these notices, collateral estoppel would be inappropriate as it is unclear that the *Arbitrazh* court actually decided the issue. The *Arbitrazh* court's opinion neglected to mention the 24 October 2006 notice entirely, and the only reference to the notices dated 13 March 2006 and earlier was that '[t]he materials

5. Reported in Yearbook XXXVI (2011) pp. 451-457 (US no. 737).

of this case … do not contain any actual evidence (DHL receipts) that those notices have been sent to [Samaraneftegaz's] address'.

[19] "As for the remaining notices, the Court finds that there is insufficient identity of issues to support collateral estoppel. See *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971) (per curiam) ('Issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same.'). Despite Samaraneftegaz's assurances that it does not seek preclusive effect with respect to any legal conclusions, the *Arbitrazh* court's determinations were not strictly findings of fact. Rather, its decision that Samaraneftegaz did not 'receive' notice, including through Yukos EP, is based at least to some extent on its application of Russian law. By contrast, this case is governed by a different legal standard – the inquiry is whether the steps taken to apprise Samaraneftegaz of the proceedings comport with domestic due process standards. The Court also notes that deference to the *Arbitrazh* court's findings on the narrow question of Samaraneftegaz's receipt of certain notices would not promote judicial economy, as this Court can readily determine the issue for itself from the record, and these factual issues are intertwined with the due process analysis that the Court must independently conduct. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (describing as one of collateral estoppel's dual purposes 'promoting judicial economy by preventing needless litigation')."[6]

b. Lack of notice

[20] "To establish lack of notice as a defense to enforcement under Art. V(1)(*b*) of the Convention, the party challenging the award must show that the arbitration procedures failed to comport with this country's standards of due process. *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974).[7] Under US law, 'the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner"'. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992)[8] (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

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6. "Samaraneftegaz also urges that preclusive effect be given to the findings in the *Neft-Aktiv* action. As discussed below, Samaraneftegaz has forfeited the opportunity to litigate the validity of the Loans, and has additionally failed to identify a well-defined, dominant public policy that would require the refusal of recognition in this case. Accordingly, the Court need not address the preclusive effect of the *Neft-Aktiv* findings."
7. Reported in Yearbook I (1976) p. 205 (US no. 7).
8. Reported in Yearbook XVIII (1993) pp. 596-605 (US no. 143).

[21] "Samaraneftegaz's claim of lack of notice does not amount to a due process violation. It is significant that Samaraneftegaz decided not to participate in the arbitration with full knowledge of its existence after having received five separate notices of its initiation. Indeed, Samaraneftegaz does not dispute that the ICC gave notice on 20 January 2006 that it was named as a respondent in the arbitration, and the letter was properly sent to Samaraneftegaz's corporate address in Samara. Samaraneftegaz also admits that it received further ICC notices dated 7 February 2006, 15 February 2006, 28 February 2006 and 13 March 2006, apprising it of the due date of its answer, soliciting comments on the proposal to use a sole arbitrator rather than a panel, and informing it of Yukos Capital's nomination of another co-arbitrator. Aside from notices of the commencement of proceedings, Samaraneftegaz also does not contest that it received the Chairman's letter, dated 24 October 2006, containing the revised Terms of Reference, which was also mailed to its corporate address in Samara. The letter informed Samaraneftegaz that it was being represented by Yukos EP, reported Grekhov [Yukos EP's president] and Starodubtsev's [Yukos EP's later acting president] jurisdictional challenges on behalf of Samaraneftegaz, summarized the parties' positions, outlined the issues to be determined, catalogued the procedural history of the arbitration to date, including notice that the ICC Court confirmed John Kerr as co-arbitrator, appointed Dr. Ivan Zykin as a co-arbitrator, and appointed Dr. Bernhard F. Meyer-Hauser as Chairman. The notice also reported that the Terms of Reference hearing date was 5 September 2006.

[22] "If, as Samaraneftegaz contends, it did not receive notice of any developments in the arbitration proceeding after 13 March 2006, at the very least, the 24 October 2006 letter would have alerted it to the fact that the arbitration was proceeding in its absence, and Samaraneftegaz could have informed the ICC that it was not receiving communications or otherwise availed itself of the opportunity to participate.[9]

[23] "These facts support a conclusion that Samaraneftegaz's absence was due to a decision not to appear, rather than lack of notice. See *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 729 (5th Cir. 1987) ('[D]ue process is not violated if the hearing proceeds in the absence of one of the parties when the party's absence is the result of his decision not to attend.'); *Geotech Lizenz AG v. Evergreen Sys., Inc.*, 697 F.Supp. 1248, 1253 (E.D.N.Y. 1988)[10] (finding that notice

9. "For instance, Samaraneftegaz could have petitioned to be heard on the Terms of Reference, which had not yet been approved by the ICC Court, and asked for the date of the evidentiary hearing."
10. Reported in Yearbook XV (1990) pp. 562-568 (US no. 92).

complied with due process where the '[respondent's] failure to participate was a decision that was reached only after the Company had full knowledge of the peril which it acted'). Since the record does not contain any evidence that Samaraneftegaz attempted to submit any briefing or otherwise be heard after receiving notice that the arbitration was proceeding in its absence, the Court cannot conclude that Samaraneftegaz was prohibited from presenting its case or denied the opportunity to be heard at a meaningful time and in a meaningful manner.[11]

[24] "In any event, there has been no due process violation when the notices were reasonably calculated to inform Samaraneftegaz of the proceeding and provided Samaraneftegaz an opportunity to be heard. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950). Due process does not require perfect or actual notice.[12] After sending notices directly to Samaraneftegaz's headquarters informing it of the pendency of the arbitration, the ICC reasonably started to direct its correspondence to Yukos EP, as the only entity from whom it ever received a response in the arbitral proceeding. The ICC reasonably believed that Yukos EP was Samaraneftegaz's representative: in the 6 April letter, Grekhov, the President of Yukos EP, described Yukos EP as Samaraneftegaz's management company, acknowledged receipt of an earlier letter in the matter, and asserted a defense on behalf of Samaraneftegaz. Yukos EP was in contact

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11. "Samaraneftegaz argues that due process requires that 'adequate notice be provided at each significant stage in the arbitral process'. At oral argument, Samaraneftegaz emphasized two cases to this effect. The cases cited, however, do not go as far as Samaraneftegaz suggests. In *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, 2005 U.S. Dist. Lexis 8810, at *30 (D. Kan. 10 May 2005) [reported in Yearbook XXXI (2006) pp. 1105-1124 (US no. 539)], the court noted the lack of proof that the respondent received notice beyond that of the proceeding itself. That is not equivalent to requiring notice at 'each significant stage' of the arbitration, and in any event Samaraneftegaz does not dispute that it received the arbitrators' initial letters and the 24 October 2006 revised terms of reference, which set forth much of the information noted as possibly absent in *Guang Dong*. Similarly, in *Qingdao Free Trade Zone Genius Int'l Trading Co., Ltd. v. P&S Int'l Inc.*, 2009 U.S. Dist. LEXIS 85949, *11-12 (D. Or. 16 Sept. 2009), the court declined to enforce an award where the notices did not sufficiently alert respondent to petitioner's demand for arbitration. By contrast, Samaraneftegaz does not dispute that it knew that Yukos Capital had initiated arbitration."

12. "As the Supreme Court noted in *Mullane*: '[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.' Id. (citations omitted)."

again on 12 May 2006, through its new acting president, Y.S. Starodubtsev, who reasserted Samaraneftegaz's jurisdictional defense.

[25] "After the ICC sent the revised Terms of Reference directly to Samaraneftegaz's headquarters alerting it to the fact that the tribunal had deemed Yukos EP to be its representative, it did not receive any response disputing the position that Yukos EP was its representative or stating that it did not receive prior notices. This is not the case where the ICC stopped sending notices entirely after learning that Samaraneftegaz did not wish to appear in proceedings – it continued sending notices to an entity that it reasonably believed represented Samaraneftegaz. Nor does Samaraneftegaz's change in management companies to Yukos Refining and Marketing (Yukos RM) in June 2006 render the ICC's continued notices to Yukos EP unreasonable. It was Samaraneftegaz's responsibility to inform the ICC of any changes to its choice of representative, see ICC Rules Art. 3(2), and not the duty of the ICC to keep abreast of such changes.

[26] "Samaraneftegaz argues that another reason that notice was inadequate is that the ICC's notes were in English, and not a single person at Samaraneftegaz spoke enough English to understand the notices. This is unpersuasive since Samaraneftegaz had already consented to arbitrate in English. Samaraneftegaz concedes that it knew that Yukos Capital had commenced arbitral proceedings. If there were truly an issue of comprehension, the onus rested on Samaraneftegaz to secure a translation.

[27] "The Court holds that Samaraneftegaz has failed to satisfy its burden to demonstrate the proceedings were conducted in violation of US due process standards."

2. Public Policy

[28] "Samaraneftegaz argues that the Court's enforcement of the ICC's award would give effect to Russian tax fraud since the Loans were a mechanism to return Samaraneftegaz's own funds that were part of Yukos Capital's tax evasion scheme. The Court disagrees.

[29] "A court's review of an arbitral award is limited, and in this context, does not extend to the validity of the Loan agreements. In *Buckeye Check Cashing, Inc. v. Cardegna et al.*, 546 U.S. 440, 449 (2006),[13] the Supreme Court held that issues relating to the contract's validity as a whole, as distinguished from the arbitration agreement in particular, are matters for the arbitrator to consider in

13. Reported in Yearbook XXXI (2006) pp. 326-333.

the first instance. See also *Rent-a-Center, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2778-2779 (2010).[14] Since the Court has already determined that the arbitration addenda are valid, the legality of the Loans is a matter appropriate for arbitration. It is not the court's role in reviewing an award to find facts or draw inferences for itself in the first instance. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 45 (1987) ('Nor does the fact that [the court] is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task.')."

[30] "Samaraneftegaz counters that it cannot be precluded by any findings in the award because it was denied the opportunity to dispute the validity of the Loans. That argument, as explained earlier, is meritless as Samaraneftegaz had adequate notice of the proceedings.

[31] "Samaraneftegaz also argues that the arbitrators never found that the underlying loans were valid, and merely assumed in error that their validity was undisputed. The Second Circuit is clear, however, that whether or not the issues were actually litigated in the arbitration proceeding is immaterial, if they were required to be arbitrated. *Europcar Italia, SpA v. Maiellano Tours*, 156 F.3d 310, 315 (2d Cir. 1998).[15]

[32] "Samaraneftegaz's failure to contest the validity of the Loans before the ICC is a result of its own choice; it cannot now rely on its own omissions to support a public policy defense. Samaraneftegaz was bound by a valid arbitration clause to contest this issue before the arbitrators. Instead of doing so, its sole shareholder initiated a collateral proceeding in Russia while the arbitration was pending to litigate the same issue in a transparent attempt to circumvent a forum that it considered unfavorable. To refuse to enforce a valid award in these circumstances would run counter to the strong public policy in favor of arbitration. See *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 410-411 (2d Cir. 2009).[16]

[33] "The Court exercises its discretion in declining to credit Samaraneftegaz's belated public policy arguments. See *International Commercial Arbitration: A Guide for US Judges*, Federal Judicial Center (2013) at 72 ('[N]on-enforcement is discretionary rather than mandatory.').

[34] "Even if the Court were to consider the substance of Samaraneftegaz's defense, Samaraneftegaz has failed to identify a well-defined and dominant public policy. As with any defense to recognition of the arbitral award, Samaraneftegaz bears a heavy burden of proof. *Encyclopaedia Universalis S.A.*, 403 F.3d at 90. The

14. Reported in Yearbook XXXV (2010) pp. 621-624.
15. Reported in Yearbook XXIV (1999) pp. 860-870 (US no. 280).
16. Reported in Yearbook XXXV (2010) pp. 481-484 (US no. 682).

Second Circuit has cautioned that the public policy defense in particular 'must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice'. *Telnor Mobile Communs*, 584 F.3d at 396 (internal quotation marks omitted); see also *Parsons & Whittemore Overseas Co.*, 508 F.2d at 973.

[35] "Public policy must be 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'. *United Paperworkers Int'l Union*, 484 U.S. at 43 (internal quotation marks omitted).

