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 78 New York Convention decisions rendered in 26 countries, bringing the total to 1,744 decisions from 67 countries and 2 jurisdictions. According to the Treaty Section of the United Nations, there are, as of 1 November 2011, 146 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 XXXVI (2011) can therefore access materials from both this Volume and Volume XXXV (2010).

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

In addition to publishing court decisions and up-to-date lists of Contracting States to these Conventions, the Yearbook also includes Commentaries. This Volume contains 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). A List of Court Decisions and Arbitral Awards applying the European Convention is also included. 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 soon as the **second edition** of Prof. van den Berg's 1981 treatise *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*. Concise yet inclusive information on the essential aspects of the scope, interpretation and application of the Convention can also be found in *ICCA's Guide to the Interpretation of the 1958 New York Convention*, a handbook published by ICCA on the occasion of its fiftieth anniversary in 2011. The Guide is freely available in PDF format from the ICCA website, <www.arbitration-icca.org>.

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. See also <www.newyorkconvention.org>.

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 1,750 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.

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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 1 November 2011*)[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	–
Australian Antartic Territory[5]	*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 100 States including extensions). On 25 February 1988, the Government of Austria withdrew its reciprocity reservation; on 23 April 1993, the Government of Switzerland withdrew its reciprocity reservation; and on 31 August 1998, the Government of Germany withdrew its reciprocity reservation.

   The 2nd is the so-called "commercial reservation" (at present made by 56 States including extensions). On 27 November 1989, the Government of France withdrew its commercial reservation.
3. Extension made by the United States of America upon acceding to the Convention.
4. Argentina declared that the present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution. In addition, upon signature, Argentina declared that "If another Contracting Party extends the application of the Convention to territories which fall within the sovereignty of the Argentine Republic, the rights of the Argentine Republic shall in no way be affected by that extension."
5. Extension made by Australia upon acceding to the Convention.

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
Christmas Island[5]	*26 Mar.*	*1975a*	–

6. With regard to awards made in the territory of non-Contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.
7. Extension made by the United Kingdom on the date indicated in the List.
8. State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.
9. The commercial reservation does not apply to the province of Quebec.
10. Upon resuming the exercise of sovereignty over Hong Kong, China gave notice that the Convention with the reservations made by China ("reciprocity" and "commercial") will also apply to the Hong Kong Special Administrative Region.

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

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	–
Georgia	2 June	1994a	–

11. On 20 November 1990, Law no. 39 of 1990 was promulgated implementing the Convention in Colombia. This law filled a lacunae created by the decision of 6 October 1988, by which the Supreme Court declared the unconstitutionality of the Law no. 37 of 1979, implementing the New York Convention in Colombia.
12. Extension made by France on the date indicated in the List.
13. The Convention was signed by the former *Czechoslovakia* on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959. Czechoslovakia made the 1st reservation and declared that with regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which these States grant reciprocal treatment. On 28 May 1993, *Slovakia* and, on 30 September 1993, the *Czech Republic* deposited instruments of succession.
14. Extension made by Denmark on the date indicated in the List.

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	–
Lao People's Democratic Republic	17 June	1998a	–
Latvia	14 Apr.	1992a	–

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.

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	–
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*
New Zealand	6 Jan. 1983a	1
Nicaragua	24 Sep. 2003a	–
Niger	14 Oct. 1964a	–

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.

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	–
Saudi Arabia	19 Apr.	1994a	1
Senegal	17 Oct.	1994a	–
Serbia[8,25]	12 Mar.	2001	1 - 2
Singapore	21 Aug.	1986a	1
Slovakia[13]	28 May	1993s	1
Slovenia[8]	6 July	1992s	1 - 2
South Africa	3 May	1976a	–
Spain	12 May	1977a	–

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.

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	–
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[27]	12 Sep. 1995a	1 - 2
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	–

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. Viet Nam declared that interpretation of the Convention before the Vietnamese Courts or competent Authorities should be made in accordance with the Constitution and law of Viet Nam.

NEW YORK CONVENTION OF 1958 INDEX OF CASES REPORTED IN VOLUME XXXVI (2011)

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 soon 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.

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ARTICLE V(1) – GROUNDS FOR REFUSAL OF ENFORCEMENT TO BE PROVEN BY THE RESPONDENT

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GROUND *b*: VIOLATION OF DUE PROCESS

GROUND *c*: EXCESS BY ARBITRATOR OF HIS OR HER AUTHORITY (¶ **512**)

GROUND *d*: IRREGULARITY IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL OR ARBITRAL PROCEDURE (¶ **513**)

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

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

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INDEX OF CASES

¶ 001 INTERPRETATION OF THE CONVENTION
Index Volume XXXVI (2011): France 50; Poland 1; UK 92 (sub 93-95)

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")
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¶ 102 ARBITRAL AWARD NOT CONSIDERED AS DOMESTIC (PARAGRAPH 1)
Index Volume XXXVI (2011): Brazil 14; US 729; US 730 (sub 5-6); US 732

¶ 103 NATIONALITY OF THE PARTIES NO CRITERION
Index Volume XXXVI (2011): No new decisions are reported.