[36] "Samaraneftegaz cites several sources purportedly identifying a US public policy against foreign tax evasion. First, it relies on US statutes that criminalize tax evasion (26 U.S.C. Sects. 7201-7212, 7268, 7270, and 7275), money laundering (18 U.S.C. Sects. 1956-1957), conspiracies to defraud the United States (18 U.S.C. Sect. 371), and set penalties on transfer pricing (26 U.S.C. Sects. 482, 6662). These provisions miss the mark; while they may evidence a public policy against violating domestic tax laws, they say nothing of the United States' role in policing claims of foreign tax fraud.

[37] "Samaraneftegaz also points out that the mail and wire fraud statutes, 18 U.S.C. Sects. 1341, 1343, criminalize conduct directed at defrauding foreign governments. (Samaraneftegaz Motion … (citing *Pasquantino v. United States*, 544 U.S. 349 (2005).) *Pasquantino* cannot fairly be read to state a well-defined and dominant public policy. In that case, the Supreme Court condemned a plot that involved smuggling liquor into Canada because the conduct fell within the plain terms of the wire fraud statute, and the Court refused to create a specific exception for frauds directed at evading foreign taxes. Id. at 358 ('[T]he wire fraud statute punishes fraudulent use of domestic wires, whether or not such conduct … evades foreign taxes.'). The Second Circuit, in holding that a scheme to defraud Canada of tax revenue was cognizable under the wire fraud statute, noted that its concern extended only to 'what has been expressly forbidden by statute – the use of the wires in the scheme to defraud', not with '[w]hether our decision … indirectly assists our Canadian neighbors … in the collection of taxes….' *United States v. Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997). The fact that a scheme is not excluded from the reach of a statute is not evidence that it offends the most basic notions of morality and justice so as form the basis of domestic public policy.

[38] "Third, Samaraneftegaz relies on a tax treaty between the US and Russia – the Convention Between the United States of America and the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, US-Rus., 17 June 1992,

S. Treaty Doc. No. 102-39, and cases supporting the IRS' authority to issue summons in aid of foreign tax investigations. Yet Samaraneftegaz cites no provision of the treaty that calls the United States to enforce Russian tax laws against non-citizens in any context other than double-taxation. Any efforts to cooperate with foreign authorities through information exchange may support a general public interest but do not rise to the level of representing public policy. See *United Paperworkers Int'l Union*, 484 U.S. at 43.[17]

[39] "In light of the Second Circuit's admonition that Art. V(2)(*b*) must be 'construed very narrowly', *Europcar Italia SpA*, 156 F.3d at 315, the Court declines to refuse recognition on this basis."[18]

III. CONCLUSION

[40] "For the reasons discussed above, the Court grants Yukos Capital's motion for summary judgment and denies Saramaneftegaz's motion for summary judgment…."

17. "While the defense is frequently invoked, it is rarely successful. *Agility Pub. Warehousing Co. K.S.C. v. Supreme Foodserv. GMBH*, 495 Fed. Appx. 149, 151, 2012 U.S. App. Lexis 18698 (2d Cir. 6 September 2012). The cases that Samaraneftegaz cites can be distinguished or are inapposite. In *Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B.V.*, 574 F.Supp. 367, 372 (S.D.N.Y. 1983), the court found that the arbitrators directed the violation of a Dutch sequestration decree. The *Neft-Aktiv* decision was not rendered until after the arbitral award, and Samaraneftegaz does not contend that the award disregarded the law at the time it was decided. Unlike the respondent in *Changzhou AMEC E. Tools &Equip. CP. LTD v. E. Tools &Equip. Inc.*, 2012 U.S. Dist LEXIS 106967, 2012 WL 3106620 (C.D. Cal. 30 July 2012), Samaraneftegaz does not contend that it signed the loan agreements under duress. In *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F.Supp. 1063. 1069 (N.D. Ga. 1980) [reported in Yearbook VI (1981) pp. 247-248 (US no. 32)], the court declined to enforce an award that adopted a penal rather than compensatory interest rate. Unlike here, the public policy in that case was a well-defined and specific principle expressed in case law. Samaraneftegaz cites other cases in which courts have refused to enforce private contracts that contravened public policy, but those cases were not proceedings to recognize and enforce arbitration awards, and fail to account for the strong federal policy favoring arbitration."
18. "Having found that the public policy defense does not apply, the Court does not consider whether, as Yukos Capital contends, the revenue rule would bar such a defense."

793. United States District Court, Southern District of New York, 27 August 2013, No. 10 Civ. 206 (AKH)

Parties:	Petitioner: Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (Mexico) Respondent: PEMEX – Exploración y Producción (Mexico)
Published in:	Available online at <http://docs.justia.com/cases/federal/district-courts/new_york/nysdce/1:2010cv00206/357027/160>; 2013 U.S. Dist. LEXIS 121951
Articles:	V; V(1)(*e*); VII(1)
Subject matters:	– discretion to enforce set aside award – 1975 Panama Convention
Topics:	¶ 500A + ¶ 516 + ¶ 704(A)

Summary

Enforcement of an ICC award rendered in Mexico in December 2009 was granted even though the award had been annulled by a competent Mexican court. As stated in the 2007 decision of the District of Columbia Circuit in TermoRio, the enforcement court has the (narrow) discretion not to defer to a foreign annulment decision when that decision violates basic notions of justice. This was the case here. The Mexican court relied on a statute enacted in May 2009 and thus not in force when arbitration commenced between the parties in December 2004. Also, the annulment decision left petitioner without a remedy to litigate in court the merits of the dispute decided in its favor in arbitration. The dispute underlying the award concerned the administrative rescission of the contract by the Mexican state party in 2004: under a 2007 law, disputes concerning administrative rescissions are heard in a specialized court where the time limit to bring a claim is forty-five days.

In October 1997, PEMEX-Exploración y Producción (PEP), a subsidiary of Petróleos Mexicanos (PEMEX) an entity of the Mexican state, entered into a contract with Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA), a subsidiary of KBR, Inc., a US company. Under the October 1997 contract COMMISA undertook to build and install two offshore

natural gas platforms in the Gulf of Mexico. The October 1997 Contract was governed by Mexican law; it also contained a clause referring any "controversy, claim, difference, or dispute that may arise from or that is related to, or associated with, the present Contract or any instance of breach with the present Contract" to ICC arbitration in Mexico.

In May 2003, PEP and COMMISA entered into a related contract. The May 2003 Contract was also governed by Mexican law; it also provided for ICC arbitration of disputes in Mexico.

Both the October 1997 Contract and the May 2003 Contract (collectively, the Contracts) stated that PEP was allowed partial or total administrative rescission in the event of partial or total breach of contract by COMMISA.

Disputes arose between the parties in respect of alleged breaches of their respective contractual obligations. On 29 March 2004, PEP notified COMMISA that it intended to administratively rescind the Contracts. When conciliation efforts failed, COMMISA filed a request for ICC arbitration on 1 December 2004. On 16 December 2004, PEP gave COMMISA notice that it was proceeding with the administrative rescission of the Contracts.

On 23 December 2004, COMMISA filed a petition for *amparo* – a judicial challenge to the validity or constitutionality of acts of a government authority – with the Fourteenth District Court on Administrative Matters for the Federal District, claiming that PEP's administrative rescission was untimely and that the statutes on which it was based were unconstitutional and inapplicable to the parties' dispute. On 23 August 2005, the district court dismissed COMMISA's petition, holding that the administrative rescission by PEP was not an act of public authority and thus an *amparo* was not the proper challenge procedure. On 17 May 2006, the Sixth Collegiate Court on Administrative Matters of the First Circuit reversed the district court's decision, holding that PEP's administrative rescission was an act of public authority, and that an *amparo* proceeding was a proper way to challenge it. The issue of the administrative rescission statutes' constitutionality was referred to the Mexican Supreme Court. On 23 June 2006, the Supreme Court held that the administrative rescission statutes were constitutional, and that the federal district courts for administrative matters had jurisdiction to hear and resolve contractual disputes arising from administrative rescissions. On remand, by a decision of 23 February 2007, the Sixth Collegiate Court held that PEP had properly followed the administrative rescission statutes and that the rescission was timely.

In the meantime, an ICC arbitral tribunal was constituted following COMMISA's 1 December 2004 request for arbitration. By a Preliminary Award of 20 November 2006, the ICC tribunal held that it had jurisdiction over the

dispute, rejecting as meritless PEP's objections that (i) the arbitration clause was not broad enough to cover the specific dispute at issue; (ii) COMMISA had not properly exhausted alternative remedies prior to seeking arbitration; and (iii) COMMISA had waived its right to arbitration by pursuing remedies in the courts in the *amparo* action.

While the ICC arbitration was pending, Mexico introduced two new statutes: (1) the Organic Law of the Federal Court in Tax and Administrative Matters– which took effect on 7 December 2007 – establishing a new administrative court with exclusive jurisdiction over disputes relating to public contracts, including complaints in respect of administrative rescissions; and (2) the Law of Public Works and Related Services, effective as of 28 May 2009, whose Sect. 98 provided that although government contractual disputes generally can be arbitrated, disputes relating, inter alia, to administrative rescission cannot be settled by arbitration.

On 16 December 2009, the ICC arbitrators rendered a Final Award in favor of COMMISA (the Award). The tribunal held that res judicata was not a bar to the claim, since the Mexican courts in the *amparo* action addressed different claims and causes of action than those presented in arbitration. It also stated that Sect. 98 did not apply to the case because the law establishing PEMEX (the PEMEX and Affiliates Organic Law – the PEMEX Law) expressly authorized PEMEX and its affiliates – and thus also PEP – to enter into arbitrations.

COMMISA sought enforcement of the Award in the United States. On 2 November 2010, the United States District Court for the Southern District of New York, per Alvin K. Hellerstein, US DJ confirmed the Award in the total amount of US$ 355,864,541.75, including interest on the main sum (the 2010 enforcement decision). PEP appealed to the Second Circuit.

At the same time as COMMISA commenced the US enforcement proceedings, PEP commenced an action in the Mexican courts, seeking annulment of the ICC Award on the ground that the dispute was not arbitrable and the Award was in violation of Mexican public policy. Two district courts in two successive instances dismissed PEP's petition.

On further appeal, on 21 September 2011, the Eleventh Collegiate Court for the Federal District reversed the lower courts' decisions and annulled the Award (the Mexican annulment decision). The Court relied on a 1994 decision of the Mexican Supreme Court, according to which administrative rescissions are "acts of authority". Administrative rescissions, reasoned the Court, are acts of sovereign authority issued to safeguard financial resources of the Mexican state; as a consequence, it would be "absurd" to have them heard in arbitration, which is designed to settle private disputes. The Court referred in this respect to Sect.

98 "as a guideline" to the current trend of the Mexican legislator regarding public works, which is to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to the state: among others, the availability of arbitration. The dispute between COMMISA and PEP was not arbitrable and the ICC lacked jurisdiction.

Following the issuance of the Mexican annulment decision, the United States Court of Appeals for the Second Circuit, which was hearing PEP's appeal from the 2010 enforcement decision, remanded the case to the Southern District of New York to address the effect of the Mexican annulment decision on enforcement.

The Southern District of New York, again per Alvin K. Hellerstein, again granted enforcement, declining to defer to the Mexican annulment decision, which it found to violate basic notions of justice in that it relied on a law that was not in existence at the time the parties' contract was formed and left COMMISA without an apparent ability to litigate its claims.

The district court applied the 1975 Panama (Inter-American) Convention, which is "largely similar" to the 1958 New York Convention so that precedents under one are generally applicable to the other. Art. 5(e) of the Panama Convention, like Art. V(1)(*e*) of the New York Convention, provides that recognition and enforcement may be refused if the award has been set aside by a competent authority of the state where the award was rendered. The Eleventh Collegiate Court was clearly a "competent authority". The question was therefore the extent of the court's discretion under "may".

Based on a review of several relevant decisions, rendered in respect of the New York Convention, the court reached the conclusion that while the court has discretion, it is a narrow one. A 2007 decision of the District of Columbia Circuit (*TermoRio*) specified the width of that discretion by stating that only where annulment "is repugnant to fundamental notions of what is decent and just in the United States" or "violated any basic notions of justice in which we subscribe", it need not be followed.

This was the case here. The court reasoned that when COMMISA commenced ICC arbitration in December 2004, it had every reason to believe that the dispute could be arbitrated: PEP had signed two Contracts containing an arbitration clause; the arbitration clause was broadly worded and mandatory; the PEMEX Law specifically authorized PEMEX and its affiliates to resolve commercial disputes by arbitration; and NAFTA, the 1992 trade agreement among Mexico, the United States and Canada which was at the origin of the enactment of the PEMEX Law, also authorized arbitration of disputes between private parties and

a signatory state in cases where state enterprises had contracted in the public interest.

The Eleventh Collegiate Court relied on a 1994 Mexican Supreme Court decision that did not mention arbitration (and was clearly so marginally relevant that PEP failed to cite it during the initial years of the parties' litigation), and applied Sect. 98, which was not in force when COMMISA commenced arbitration, retroactively and with the expressed aim to favor a state enterprise over a private party. Thus, concluded the district court, "retroactive application of laws and the unfairness associated with such application" was at the center of the dispute, and was exacerbated by the fact that the Mexican annulment decision left COMMISA without a remedy to litigate in court the merits of the dispute decided in arbitration. Following the enactment of the 2007 Law establishing the Federal Court in Tax and Administrative Matters, COMMISA could only bring its claim in respect of the administrative rescission in that court. However, the time limit to do so – forty-five days as opposed to 10 years in the District Courts for Administrative Matters, where matters of administrative rescissions were litigated before the 2007 Law – had expired. In fact, on 6 November 2012 COMMISA sought to file suit in the Tax and Administrative Court, but the case was dismissed on the ground that it was barred by both the statute of limitations and by res judicata.

The district court therefore concluded that the Mexican annulment decision violated basic notions of justice, and held that the ICC Award should be enforced.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345085-n>.

Excerpt

[1] "Generally, arbitration awards issued in one nation can be enforced by judgments and executions granted by the courts of another nation. However, arbitration awards also can be nullified, and if nullified by the courts of the nation in which, or according to the law of which, the arbitration was conducted, a conflict is created for the courts of other nations. Which is to be given primacy, the award or the nullifying judgment?

[2] "This is the issue of the case. After a vigorously contested arbitration, a panel of arbitrators in Mexico City issued an award (the 'Award') in favor of petitioner, Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA). The Award, with interest, is now worth almost 400 million US dollars. COMMISA obtained judgment in this court confirming the Award. Respondent, PEMEX-Exploración y Producción (PEP), an instrumentality of Mexico, continued to resist, appealing from the judgment to the Second Circuit of Appeals, and filing litigation proceedings in the Mexican courts to nullify the Award.

[3] "PEP was successful in the Mexican courts. On 21 September 2011, the Eleventh Collegiate Court on Civil Matters of the Federal District (the 'Eleventh Collegiate Court', generally equivalent in hierarchy and authority to the US Court of Appeals for the D.C. Circuit) issued a 486-page decision that held that the Award was invalid. It reversed the Mexican district court, and remanded the case to it to issue a judgment in favor of PEP. On 25 October 2011, the district court issued such a judgment with its own forty-six-page opinion.

[4] "The Eleventh Collegiate Court held that arbitrators are not competent to hear and decide cases brought against the sovereign, or an instrumentality of the sovereign, and that proper recourse of an aggrieved commercial party is in the Mexican district court for administrative matters. Hence, it nullified the Award. The court based its decision in part on a statute that was not in existence at the time the parties entered their contract, and the decision left COMMISA without the apparent ability to obtain a hearing on the merits of its case.

[5] "In response to that decision and its finality, the Second Circuit Court of Appeals remanded the case to me to address the effect that the decree of nullification should have on the Award and on my judgment confirming the Award. Following remand, I received further briefing from the parties, heard arguments on the complex issues that were presented, and conducted a three-day trial of the parties' experts on Mexican law. This decision reflects my findings and conclusions.

[6] "I hold, for the reasons discussed below, that the Eleventh Collegiate Court decision violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed and left COMMISA without an apparent ability to litigate its claims. I therefore decline to defer to the Eleventh Collegiate Court's ruling, and I again confirm the Award and grant judgment thereon."

I. BACKGROUND

1. The Parties and the Contracts

[7] "Under the Political Constitution of the United Mexican States, all petroleum and hydrocarbons in Mexico belong to the state. State-owned Petróleos Mexicanos (PEMEX) controls and manages those resources. PEP, based in Mexico City, is the PEMEX subsidiary responsible for oil and natural gas exploration and production. COMMISA, a Mexican corporation, is a subsidiary of KBR, Inc., a construction company and military contractor incorporated in Delaware and headquartered in Houston, Texas.

[8] "In October 1997, PEP and COMMISA entered into a contract (the October 1997 Contract) for COMMISA to build and install two offshore natural gas platforms in the Bay of Campeche, in the southerly part of the Gulf of Mexico. Among other provisions, the October 1997 Contract includes: (i) a clause providing that the contract is governed by Mexican law;[1] (ii) a clause providing for any dispute to be settled through arbitration conducted in Mexico City in accordance with the Conciliation and Arbitration Regulations of the International Chamber of Commerce (ICC);[2] (iii) a clause allowing PEP to rescind the contract (i.e., issue an administrative rescission) if COMMISA failed to comply with certain obligations under the contract;[3] and (iv) a clause requiring

1. "'The Contract shall be governed in accordance with the federal laws of the United Mexican States.'"
2. "'Any controversy, claim, difference, or dispute that may arise from or that is related to, or associated with, the present Contract or any instance of breach with the present Contract, shall be definitely settled through arbitration conducted in Mexico City, D.F., in accordance with the Conciliation and Arbitration Regulations of the International Chamber of Commerce that are in effect at that time. The arbitrators shall be three in number, and the language in which the arbitration shall be conducted shall be Spanish.' Id. at Clause. 23.3."
3. "'In the event that the Contractor finds itself in one or more of the grounds described in Clause 10.3.2 and Clause 10.3.3., or in general fails to comply with the provisions, guidelines, bases, procedures, and requirements established by the Law of Acquisitions and Public Works and other

COMMISA to obtain a performance bond guaranteeing its contractual obligations.[4]

[9] "In May 2003, PEP and COMMISA entered into a related contract ('the May 2003 Contract' and together with the October 1997 Contract, 'the Contracts'). Like the October 1997 Contract, the May 2003 Contract is governed by Mexican law and provides for both arbitration and administrative rescission by PEP.

[10] "The parties' arbitration agreement was made pursuant to the PEMEX enabling statute, which also applied to PEP as a subsidiary of PEMEX. The Organic Law by which PEMEX was organized as a wholly-owned, government entity, contemplated the possibility of arbitration. Sect. 14 of the PEMEX and Affiliates Organic Law provides:

> 'In the event of international legal acts, Petróleos Mexicanos or its Affiliates may agree upon the application of foreign law, the jurisdiction of foreign courts in trade matters, and execute arbitration agreements whenever deemed appropriate in furtherance of their purpose.'

The PEMEX law was passed following the enactment, in 1994, of the North American Free Trade Agreement (NAFTA), which sought to encourage investment in Mexico by providing for the arbitration of international disputes. North American Free Trade Agreement, US-Can.-Mex., 17 Dec. 1992, 32 I.L.M. 289 (1993), Art. 1115, 2022."

2. COMMISA's Judicial Challenge to PEP's Administrative Rescission

[11] "On 29 March 2004, after each party charged the other with breaching contractual obligations, PEP notified COMMISA that it intended to administratively rescind the Contracts. However, before doing so, PEP and COMMISA engaged in conciliation efforts, attempting to resolve their disputes

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applicable legal provisions, PEP may rescind the present contract administratively, in whole or in part, in accordance with the terms set forth in the above mentioned clauses.' Id. at Clause 10.3. Clause 10.3.2. identifies 'Instances of Partial Administrative Rescission', including, for example, '[i]f the Contractor unjustifiably suspends the Works or refuses to replace any part thereof which has been rejected by PEP', or '[i]f the Contractor partially abandons the Works'. Clause 10.3.3, identifies 'Instances of Total Administrative Rescission', including, for example, '[i]f the Contractor fails to begin the Works … on the date stipulated', or '[i]f the Contractor abandons the [Works]'."

4. "'In order to guarantee the fulfillment of its obligations arising from this present Contract, the Contractor shall obtain and provide to PEP … a bond policy in an amount equal to 10 percent … of the total amount of the Contract.' Id. at Clause 7.1."

amicably. On 1 December 2004, conciliation having failed, COMMISA filed a demand for arbitration with the ICC. Two weeks later, on 16 December 2004, PEP gave COMMISA notice that it was proceeding by administrative rescission. COMMISA responded by filing a petition for an indirect *amparo*[5] with the Fourteenth District Court on Administrative Matters for the Federal District (Fourteenth District Court) on 23 December 2004.[6] COMMISA alleged that PEP's administrative rescission was untimely and that the statutes on which it was based were unconstitutional and inapplicable to the parties' dispute. The Fourteenth District Court held that the administration rescission by PEP was not an act of public authority and thus an *amparo* was not the proper procedure to challenge the rescission and, on 23 August 2005, dismissed COMMISA's petition.

[12] "COMMISA appealed the district court's decision to the Sixth Collegiate Court on Administrative Matters of the First Circuit (Sixth Collegiate Court). The Sixth Collegiate Court reversed on 17 May 2006, holding that PEP's administrative rescission was an act of public authority, and that an *amparo* proceeding was a proper way to challenge it. The Sixth Collegiate Court referred the issue of the administrative rescission statutes' constitutionality to the Mexican Supreme Court, the highest court in Mexico.

[13] "On 23 June 2006, the Mexican Supreme Court held that the administrative rescission statutes were constitutional. The court ruled that state agencies had a 'special privilege' to promote the public good, and that administrative rescissions fell within this privilege. Administrative rescission did not violate the Mexican Constitution's guarantee of right of access to the courts because 'there is no obstacle or restriction whatever against a private party … [filing] within the relevant time periods … an administrative dispute proceeding, thereby triggering intervention by the relevant court, if [the aggrieved party] … has been adversely affected by the cancellation of the administrative contract for

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5. "An *amparo* is a remedy without a common law equivalent. Bruce Zagaris, 'The Amparo Process in Mexico', 6 U.S.-Mex. L.J. 61, 61 (1998). An *amparo* action is a judicial challenge to the validity or constitutionality of acts of a government authority. See Michael Taylor, 'Why Do Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch', 27 N.M. L. Rev. 141, 151 (1997). Damages are not awarded. The sole remedy is a declaration that the challenged government action is invalid. See 22 April 2010 Declaration of Dr. Claus Werne Von Wobeser Hoephfer.... An indirect *amparo* is initiated in a district court; a direct *amparo* is initiated in an appellate court. Zagaris, 6 U.S.-Mex. L.J. at 61."

6. "The district courts of the United Mexican States, like the US district courts, are the trial courts. There are four categories of district courts in Mexico: civil, criminal, administrative, and labor. As in the United States, the district judges hear cases individually, while the appeals courts, known as the collegiate courts, typically sit in three-judge panels."

public works to which it was a party'. Id. at 71. Pursuant to Art. 52(I) of the Organic Law of the Judiciary, the Supreme Court held, the federal district courts for administrative matters (the District Courts for Administrative Matters) had jurisdiction to hear and resolve contractual disputes arising from administrative rescissions. The Supreme Court did not discuss whether arbitrators could hear issues of administrative rescission if the parties' contracts provided that all disputes arising from the contract should be resolved by arbitration.

[14] "The Mexican Supreme Court remanded the case to the Sixth Collegiate Court to consider COMMISA's non-constitutional claims that the administrative rescission statutes were inapplicable and that the administrative rescission was untimely. On 23 February 2007, the Sixth Collegiate Court held that PEP had properly followed the administrative rescission statutes and that the rescission was timely. The court dismissed COMMISA's petition for an *amparo* against PEP's issuance of an administrative rescission.

[15] "Thus, under Mexican law, a state instrumentality like PEP could respond to a contract dispute by issuing an administrative rescission of the contract. The private party could then litigate the contract issues in the appropriate Mexican district court. However, the Mexican courts did not rule on the issue of arbitrability. What would be the implications of an agreement between a government-owned party and a private party to arbitrate all of their disputes including, presumably, a dispute involving not only the conduct claimed to constitute the breach of contract, but also the action of the government-owned party to rescind the contract? That issue was left for future resolution by the arbitrators and by the Mexican courts."

3. Commencement of Arbitration and Challenge to Arbitral Jurisdiction

[16] "While the *amparo* proceedings unfolded, the ICC Tribunal was formed pursuant to COMMISA's demand for arbitration issued 1 December 2004. PEP promptly attacked the arbitrators' jurisdiction, arguing that (i) the arbitration clause was not worded broadly enough to cover the specific dispute at issue; (ii) that COMMISA had not properly exhausted alternative remedies prior to seeking arbitration; and (iii) that COMMISA had waived its right to arbitration by pursuing remedies in the courts. Notably, PEP did not argue at the time that arbitration was an improper forum for deciding disputes related to administrative rescissions. On 20 November 2006, the ICC Tribunal issued a unanimous award (the Preliminary Award) holding that PEP's arguments lacked merit and that the arbitration panel had jurisdiction over all the issues in dispute.

[17] "Following the Preliminary Award, PEP moved for reconsideration, arguing again that the arbitration panel lacked jurisdiction, PEP contended in a 28 March 2007 filing that the recent decisions of the Mexican Supreme Court and the Sixth Collegiate Court deprived the panel of jurisdiction. PEP argued, since the administrative rescission had been held proper by the Mexican courts, the doctrine of res judicata barred the panel from hearing the parties' dispute. The panel denied PEP's motion, ruling, in an 18 May 2007 order, that it retained jurisdiction to hear the merits of the dispute, subject to a final resolution of the issue in the final award.

[18] "On 8 October 2007, PEP again filed a motion with the arbitration panel, arguing once more that res judicata barred the action and that COMMISA had waived its right to arbitration by filing the *amparo* proceeding in the Mexican courts. PEP now added an additional argument: that the administrative rescission was an 'act of authority' and could not be arbitrated 'since these matters are not subject to arbitration'. The panel disagreed and, on 12 November 2007, issued an order reaffirming its earlier decision that it could hear the merits, subject to a ruling on the issue of jurisdiction in its final award.

[19] "PEP, noting its objection, continued to participate in the arbitration proceedings. PEP did not seek to appeal the Preliminary Award or the subsequent rulings of the arbitration panel, even though PEP had the right to do so under Art. 1432 of Mexico's Commercial Code."[7]

4. Changes in Mexican Law Relating to Public Authorities

[20] "As the arbitration between COMMISA and PEP proceeded, Mexican law changed in material ways. Under a statute that took effect 7 December 2007, litigation relating to issues of compliance with the requirements of public contracts was to be litigated in a special administrative court that was established to hear tax and financial matters. Art. 14(VII) of the Organic Law of the Federal Court in Tax and Administrative Matters (Art. 14(VII)) provided:

> 'The Federal Tax and Administrative Justice Court shall hear cases that are brought against the final decisions, administrative acts, and procedures … that are handed down in administrative matters on the interpretation of and compliance with contracts for public works, acquisitions, leases and

7. "Art. 1432 provides: 'If prior to the issuance of its final award the [arbitration] tribunal declares itself competent, either party may petition a judge to review the foregoing within thirty days after receiving notice of the declaration, and his decision shall be non-appealable.'"

services entered into by the departments and entities of the Federal Public Administration.'[8]

[21] "Cases complaining of administrative rescissions now would be litigated in the Federal Tax and Administrative Justice Court (the Tax and Administrative Court), a department of the Executive. In the District Courts for Administrative Matters, where matters of administrative rescissions had been litigated, the ten-year statute of limitations applicable to breach of contract actions applied. In the Tax and Administrative Court, in contrast, a forty-five-day statute of limitations governed. Moreover, the Supreme Court of Mexico held, in a decision that was issued in March 2010,[9] that Art. 14(VII) mandated that the Tax and Administrative Court was the exclusive forum to hear disputes concerning administrative rescissions.

[22] "A second statutory change addressed the arbitrability of administrative rescissions. Sect. 98 of the Law of Public Works and Related Services (Sect. 98), effective 28 May 2009, provided that although government contractual disputes generally could be arbitrated, '[t]he administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine may not be subject to arbitration proceedings'. The law thus required that all cases that challenged administrative rescissions that occurred after 28 May 2009 could not be arbitrated. The law, however, did not address whether it applied to administrative rescissions that were issued prior to its enactment."

5. The Award in Favor of COMMISA

[23] "Meanwhile, the arbitration proceedings progressed. The parties submitted extensive briefing to the arbitrators on the merits of their claims and, at a hearing in Mexico City from 7 November 2007 to 5 December 2007, presented evidence and witnesses. On 16 December 2009, the ICC Tribunal, by a vote of two to one, issued its Award. The majority first reaffirmed that it had jurisdiction over the case. The majority held that res judicata was not a bar to the claim, since the

8. "PEP disputes this translation, which was provided by COMMISA. According to PEP, the statute refers to decisions and administrative acts that 'are to be handed down' instead of decisions and acts that 'are handed down'. PEP argues that the statute was written to refer to future decisions and actions, not actions that occurred in the past, and therefore does not apply to PEP's 2004 administrative rescission. I am not competent to decide between these competing translations, and my decision does not depend on a choice between them."

9. "The copy of the decision provided by the parties does not indicate on which day of the month the decision was issued."

courts in COMMISA's *amparo* action addressed 'completely different claims and causes of action' than those presented in arbitration. In the *amparo* action, COMMISA argued that the government had violated its constitutional rights, but in the arbitration, COMMISA sought contract damages. The panel also found that Sect. 98 did not apply to the case because Sect. 14 of the PEMEX Law expressly authorized PEP to enter into arbitrations. On the merits, the majority found for COMMISA on most counts, although it granted some of PEP's counterclaims. The majority awarded COMMISA [US]$ 286,101,437.17, plus MXN 34,459,557.58 (approximately $ 3 million), interest, and $ 7,544.536.39 in fees and expenses.[10]

[24] "The dissenting arbitrator expressed the belief that res judicata barred the action because COMMISA sought 'to achieve the same result' in its *amparo* action as in the arbitration. The dissenting arbitrator contended that Sect. 98 was an additional bar to the action. Even without that statute, the panel still lacked jurisdiction because the administration rescission was an 'act of authority', and such acts could not be arbitrated."

6. Confirmation Proceedings in the US District Court

[25] "With its arbitration award in hand, COMMISA filed its petition to confirm the Award in this Court on 11 January 2010. On 5 April 2010, PEP moved to dismiss the petition or, alternatively, for a stay pending resolution of its efforts to nullify the Award in Mexico. I held oral argument on the petition on 25 August 2010. At argument, I ruled that PEP had sufficient contacts with New York to be subject to jurisdiction in the Southern District of New York and that the case should not be dismissed for forum non conveniens or stayed in light of the proceedings in the Mexican courts. I granted COMMISA's petition to confirm the Award, and judgment was entered on 2 November 2010. PEP appealed, and I granted PEP's motion to stay enforcement pending appeal upon PEP's deposit of an agreed amount of $ 395,009,641.34 into the Court Registry Investment Account to secure the judgment."

7. Annulment Proceedings in Mexico

[26] "Concurrently with the litigation initiated by COMMISA in the Southern District of New York, PEP filed suit in the Mexican courts, seeking to nullify the

10. "At the time of this court's judgment, filed 2 November 2010, PEP's judgment debt to COMMISA was $ 355,864,541.75."

Award against it. Initially, on 24 March 2010, it filed suit in the Third Judicial District Court on Civil and Labor Matters for the State of Nuevo Leon, the State where COMMISA is incorporated. PEP alleged, pursuant to Art. 1457 of the Mexican Commercial Code, that the dispute between it and COMMISA was not arbitrable, and that the Award conflicted with Mexican public policy, two of the grounds of nullification provided by Art. 1457.[11] The Mexican District Court dismissed the action on 30 March 2010, holding that PEP had to proceed in the district where the arbitration took place, Mexico City.

[27] "PEP re-filed its suit on 7 April 2010, in the Fifth District Court on Civil Matters for the Federal District (Fifth District Court) in Mexico City.[12] That action was also dismissed on 25 June 2010, partially on substantive grounds. The Fifth District Court held that PEP had waived its argument of non-arbitrability by failing to object timely to the panel's Preliminary Award in favor of its jurisdiction, as Art. 1432 of Mexico's Commercial Code allowed it to do.[13] As an alternative ground of dismissal, the Fifth District Court held that the Award did not violate public policy; it 'in no way affect[ed] public peace or the interests and principles governing the national community', but involved only 'individual interests arising from a commercial relationship existing between the parties'.

[28] "PEP then filed a petition for an indirect *amparo* in the Tenth District Court on Civil Matters in the Federal District (Tenth District Court) to challenge the decision of the Fifth District Court.[14] Again, PEP failed. On 27 October 2010,

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11. "Art. 1457 provides:

> 'Arbitral awards may only be annulled by a competent judge when:
> (I) The party bringing the action demonstrates that:
> (a) One of the parties to the arbitration agreement was affected by an incapacity, or that such agreement is not valid by reason of the law to which the parties submitted it, or if nothing was indicated in such respect, by reason of Mexican law;
> (b) It was not notified of the appointment of an arbitrator or of the arbitration proceedings, or was not able, by any reason whatsoever, to exercise his rights;
> (c) The award refers to a controversy which was not foreseen in the arbitration agreement, or contains determinations that exceed its scope … or
> (d) The composition of the arbitral panel or the arbitration procedure were not provided for in the arbitration agreement … or
> (II) The Judge determines that, pursuant to Mexican law, the matter of the controversy is not subject to arbitration, or that the award is contrary to public policy.'"

12. "The *Distrito Federal*, or Federal District, is coterminous, generally, with Mexico City."
13. "See supra note [8]."
14. "Since PEP, under Mexican law, could not appeal the Fifth District's decision, PEP proceeded by indirect *amparo*. See … Bruce Zagaris, 'The Amparo Process in Mexico', 6 U.S.-Mex. L.J. 61, 61 (1998)."

the Tenth District Court dismissed PEP's action. The Tenth District Court agreed with the Fifth District Court that the parties' contractual agreement had a broad arbitration clause that covered all claims of damages arising from both the breach of contract and from the administrative rescission. The Tenth District Court ruled that the Organic Law that established PEMEX authorized it and its subsidiaries (including PEP) to arbitrate its disputes, and 'an Arbitral Tribunal indeed has powers to address the grounds, context and contract effects of a rescission for they are private in nature'.

[29] "PEP appealed to the Eleventh Collegiate Court for the Federal District. This time it succeeded. On 25 August 2011, a three-judge panel of the Eleventh Collegiate Court reversed, and ordered *amparo* relief in favor of PEP. Its 486-page opinion, issued 21 September 2011, held that public policy was implicated because administrative rescissions are 'issued to safeguard financial resources' of the state.[15] Arbitrations, the Eleventh Collegiate Court held, were designed to settle private disputes, and it would be 'absurd' if 'a private party in its capacity as [a] subject [could] hear, try, and rule [on] acts of authority'. Id. at 424.

[30] "The court based its decision on two sources of law. First, the Eleventh Collegiate Court found that its public policy conclusion was 'strengthened by' Sect. 98, the 2009 statute that forbade arbitrators from hearing administrative rescissions. Id. at 427. The Eleventh Collegiate Court quoted extensively from an explanatory article by the Mexican government describing the purpose of Sect. 98. That article explained that 'it was a mistake to decide to exclusively leave to the force of the market the task of making economic decisions' and that it was essential to 'generat[e] employment sources through public expenditures'. Id. at 428-431. In light of Sect. 98, the Eleventh Collegiate Court concluded that 'the current trend of the legislator regarding public works is to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to the State. Therefore, the State should be granted, once again, suitable mechanisms to fulfill those objectives.' Id. at 431. The Eleventh Collegiate Court remarked that Sect. 98 was not being applied retroactively since it was being considered solely as a 'guiding principle'. Id. at 432.

[31] "The second source of law relied on by the Eleventh Collegiate Court was a 1994 decision of the Mexican Supreme Court. That decision, which did not discuss arbitration, had described administrative rescissions as 'acts of authority'.

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15. "Although the opinion was 486 pages, most of the decision was an extensive recitation of the parties' positions and the legal history of the case. The court explained its rationale in the final 80 pages of the decision."

Since 'acts of authority' should not be arbitrated, the Eleventh Collegiate Court held, the arbitrators that heard the COMMISA/PEP dispute were without jurisdiction.

[32] "As to the Organic Law by which PEMEX was organized and which authorized it to enter into arbitrations, the Eleventh Collegiate Court ruled that since PEMEX could have arbitrated the case if it had not declared an administrative rescission, there was no conflict between its decision and the Organic Law. Id. at 445-448. Furthermore, the issues arising from PEP's administrative rescission, and COMMISA's claims for breach of contract, were intertwined and inseparable, and since the arbitration panel lacked jurisdiction to hear the issues arising from the administrative rescission, it was barred as well from hearing the issues arising from the breach of contract. Id. at 439.

[33] "The Eleventh Collegiate Court held also that PEP had not waived its argument that the arbitrators lacked jurisdiction. The Eleventh Collegiate Court held that only private rights can be waived, and since PEP was acting as a public authority, it could not waive the rights of the public. The court found that the Fifth District Court had misinterpreted Art. 1432 of Mexico's Commercial Code. Art. 1432, the Eleventh Collegiate Court concluded, provides only that a party 'may' take an immediate appeal of a preliminary award, but does not require a party to do so. Id. at 469.

[34] "The Eleventh Collegiate Court emphasized that administrative rescissions by the public party did not deprive the private contracting party of basic rights to have its claim adjudicated in a neutral forum. At several different points, the Eleventh Collegiate Court commented that COMMISA should have brought its breach of contract claims to the District Courts for Administrative Matters. The Mexican Supreme Court, when it considered COMMISA's *amparo* action in 2006, had found that COMMISA could have filed its claims in the District Courts for Administrative Matters. Thus, the Eleventh Collegiate Court ruled that 'the matter should have been settled through a federal ordinary administrative proceeding heard by a District Judge in Administrative Matters' and not by arbitrators. Id. at 418. The Eleventh Collegiate Court did not mention Art. 14(VII), the 2007 law conferring jurisdiction to the Tax and Administrative Court to hear disputes about administrative rescissions, nor did the court discuss the March 2010 decision of the Mexican Supreme Court which held that the Tax and Administrative Court was the exclusive forum to hear such disputes.

[35] "The Eleventh Collegiate Court opinion instructed the Fifth District Court to nullify the Award. On 25 October 2011, the Fifth District Court did so. Its forty-six-page opinion echoed the rationale of the Eleventh Collegiate Court,

finding that it would be 'unacceptable and contrary to the country's legal system' to allow arbitrators 'to resolve a matter of public policy and general interest'."

8. Post-annulment Litigation in Mexico

[36] "In addition to its efforts to have the Award in favor of COMMISA nullified, PEP filed and pursued two lawsuits in the Mexican courts that were consistent with the rationale of its administrative rescission: that it was COMMISA that breached the contract, not PEP. PEP filed suit seeking to recover against the sureties on the performance bond that COMMISA had posted to guarantee its full performance of the contract, and on 24 October 2011, the Second Unitary Court in Civil and Administrative Matters affirmed a lower court decision allowing the bonds to be enforced. As of the current date, PEP is owed the amount of the bond, approximately $ 80 million, plus interest of approximately $ 25 million. COMMISA sought relief by an indirect *amparo* proceeding, but the case was dismissed, and the parties inform me that judgment against COMMISA's sureties has not been perfected.

[37] "PEP also filed a *finiquito*, a proceeding similar to judicial accounting in US courts, in a Monterrey district court, seeking to collect additional funds that were not satisfied by the performance bond. On 16 April 2013, the action was dismissed for having been filed in the wrong venue, but PEP has indicated that it plans to re-file the *finiquito* action.

[38] "COMMISA also pursued relief in the Mexican courts. COMMISA filed a damages claim against PEP in the Tax and Administrative Court on 6 November 2012. But the court held that the action was barred by the 45-day statute of limitations (which ran from the date of the administrative rescission, 16 December 2004), and that the 10-year statute of limitations, applicable to breach of contract actions in the district courts, did not apply. The court held also that COMMISA's action was barred by res judicata, based on the 23 February 2007 decision of the Sixth Collegiate Court finding that PEP had properly issued the administrative rescission.

[39] "COMMISA's parent company, KBR, also is planning legal action. On 19 February 2013, KBR sent a notice to the Mexican Government that it intended to pursue remedies under NAFTA for violations by the Mexican courts of NAFTA Art. 1105, which requires a 'fair and equitable treatment' of foreign

investors in Mexico.[16] The nullification of the Award constituted such a violation, KBR argued."

9. The Second Circuit's Remand and Ensuing Proceedings in the US District Court

[40] "Meanwhile, the case was remanded to me for further proceedings. On PEP's motion, the US Court of Appeals vacated the judgment I had issued and ordered me 'to address in the first instance whether enforcement of the award should be denied because it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made"' (quoting New York Convention Art. V(1)(*e*)). PEP promptly moved to dismiss COMMISA's petition to confirm the Award in COMMISA's favor, and for release of the funds PEP had deposited in the Court's Registry Investment Account to secure COMMISA's judgment while PEP's appeal to the Second Circuit was pending.[17] COMMISA countered with a renewed motion to confirm its Award.

[41] "Pursuant to the remand, I ordered supplemental briefing to understand the obligations and discretion of a district judge under US federal law in relation to the decrees of the Mexican courts nullifying the Award. I also needed to understand the extensive opinions of the Mexican courts, the litigation background between COMMISA and PEP, the nature of the remedy of administrative rescission and its possible interplay with arbitration, and if there was any remaining opportunity for COMMISA to obtain a full and fair hearing of the merits of its controversy with PEP. Because of the complexity of the issues and the divisions of opinion of the recognized experts on Mexican law that the parties presented to me, I conducted three days of hearings to receive the testimony of the experts, on 10, 11 and 12 April 2013.

[42] "Each side presented two experts at the hearing. COMMISA's first expert, Carlos Loperena, testified that the Eleventh Collegiate Court's opinion was contrary to Mexican law as it regarded arbitrations. Loperena criticized the Eleventh Collegiate Court's reliance on both the 1994 Mexican Supreme Court decision, which had not addressed arbitrations, and Sect. 98 of the Public Works Law, which had not been in effect when the parties entered into their contract.

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16. "Art. 1105(1) provides: 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'"

17. "On 17 January 2013, I granted PEP's motion to return the funds it had deposited, ruling that since a supersedeas bond had become inappropriate, so should PEP's deposit of $ 395 million in lieu of such a bond."

COMMISA's second expert, Dr. Claus Werner von Wobeser Hoepfner, testified that the Eleventh Collegiate Court's decision left COMMISA without a remedy to obtain a hearing on the merits of its claims. He testified that the Mexican Supreme Court's 2010 decision interpreting Art. 14(VII) meant that the Tax and Administrative Court was to be the exclusive forum in which COMMISA could bring an action, and that its 45-day period of limitations barred COMMISA from filing a lawsuit in that court.

[43] "PEP's witnesses portrayed the Eleventh Collegiate Court's decision as consistent with the development of Mexican law. Dr. Francisco González de Cossío testified that the Mexican courts had long held that administrative rescissions were acts of authority, and that acts of authority cannot be arbitrated. As to the PEMEX Organic Law, which gave PEP authority to engage in arbitrations, Dr. González de Cossío testified that the law was only an enabling statute, giving PEP the authority to engage in arbitrations in some circumstances, but it did not require PEP to arbitrate when such arbitration would violate public policy. PEP's second expert, Roberto Hernández-García, testified that COMMISA continues to have a remedy in the Mexican courts, Art. 14(VII), he said, was future oriented, and it did not apply to administrative rescissions that were issued prior to its enactment. Hernández-García testified that a retroactive application of the law would violate the Mexican constitution."

II. THE 1975 PANAMA CONVENTION AND ENFORCEMENT OF SET ASIDE AWARDS

[44] "COMMISA's petition to confirm the Award in its favor invokes the Inter-American Convention on International Commercial Arbitration (the Panama Convention). See 9 U.S.C. Sect. 305; John Bowman, 'The Panama Convention and its Implementation Under the Federal Arbitration Act', 11 Am. Rev, Int'l. Arb. 1, 91-94 (2000). The Panama Convention and the [1958 New York Convention] are largely similar, and so precedents under one are generally applicable to the other. See *Productos Mercantiles e Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994)[18] ('The legislative history of the [Panama] Convention's implementing statute … clearly demonstrates that Congress intended the [Panama] Convention to reach the same results as those reached under the New York Convention' such that 'courts in the United States would achieve a general uniformity of results under the two conventions').

18. Reported in Yearbook XX (1995) pp. 955-961 (US no. 184).

[45] "Art. 4 of the Panama Convention provides that an arbitration decision reached in a foreign country can be recognized in US courts 'in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provision of international treaties'.
[46] "The Panama Convention is enforceable pursuant to the Federal Arbitration Act (FAA). 9 U.S.C. Sect. 301; see Bowman, 11 Am. Rev. Int'l. Arb. at 70-72, 81-84. The FAA allows a party to an arbitral award falling under the Panama Convention to apply to a court for an order confirming the award. 9 U.S.C. Sects. 302, 207. If the court determines it has jurisdiction, that 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. 'Under Art. [5] of the [Panama Convention], '[t]he recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove the existence of certain carefully specified defenses', *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 397 (2d Cir. 2011)[19] (quoting Panama Convention Art. 5). While courts have some freedom to set aside arbitration awards if the award followed an arbitration in the court's own nation, '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. [5] of the Convention'. *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)[20] (citation omitted).
[47] "One of the specified grounds of Art. 5 of the Panama Convention is relevant to this case. Art. 5(e) provides:

> 'The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested … [t]hat the decision … has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.'

[48] "Thus, under Art. 5 of the Panama Convention, I may set aside the Award if PEP can show that a competent authority in Mexico annulled the award. Clearly, the Eleventh Collegiate Court is a 'competent authority'. The question I have to decide is the meaning of 'may set aside'. In other words, what is my

19. Reported in Yearbook XXXVII (2012) pp. 346-349 (US no. 756).
20. Reported in Yearbook XXIII (1998) pp. 1058-1067 (US no. 261).

discretion acting as a US District Judge to confirm an award that a foreign country has held to be invalid?

[49] "A number of decisions address this issue of discretion. In *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd*, 191 F.3d 194 (2d Cir. 1999),[21] Baker Marine (Nig.) Ltd., a barge company, entered into a contract with its partner company, Danos and Curole Marine Contractors, Inc., to provide barge services in Nigeria to the oil company Chevron Corp. Claiming that both Danos and Chevron breached that contract, Baker Marine commenced arbitration proceedings against the two companies and won two arbitration awards totaling approximately [US]$ 3 million. Baker Marine sought enforcement of the two awards in the Nigerian courts, and Danos and Chevron appealed to those courts to vacate the awards. In two separate decisions, the Nigerian Federal High Court set aside the awards, finding that 'the arbitrators had improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and made inconsistent awards, among other things'. Id. at 196. Notwithstanding its loss in the Nigerian courts, Baker Marine sought to enforce the award in the US courts, filing a petition to confirm in the Northern District of New York. Baker Marine simply sought to confirm the award and did not argue 'that the Nigerian courts acted contrary to Nigerian law'. Id. at 197.

[50] "The District Court dismissed the petition to confirm, pursuant to the New York Convention.[22] The Second Circuit affirmed. While Baker Marine argued that Art. 5's use of the term 'may' meant that courts were allowed to confirm arbitration awards even if they had been vacated, the Second Circuit found the argument unconvincing given the facts of the case, writing '[i]t is sufficient answer that Baker Marine has shown no adequate reason for refusing to recognize the judgments of the Nigerian court'. Id. at 197; see also *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007)[23] ('Baker Marine is

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21. Reported in Yearbook XXIV (1999) pp. 909-914 (US no. 288).

22. "The relevant portion of Art. 5(1)(e) of the Panama Convention is substantially identical to the analogous portion of Art. V(1)(*e*) of the New York Convention: 'Recognition and enforcement of the [arbitral] 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 … [t]he award … 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.' See *TermoRio S.A. E.S.P. Group, LLC v. Electranta S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007) [reported in Yearbook XXXIII (2008) pp. 955-969 (US no. 621)] ('[T]he relevant provisions of the Panama Convention and the New York Convention are substantively identical for [these] purposes.…'); Bowman, 11 Am. Rev. Int'l. Arb. at 59 ('The drafters of Art. 5 of the Panama Convention incorporated Art. V of the New York Convention almost verbatim.')."

23. Reported in Yearbook XXXIII (2008) pp. 955-969 (US no. 621).

consistent with the view that, when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case.'); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279, 288 (S.D.N.Y. 1999)[24] ('Spier's reference to the permissive "may" in Art. V(1) of the [New York] Convention does not assist him since, as in Baker Marine, Spier has shown no adequate reason for refusing to recognize the judgments of the Italian courts.'). The Second Circuit further noted that '[i]f a party whose arbitration award has been vacated at the site of the award' could nonetheless 'obtain enforcement of the award under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement"'. *Baker Marine*, 191 F.3d at 197 (quoting Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 355 (1981)).

[51] "In *TermoRio*, the D.C. Circuit similarly declined to enforce an arbitration award that had been nullified. There, TermoRio S.A.E.S.P. entered into a contract with Electrificadora del Atlantico S.A.E.S.P. (Electranta), a Colombian state-owned utility, under which Electranta agreed to purchase electricity from TermoRio. TermoRio contended that Electranta breached the agreement by failing to buy the minimum amount of electricity specified in the contract, and an arbitration panel awarded TermoRio more than [US]$ 60 million. Electranta brought an extraordinary writ before a Colombian court to challenge the arbitration award, and the court vacated the award. The Colombian court found that the arbitrators were required to conduct the arbitration in accordance with Colombian law, and that the procedures used by the arbitrators violated that law. 487 F.3d at 931.

[52] "In upholding the annulment of the arbitration award, the D.C. Circuit concluded that '[p]ursuant to [New York Convention Art. V(1)(*e*)], a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a "competent authority" in the primary Contracting State'.[25] Id. at 935. The D.C. Circuit found that because the relevant Colombian court was a competent authority and that 'there is nothing in the record here indicating

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24. Reported in Yearbook XXV (2000) pp. 1042-1056 (US no. 325).

25. "'Under the [New York] 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. All other signatory States are secondary jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.' *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 (5th Cir. 2003) [reported in Yearbook XXVIII (2003) pp. 908-964 (US no. 404)] (footnote and internal quotation marks omitted)."

that the proceedings before the [Columbian court] were tainted or that the judgment of that court is other than authentic', the arbitration award should be set aside'. Id. The D.C. Circuit observed that '[f]or us to [confirm the award] would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made. This principle controls the disposition of this case'. Id. at 937.

[53] "However, there may be circumstances, the D.C. Circuit ruled, where an arbitration award should be confirmed despite judgment of nullification in the primary state. The D.C. Circuit observed that there is a 'narrow public policy gloss on Art. V(1)(*e*) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States'. Id. at 939 (internal quotation marks omitted). In *TermoRio*, in the absence of evidence that the nullification proceedings or nullification judgment 'violated any basic notions of justice to which we subscribe', the public policy gloss could not save a nullified award. Id.[26]

[54] "In contrast to the decisions in *Baker Marine* and *TermoRio*, the district court in *Chromalloy Aeroservices, A Division of Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C. 1996),[27] confirmed an arbitral award that had been rejected by a competent authority in the primary state. There, Chromalloy, an American military contractor, entered into an agreement with the Egyptian air force to provide parts, maintenance, and repair for helicopters used by the air force. Egypt cancelled the contract, and Chromalloy claimed the cancellation was a breach. An arbitration panel sided with Chromalloy, awarding the company more than [US]$ 17 million. After Chromalloy filed a petition in the District Court of the District of Colombia to confirm the award, Egypt filed an emergency appeal with the Egyptian Court of Appeal, which issued an order overturning the award. The US District Court declined to defer to the Egyptian court's decision, holding that since the parties' contract provided that the arbitrators' resolution 'shall be final and binding and cannot be made subject to any appeal', Egypt had violated the terms of the contract when it appealed. Id. at 912. The court held also that '[a] decision by this Court to recognize the

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26. "Baker Marine also suggested that there could be circumstances where a nullified award could be confirmed if the nullification violated public policy. See *Baker Marine*, 191 F.3d at 197 n.3 ('Recognition of the Nigerian judgment in this case does not conflict with United States public policy.')."

27. Reported in Yearbook XXII (1997) pp. 1001-1012 (US no. 230).

decision of the Egyptian court would violate [the] clear US public policy' in favor of enforcement of binding arbitration clauses. Id. at 913.

[55] "The broad holding of *Chromalloy* has been criticized. See *TermoRio*, 487 F.3d at 937 (declining to determine whether *Chromalloy* was correctly decided while noting that courts should defer to nullifications despite 'the Convention policy in favor of enforcement of arbitration awards'); see also I*nt'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F.Supp.2d 12, 30 (D.D.C. 2011).[28] However, *Chromalloy* remains alive, for both *Baker Marine* and *TermoRio* recognized that a district court should hesitate to defer to a judgment of nullification that conflicts with fundamental notions of fairness. See *TermoRio*, 487 F.3d at 939 (concluding that deferral is not warranted if doing so would violate 'basic notions of justice'); *Baker Marine*, 191 F.3d at 197 n. 3 (distinguishing *Chromalloy* on the ground that 'recognition of the Nigerian judgment in this case does not conflict with United States public policy')."

III. DISCUSSION AND ANALYSIS

[56] "Parties engaged in cross-border transactions often agree to arbitrate their disputes to promote both fairness, and the mutual perception of fairness, and to avoid foreign judicial systems and perceived favoritism to local parties, particularly if the local party is a government-owned, or politically powerful, entity. International law favors arbitration, and generally facilitates the enforceability of arbitrators' awards. However, national sovereignty runs strong, and sometimes results in judicial interventions, and even nullifications, of arbitration proceedings and awards. If that occurs, the courts of the nation in which the prevailing party seeks to enforce the award in its favor may be presented with a dilemma: to enforce the arbitration award, or to defer to the judgment nullifying the award.[29]

[57] "This is the dilemma of this case, a dilemma that the remand of the Second Circuit asks me to resolve. The issue, as it is framed by treaty, statute and case law is this: What, if any, is the discretion of a court asked to confirm an arbitration award that has been nullified by a competent authority of the state in which the arbitration was held?

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28. Reported in Yearbook XXXVI (2011) pp. 415-419 (US no. 727).

29. "Cf. Radu Lelutiu, 'Note, Managing Requests for Enforcement of Vacated Awards Under the New York Convention', 14 Am. Rev. Int'l Arb. 345, 351 (2004) (observing that it is not unusual for arbitration awards to be vacated because 'the breaching party is not infrequently a government entity in whose rescue national courts are eager to graciously aid')."

[58] "Under Art. 5 of the Panama Convention as applied by the Federal Arbitration Act, 'recognition and execution of [the arbitral award] may be refused' if the award has been nullified by a 'competent authority' of the state in which, or according to the law of which, the arbitration was conducted. The statutory phrase, 'may', gives me discretion but, it appears from the two important court of appeals cases on the subject, a narrow discretion.[30] The Second Circuit in *Baker Marine* did not define the scope of discretion, ruling only that the party that had won the arbitration did not give an 'adequate reason' why comity should not be given to the foreign court's judgment. 191 F.3d at 197. In *TermoRio*, the D.C. Circuit gave a more substantive definition of the enforcing court's discretion: if the judgment of nullification 'is repugnant to fundamental notions of what is decent and just in the United States' or, stated another way, if the judgment 'violated any basic notions of justice in which we subscribe', then it need not be followed. 487 F.3d at 939.

[59] "I find that under the standard announced in *TermoRio*, the decision vacating the Award violated 'basic notions of justice', and that deference is therefore not required.

[60] "When COMMISA initiated arbitration at the end of 2004, it had every reason to believe that its dispute with PEP could be arbitrated. Twice PEP had signed an agreement stating that disputes related to the gas platforms contracts would be arbitrated. The arbitration clause was broadly worded and mandatory, providing that '[a]ny controversy, claim, difference, or dispute that may arise from or that is related to, or associated with, the present Contract or any instance of breach with the present Contract, shall be definitely settled through arbitration....' Sect. 23.3. PEP had the authority to enter into such an arbitration provision, as the organic law that gave PEP its existence specifically authorized it to resolve commercial disputes by arbitration. Sect. 14 of the PEMEX and Affiliates Organic Law ('In the event of international legal acts, Petroleos Mexicanos or its Affiliates may agree upon the application of foreign law, the jurisdiction of foreign courts in trade matters, and execute arbitration agreements whenever deemed appropriate in furtherance of their purpose.').

[61] "NAFTA, the trade agreement that Mexico, the United States, and Canada executed in 1992, was to the same effect. It authorized arbitration of disputes between private parties and a signatory nation in cases where state enterprises had contracted in the public interest. See North American Free Trade Agreement, US-Can.-Mex., 17 Dec. 1992, 32 I.L.M. 289 (1993), Art. 1116.

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30. "At argument, I read the cases as giving me a 'wee small area of discretion'...."

[62] "Clearly, Mexico had agreed that it could be subject to arbitration in cases just like the one before us, and indeed COMMISA's parent, KBR, has sought just an arbitration. The fact that Mexico had agreed that it could engage in arbitration suggests that Mexico believed its instrumentalities were subject to arbitration as well.

[63] "Moreover, PEP's own conduct showed that it considered itself subject to arbitration. PEP's initial arguments against arbitration had nothing to do with a 'public policy' against allowing state enterprises to enter arbitration, but instead were focused on narrow, technical grounds. PEP argued, among other things, that COMMISA had waived its claims by filing an *amparo* action, and that COMMISA had failed to properly exhaust other options before seeking arbitration. Even after the Mexican Supreme Court issued its 23 June 2006 ruling that the administrative rescission statutes were valid and constitutional, PEP's arguments against arbitration were based on the principle of res judicata, not public policy. It was not until October 2007, nearly three years after COMMISA initiated the arbitration, that PEP made the argument that public policy forbade arbitration.[31]

[64] "Indeed, it was not until 28 May 2009, when Sect. 98 of the Law of Public Works and Related Services came into effect, that there was a source of law that supported the argument that the parties' dispute was not arbitrable. The statute provided: '[t]he administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine may not be subject to arbitration proceedings'. The Eleventh Collegiate Court relied heavily on Sect. 98 in its decision to strike down the arbitration award in favor of COMMISA. The purpose of the law, according to the Eleventh Collegiate Court, was 'to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to the State'. Id. at 431. It therefore followed that it 'would be contrary to public policy' to allow PEP, an entity that was so important to the public expenditure, to be subject to a dispute resolution procedure governed by private parties. Id. at 432.

[65] "The Eleventh Collegiate Court stated that it was not applying Sect. 98 retroactively, but only as a 'guiding principle', and that a 1994 Mexican Supreme Court decision supported its conclusion. Id. at 432, 436-437. However, the 1994 decision did not mention arbitration, and its relevance to this case was so marginal that PEP failed to cite it during the initial years of the parties' litigation.

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31. "Even PEP's own witness, Doctor Francisco González de Cossío, expressed doubts about the strength of the public policy argument. In a 2008 article, González de Cossío said of this argument: 'its success has been virtually zero'."

The decision seems to be available only in extract, as the parties represented in response to the court's inquiry. Based on the Eleventh Collegiate Court's extensive discussion of Sect. 98, it was this law, not the 1994 Mexican Supreme Court decision, that was critical to its decision.

[66] "Thus, retroactive application of laws and the unfairness associated with such application is at the center of the dispute before me:

> 'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal". In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.'

Landgraf v. USI Film Products, 511 U.S. 244, 265-266 (1994) (citation omitted). Here, the law at the time of the parties' contracting gave COMMISA the 'settled expectation' that its dispute could be arbitrated. The 1994 Mexican Supreme Court decision was not sufficient to put COMMISA on notice that the statute that specifically empowered PEP to arbitrate and the arbitration clauses PEP had agreed to should have been ignored.

[67] "Further, this retroactive application of Sect. 98 was undertaken to favor a state enterprise over a private party. The Eleventh Collegiate Court explained that administrative rescissions helped 'safeguard [the state's] financial resources' and that 'the State should be granted … suitable mechanisms to fulfill [this] objectives[]'. This rationale flouts a basic principle of justice: where a sovereign has waived its immunity and has agreed to contract with a private party, a court hearing a dispute regarding that contract should treat the private party and the sovereign as equals. See *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) ('When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.') (citation omitted); *United States v. Bostwick*, 94 U.S. 53, 66 (1877) ('The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf.'); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (finding that when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there').

[68] "Applying a law that came into effect well after the parties entered into their contract was troubling. But this unfairness was exacerbated by the fact that the Eleventh Collegiate Court's decision left COMMISA without a remedy to litigate the merits of the dispute that the arbitrators had resolved in COMMISA's favor.

[69] "Throughout the litigation in Mexico, the Mexican courts recognized that the parties' dispute could have been brought in the Mexican courts. In its 23 June 2006 decision, the Mexican Supreme Court observed that 'there is no obstacle or restriction whatever against a private party … [filing] within the relevant time periods … an administrative dispute proceeding, thereby triggering intervention by the relevant court, if [the aggrieved party] … has been adversely affected by the cancellation of the administrative contract for public works to which it was a party'. This right to judicial recourse was essential to the Mexican Supreme Court's conclusion that administrative rescissions were constitutional, and not arbitrary cancellations of the contract rights of private counter-parties. Thus, the Eleventh Collegiate Court justified its judgment of nullification by observing that the case 'may have been contested by filing a federal ordinary administrative action before a District Judge in Administrative Matters to analyze the substantive matter'.

[70] "But by the time the Eleventh Collegiate Court issued its opinion, this option was no longer available to COMMISA. Art. 14(VII) of the Organic Law of the Federal Court in Tax and Administrative Matters, a 2007 statute, gave the Tax and Administrative Court jurisdiction over public works cases involving Mexican state entities. That court has a short, forty-five-day statute of limitations. Based on that statute, the Mexican Supreme Court held in 2010 that the Tax and Administrative Court was the exclusive forum for such cases. The necessary implication is that the District Courts for Administrative Matters, in which a ten-year statute of limitations applies, are not available to hear disputes like this one. COMMISA tested this issue, filing suit in the Tax and Administrative Court on 6 November 2012, arguing that the ten-year statute of limitations should apply, but COMMISA's argument was rejected and the case was dismissed barely a month after its filing. The Tax and Administrative Court held that COMMISA's suit was barred by both the statute of limitations and by res judicata.[32] This lack of remedy is particularly unjust because COMMISA has

32. "PEP's expert Roberto Hernández-García testified that he believed that COMMISA still has a remedy in the Mexican courts, despite Art. 14(VII). He contended that Art. 14(VII) should not apply because it is a future oriented law and because the Mexican constitution forbids retroactive application of laws. However, I found the testimony of COMMISA's witness, Dr. Claus Werner von Wobeser Hoepfner, more convincing. Von Wobeser Hoepfner testified that Art. 14(VII)

been deemed to owe damages to PEP, even though there has been no full hearing on the merits outside arbitration, simply because PEP issued an administrative rescission.

[71] "For these reasons, this is a very different case from *Baker Marine* and from *TermoRio*. In neither of those cases did the annulling court rely on a law that did not exist at the time of the parties' contract. In both *Baker Marine* and *TermoRio*, the nullification was based on the failure of arbitrators to follow proper procedure. The courts of Nigeria and Colombia did not hold that the cases could not be subject to arbitration, and therefore there was no contradiction between the government entities' agreements to arbitrate and the courts' rulings. Here, in contrast, the Eleventh Collegiate Court ruled that the entire case was not subject to arbitration based on public policy grounds, a ruling that was at odds with PEP's own agreement, the PEMEX enabling statute, and the law of Mexico at the time of contracting and the commencement of arbitration.

[72] "In declining to defer to the Eleventh Collegiate Court, I am neither deciding, nor reviewing, Mexican law. I base my decision not on the substantive merit of a particular Mexican law, but on its application to events that occurred before that law's adoption. At the time COMMISA brought its claims against PEP, there was no statute, case law, or any other source of authority that put COMMISA on notice that it had to pursue its claims in court, instead of in arbitration. COMMISA reasonably believed that it was entitled to arbitrate the case, and the Eleventh Collegiate Court's decision disrupted this reasonable expectation by applying a law and policy that were not in existence at the time of the parties' contract, thereby denying COMMISA an opportunity to obtain a hearing on the merits of its claims.

[73] "The decision therefore violated basic notions of justice, and I hold that the Award in favor of COMMISA should be confirmed."

IV. CONCLUSION

[74] "For the reasons stated in this opinion, I grant COMMISA's renewed motion to confirm the Award, and I deny PEP's motion to dismiss COMMISA's petition. The clerk shall mark the motions terminated.

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could be applied to actions filed before the statute's enactment because it is considered a procedural law, and such laws are applied retroactively. Moreover, the Tax and Administrative Court recently rejected COMMISA's claims on the additional ground that res judicata barred the action. Even if COMMISA could somehow pass these legal hurdles, re-litigation in the Mexican courts would add undue and unreasonable delay to a case that has already lasted almost ten years."

[75] "Several issues remain before this case can be closed: the amount of the judgment to be entered in COMMISA's favor, whether that judgment should reflect COMMISA's obligations under its performance bonds and the judgment in Mexico in favor of PEP against COMMISA's sureties with respect to those bonds, the re-deposit by PEP of a cash deposit in lieu of a *supersedeas* bond, and any other appropriate matters. These issues can be discussed with me at a conference to be held 12 September 2013, at 3 p.m. Counsel shall confer before the conference and jointly propose, in a single letter to be sent to the court by 9 September 2013, an agenda for the conference and their respective positions on the issues to be discussed."

794. United States District Court, Eastern District of Louisiana, 11 September 2013, Civil Action No. 13-0607c/w13-2409 Section: "A" (4)

Parties:	Plaintiff: Lito Martinez Asignacion (Philippines) Defendant: Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG (Germany)
Published in:	Available online at: <http://scholar.google.nl/scholar_case?case=8292611030731174582&q=lito+martinez+asignacion&hl=en&as_sdt=2006>; 2013 U.S. Dist. LEXIS 129797
Articles:	II(3)
Subject matter:	– removal from state court to federal court of 1958 New York Convention case
Topics:	¶ 217

Summary

Removal under Sect. 205 of the Federal Arbitration Act (FAA) was proper because the subject matter of the action – (i) lifting the stay of court proceedings ordered when the state court referred the parties to arbitration in the Philippines and (ii) setting aside the Philippine award as being against US public policy – related to "an arbitration agreement or award falling under" the 1958 New York Convention.

Lito Martinez Asignacion entered into a contract with Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG (Rikmers) to work as a fitter in the engine room of the *M/V RICKMERS DALIAN*, a vessel owned by Rikmers. The employment contract was executed by the Philippine Overseas Employment Administration (POEA) and incorporated the POEA Standard Terms and Conditions Governing Employment of Filipino Seafarers On Board Ocean-Going Vessels. According to the Standard Terms, all employment claims must be resolved through arbitration in the Philippines. The Standard Terms also provide that all claims arising out of a seaman's employment are governed by Philippine law.

On 26 October 2010, Martinez Asignacion sustained severe burns after a condenser overflowed in the engine room while the *M/V RICKMERS DALIAN* was traveling the Mississippi River near New Orleans. On 12 November 2010, Martinez Asignacion filed suit in Louisiana state court to recover for his injuries pursuant to the Jones Act and general maritime law. Rikmers removed the case to federal court.

By an order of 25 May 2011, the United States District Court for the Eastern District of Louisiana found that the case was correctly removed under Sect. 205 of the Federal Arbitration Act (FAA) because the claims related to an arbitration agreement falling under the 1958 New York Convention. However, the court remanded the case to state court because it found, largely relying on the 2009 Eleventh Circuit's decision in *Thomas*, that the arbitration clause in the employment contract was unenforceable as the choice of a Philippine forum and Philippine law operated in tandem as a prospective waiver of the seaman's statutory right to bring a Jones Act claim in a forum that would apply US law.

On 16 May 2012, on remand, the state court stayed the proceeding and ordered the parties to arbitrate their dispute as provided for in the contract.

Arbitration followed in the Philippines. On 15 February 2013, the arbitrators issued an award finding that Philippine law controlled and, accordingly, that Martinez Asignacion was entitled only to US$ 1,870, being scheduled benefits based on his level of disability.

On 4 March 2013, Martinez Asignacion filed a motion in Louisiana state court, requesting the court to order Rikmers to show cause as to why the stay originally ordered by the court in order to refer the parties to arbitration should not be lifted and the award should not be set aside as being against US public policy. On 3 April 2013, Rikmers again removed the case (Civil Action 13-0607) to federal court under Sect. 205 FAA. Martinez Asignacion moved to remand.

In federal court, Rikmers moved to enforce the Philippine award (Civil Action No. 13-2409).

By the present decision, the Eastern District of Louisiana, per Jay C. Zainey, US DJ, decided only on the issue of removal and concluded that removal was proper.

Removal – noted the court – is proper under Sect. 205 FAA where the subject matter of an action or proceeding "relates to" an arbitration agreement or award "falling under" the New York Convention; the Fifth Circuit has held that an arbitration agreement under the Convention relates to a case if the agreement can conceivably affect the outcome of that case. In its 25 May 2011 order, the court held that the suit brought by Martinez Asignacion in state court was removable because Martinez Asignacion's claims indisputably related to an arbitration

agreement falling under the Convention, as the arbitration clause in the employment contract could conceivably affect the outcome of the case. Also, the four jurisdictional requirements for removal were undisputably met: the employment contract was an agreement in writing to arbitrate the dispute; arbitration was to be held in the Philippines, a New York Convention signatory; the relationship was commercial because seamen employment contracts are considered commercial; and Martinez Asignacion was not a US citizen.

In its 25 May 2011 order, the district court then decided to remand the case to state court on the basis of *Thomas*. Though noting that the Eleventh Circuit questioned *Thomas* in its 2011 decision in *Lindo*, the court found it unnecessary to revisit its earlier reasoning here because the dispute "has now progressed beyond the procedural posture first presented" to the court: the claims presently raised by Martinez Asignacion clearly related to the Philippine arbitration, which was ordered pursuant to an arbitration agreement falling under the Convention, and the resulting award.

The court found that the merits of Martinez Asignacion's attack on the Philippine arbitral award were not germane to the question of whether this case was properly removed under Sect. 205 and were best reserved for the next stage of the litigation.

A detailed report of this decision is available online at <www.kluwerarbitration.com/CommonUI/document.aspx?id=1345086-n>.

Excerpt

[1] "This case, in a new posture, returns to the Court for further proceedings. It concerns personal injuries sustained by a foreign seaman on a vessel. The following factual background is drawn from the Court's prior Order and Reasons issued on 25 May 2011 in Civil Action No. 11-0627. Plaintiff, a citizen of The Republic of the Philippines (the Philippines), was employed by Defendant Rickmers, a German corporation, to work as a fitter in the engine room of the *M/V RICKMERS DALIAN*, a vessel owned by Defendant. Plaintiff and Defendant entered into a written employment contract that was executed by the Philippine government through the Philippine Overseas Employment Administration (POEA).

[2] "The employment contract incorporates the Philippine government's Standard Terms and Conditions Governing Employment of Filipino Seafarers On Board Ocean-Going Vessels (Standard Terms). The Standard Terms require that all employment claims must be resolved through arbitration in the Philippines. Specifically, Sect. 29 of the Standard Terms states that:

> 'In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators.'

[3] "Disputes submitted to the NLRC are resolved by arbitration. *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 900 (5th Cir. 2005).[1] As a result, all employment disputes subject to the POEA's Standard Terms are resolved by arbitration. See id. In addition, Sect. 31 of the Standard Terms provides that all claims arising out of a seaman's employment shall be governed by Philippine law.

[4] "On or about 26 October 2010, the *M/V RICKMERS DALIAN* was traveling the Mississippi River near New Orleans when Plaintiff sustained severe burns after a condenser overflowed in the engine room. As a result, Plaintiff filed suit

1. Reported in Yearbook XXX (2005) pp. 1118-1129 (US no. 518).

in state court on 12 November 2010 against Defendant to recover for his injuries pursuant to the Jones Act and general maritime law. On 21 March 2011, Defendant removed the case to federal court pursuant to 9 U.S.C. Sect. 205, arguing that the dispute related to an arbitration agreement in Plaintiff's employment contract. Plaintiff thereafter filed a motion to remand, arguing that remand was appropriate because his employment contract was unenforceable since arbitration of his claims would violate the public policy of the United States. Specifically, Plaintiff contended that the choice of forum and choice of law clauses in his employment contract operated in tandem as a prospective waiver of his statutory rights in violation of the public policy of the United States. In opposition, Defendant argued that removal was proper because 9 U.S.C. Sect. 205 allowed for removal of cases related to an arbitration agreement, regardless of whether that arbitration agreement would ultimately be enforceable.

[5] "Additionally, Defendant filed a motion to stay and compel arbitration. In that motion, Defendant argued that the arbitration agreement was valid and enforceable pursuant to the [1958 New York Convention]. Defendant further asserted that federal public policy strongly favors arbitration and that Plaintiff failed to satisfy his heavy burden in establishing that the arbitration agreement was not valid. Plaintiff opposed the motion to stay and compel arbitration arguing the prospective waiver of statutory rights violated the public policy of the United States based on Supreme Court precedent.

[6] "In the Court's prior Order and Reasons, issued 25 May 2011 in Civil Action No. 11-0627, the Court found that Plaintiff's suit was initially removable because his claims fell under the Convention, over which this Court has original jurisdiction. Ultimately however, because the Court found that the choice of forum and choice of law clauses contained in Plaintiff's employment contract operated in tandem as a prospective waiver of his statutory right to bring a Jones Act claim in a forum that would apply US law, the Court concluded that the arbitration clause was thereby rendered unenforceable, and accordingly remand was proper in accordance with *Beiser v. Weyler*, 284 F.3d 665, 675 (5th Cir. 2002)[2] ('If the district court decides that the arbitration agreement does not provide a defense, and no other grounds for federal jurisdiction exist, the court must ordinarily remand the case back to state court.').

[7] "After the Court remanded this action back to state court, Defendant filed exceptions in the state court proceeding to enforce the arbitration clause in Plaintiff's employment contract. On 16 May 2012, the state court granted Defendant's exceptions, stayed litigation of Plaintiff's claims, and ordered

2. Reported in Yearbook XXVII (2002) pp. 909-921 (US no. 398).

Plaintiff to arbitrate his claims in the Philippines pursuant to the arbitration clause in his employment contract.

[8] "This dispute then proceeded to arbitration in the Philippines where, on 15 February 2013, the Philippine arbitrators issued a decision finding that US law would not be applied, that Philippine law controlled and accordingly, that Plaintiff was entitled only to scheduled benefits based on his level of disability resulting in an award of [US]$ 1,870.00.

[9] "On 4 March 2013, Plaintiff filed a motion in state court requesting that the court order Defendant to show cause as to why the stay of litigation should not be lifted and why the decision of the Philippine arbitrators 'should not be set aside as being against public policy of the United States'.

[10] "On 3 April 2013, Defendant removed this action to federal court a second time. Defendant asserts, as its first basis for removal, that the 'Philippine arbitrators' decision and award constitutes an arbitral award falling under the Convention. As a result, the subject matter of the plaintiff's state court lawsuit, which plaintiff seeks to revive, "relates to an arbitration … award falling under the Convention" within the meaning of 9 U.S.C. Sect. 205.' Additionally, Defendant asserts, as its second basis for removal, that the Plaintiff's motion requesting that the state court set aside the Philippine arbitrators' decision and award 'states a claim that "arises under" federal law, specifically the federal common law of foreign relations and the Act of State doctrine'. Defendant supports this second basis by arguing that the 'federal common law of foreign relations and the Act of State doctrine confer federal jurisdiction over suits seeking to invalidate the official acts of a foreign sovereign government'. Defendant asserts that because 'the arbitration decision and award were issued by an office of the Philippine Department of Labor & Employment, an agency of the Philippine government … plaintiff's motion to "set aside" the arbitral award seeks to invalidate official actions of a Philippine government agency'.

[11] "Shortly after Defendant's removal, on 9 April 2013, Plaintiff filed the instant motion to remand in Civil Action 13-0607, arguing essentially that removal for a second time under an arbitration clause that the Court previously found unenforceable is improper and that Defendant's second basis for removal, the Act of State doctrine and the federal common law of foreign relations, is not applicable to this case. Additionally, Plaintiff 'specifically requests the [C]ourt to consider granting sanctions for wrongful removal pursuant to Federal Rule of Civil Procedure 11 or to award attorney's fees and costs pursuant to 28 U.S.C. Sect. 1447(c)'. For the following reasons, this motion is denied.

[12] "On the same day that this motion to remand came under submission, 24 April 2013, Defendant Rickmers filed a Petition for Confirmation of Foreign

Arbitral Award Pursuant to 9 U.S.C. Sect. 207. On 23 May 2013 that action was consolidated with Civil Action No. 13-0607. Defendant Rickmers (Petitioner in C.A. No. 13-2409) seeks confirmation of the aforementioned arbitral award rendered by the Philippine arbitrators.

[13] "Plaintiff Asignacion (Defendant in C.A. No. 13-2409) moves the Court to remand Civil Action No. 13-2409, to dismiss and or stay Civil Action No. 13-2409, and to issue sanctions. For the following reasons this motion, too, is denied."

II. STANDARD OF REVIEW

[14] "The removing defendant bears the burden of demonstrating that federal jurisdiction exists and therefore that removal was proper. *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), cert. denied, 510 U.S. 868, 114 S.Ct. 192, 126 L.Ed.2d 150 (1993). In assessing whether removal is appropriate, the court is guided by the principle, grounded in notions of comity and that recognition that federal courts are courts of limited jurisdiction, that removal statutes should be strictly construed. See, e.g., *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). Doubts regarding whether federal jurisdiction is proper should be resolved against federal jurisdiction. *Acuna v. Brown & Root*, 200 F.3d 335, 339 (5th Cir. 2000).

[15] "The United States is a party to the [1958 New York Convention], which Congress has implemented at 9 U.S.C. Sect. 201, et seq. (the Convention Act). 'Among the Convention Act's provisions are jurisdictional grants giving the federal district courts original and removal jurisdiction over cases *related to* arbitration agreements *falling under* the Convention.' *Acosta v. Master Maintenance and Constr. Inc.*, 452 F.3d 373, 375 (5th Cir. 2006)[3] (emphasis added). Specifically, Sect. 203 of the Convention Act provides that '[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States'. 9 U.S.C. Sect. 203. Notwithstanding the Saving to Suitors Clause, 28 U.S.C. Sect. 1333, cases arising under the Convention may be removed to federal court pursuant to Sect. 205 of the Convention Act. 9 U.S.C. Sect. 205. Sect. 205 provides as follows:

> '[w]here the subject matter of an action or proceeding pending in a State court *relates to* an arbitration agreement or award *falling under* the

3. Reported in Yearbook XXXI (2006) pp. 1494-1502 (US no. 579).

> Convention, the defendant or the defendants may, at any time before trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending'.

Id. (emphasis added).

[16] "In *Beiser v. Weyler*, the Fifth Circuit held that an arbitration agreement under the Convention '*relates to*' a plaintiff's suit if the agreement 'could conceivably affect the outcome of the plaintiff's case'. *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002) (emphasis added). '[A]s long as the defendant claims in its petition that an arbitration clause provides a defense, the district court will have jurisdiction to decide the merits of that claim.' Id. at 671-672. The Fifth Circuit further reasoned that Congress's use of the broad phrase 'relates to' demonstrated Congress's intent to confer jurisdiction liberally under Sect. 205. Id. at 674. Nevertheless, the Fifth Circuit also noted that 'the arbitrability of a dispute will ordinarily be the first issue the district court decides after removal under Sect. 205' and that a district court must remand a case back to state court if it finds that the arbitration clause does not provide a defense. Id. at 675.

[17] "An international agreement to arbitrate falls under the Convention if: '(1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen'. *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 903 (5th Cir. 2005) (quoting *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002))."[4]

III. LEGAL ANALYSIS

[18] "As previously held in Civil Action No. 11-0627, Plaintiff's suit was initially removable because his claims indisputably relate to an arbitration agreement that falls under the Convention. It cannot be disputed that the arbitration clause contained in Plaintiff's employment contract 'could conceivably affect the outcome of the plaintiff's case', *Beiser*, 284 F.3d at 669, given that the employment contract provides for arbitration of employment-related disputes in the Philippines. See supra. It is also indisputable that the employment contract falls under the Convention given that the four jurisdictional

4. Reported in Yearbook XXVII (2002) pp. 600-612 (US no. 364).

requirements for arbitration under the Convention, as described in *Lim*, supra, are met. First, Plaintiff's employment contract qualifies as an agreement in writing to arbitrate the dispute. Second, the employment contract provides for arbitration in the Philippines, a signatory of the Convention. Third, the employment contract arises out of a commercial relationship because seamen employment contracts are considered commercial. See *Francisco*, 293 F.3d at 274. Fourth, Plaintiff is not a United States citizen. Accordingly, removal was clearly proper pursuant to Sect. 205 despite the fact that the arbitral award issued on 15 February 2013 may ultimately, be deemed unenforceable on public policy grounds.

[19] "Previously, this Court, persuaded in large part by the Eleventh Circuit's reasoning in *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009),[5] held that remand of this action was appropriate after concluding that the choice of law and choice of forum clauses contained in Plaintiff's employment contract operated in tandem to effect a prospective waiver of his statutory rights that, in turn, rendered his employment contract, or at least the arbitration clause therein, unenforceable as against public policy. While the Eleventh Circuit has since called this decision into question, see *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011),[6] the Court finds it unnecessary to revisit the reasoning underlying its previous holding given that the instant dispute has now progressed beyond the procedural posture first presented to the Court. Because this action has proceeded to arbitration pursuant to an arbitration agreement that falls under the Convention, the claims presented by Plaintiff in the instant litigation now clearly relate to that arbitration. As Defendant Rickmers emphasizes: 'For now, it is obvious that the arbitral award conceivably provides Rickmers a defense to plaintiff's claims. This case therefore "relates to" the award and was properly removed under 9 U.S.C. Sect. 205, and plaintiff's motion to remand should be denied.' The Court agrees. Accordingly, removal was proper and remand is denied.

[20] "The Court notes in closing that the majority of Plaintiff Asignacion's arguments are premature at this stage of the litigation, though not necessarily without merit. Whether the arbitral award rendered by the Philippine arbitrators is ultimately enforceable or is voided on public policy grounds, is a question for another day. Art. V(2)(*b*) of the Convention provides that '[r]ecognition of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that … *[t]he recognition or*

5. Reported in Yearbook XXXIV (2009) pp. 1136-1150 (US no. 674).
6. Reported in Yearbook XXXVII (2012) pp. 330-336 (US no. 752).

enforcement of the award would be contrary to the public policy of that country'. Convention, Art. V(2)(*b*) (emphasis added).

[21] "While the Court recognizes Plaintiff Asignacion's argument that '[t]he erroneous decision by the state district court to order arbitration changes nothing', the Court cannot adopt this conclusion. Now that the parties have engaged in an arbitration that falls under the Convention and clearly relates to the claims at issue in this litigation, this litigation was properly removed to federal court and must proceed to its ultimate resolution in this forum. As Defendant Rickmers correctly notes, 'the merits of plaintiff's attack on the Philippine arbitral award are not germane to the question [of] whether this case was properly removed under 9 U.S.C. Sect. 205'. This is undoubtedly so. And, limited as the Court is to a review of its jurisdiction on these motions to remand, Plaintiff's arguments are best reserved for the next stage of this litigation.

[22] "In light of this Court's holdings, Plaintiff Asignacion's motions for sanctions are deemed to be without merit and are hereby dismissed. Additionally, because the Court has found that it must deny remand of this matter, the relief prayed for in Plaintiff Asignacion's Motion to Remand and to Dismiss and/or Stay and For Sanctions is denied as moot."

(….)