¶ 104 CONVENTION'S APPLICABILITY IN OTHER CASES
Index Volume XXXVI (2011): No new decisions are reported.

¶ 105 "PERSONS, WHETHER PHYSICAL OR LEGAL" (PARAGRAPH 1)
(including sovereign immunity)
Index Volume XXXVI (2011): No new decisions are reported.

¶ 106 PROBLEMS CONCERNING THE IDENTITY OF A PARTY
Index Volume XXXVI (2011): US 722

¶ 107 SECOND RESERVATION ("COMMERCIAL RESERVATION") (PARAGRAPH 3)
Index Volume XXXVI (2011): No new decisions are reported.

¶ 108 ARBITRAL AWARD: *Arbitrato irrituale (Italy) and other procedures akin to arbitration*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 109 ARBITRAL AWARD: *"A-national" award*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 110 ARBITRAL AWARD: *Types*
Index Volume XXXVI (2011): Albania 1; Hong Kong 25 (sub 44-86); Netherlands 37 (sub 2-9); Russian Federation 30; US 719 (sub 4-8)

¶ 111 PERMANENT ARBITRAL BODIES (PARAGRAPH 2)
Index Volume XXXVI (2011): No new decisions are reported.

¶ 112 RETROACTIVITY
Index Volume XXXVI (2011): 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

PARAGRAPHS 1 AND 2: AGREEMENT IN WRITING

¶ 206 *Exchange of letters or telegrams*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 207 "*Letters or telegrams*"
Index Volume XXXVI (2011): No new decisions are reported.

¶ 208 *Sales or purchase confirmation*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 209 *Arbitration clause in standard conditions*
(Exclusive of Arts. 1341 and 1342 Italian Civil Code; see ¶ 210 below)
Index Volume XXXVI (2011): No new decisions are reported.

¶ 210 *Articles 1341 and 1342 Italian Civil Code*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 211 *Bill of lading and charterparty*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 212 *Agent/Broker, etc.*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 213 *Amendment or renewal of agreement*
Index Volume XXXVI (2011): 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.

¶ 223 *Arbitrability*
(See also Article V(2), sub Ground *a.* "Arbitrability", ¶ 519 below)
Index Volume XXXVI (2011): Russian Federation 29; US 714 (sub 65-66); US 746

¶ 224 C. DECLARATORY JUDGMENT ON VALIDITY ARBITRATION AGREEMENT
Index Volume XXXVI (2011): Sweden 8

D. MULTI-PARTY DISPUTES

¶ 225 *Related arbitrations (consolidation, etc.)*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 226 *Third parties*
(See also Article I, sub "Problems Concerning the Identity of a Party", ¶ 106 above)
Index Volume XXXVI (2011): US 714; US 721; US 724; US 726; US 733 (sub 20-21); US 734; US 737

¶ 227 *Concurrent court proceedings ("indivisibility")*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 228 E. PRE-AWARD ATTACHMENT AND OTHER PROVISIONAL MEASURES BY A COURT
Index Volume XXXVI (2011): US 736; Venezuela 4

¶ 229 F. MEASURES IN AID OF ARBITRATION
Index Volume XXXVI (2011): No new decisions are reported.

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.

ARTICLE IV

CONDITIONS TO BE FULFILLED BY THE PETITIONER

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

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

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

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

¶ 401 IN GENERAL
Index Volume XXXVI (2011): Albania 1; Albania 2; Australia 35 (sub 21-72, 186-210 and 267-335); Brazil 13 (sub 1); Netherlands 35 (sub 6-8); Portugal 2 (sub 17); Ukraine 1 (sub 11); UAE 1 (sub 5); UAE 2

¶ 402 ORIGINAL OR COPY ARBITRAL AWARD
Index Volume XXXVI (2011): Germany 136 (sub 3); Netherlands 38 (sub 9); Switzerland 42 (sub 8-15)

¶ 403 ORIGINAL OR COPY ARBITRATION AGREEMENT
Index Volume XXXVI (2011): Greece 21 (sub 19-22)

¶ 404 AUTHENTICATION AND CERTIFICATION
Index Volume XXXVI (2011): Ecuador 1; Germany 136 (sub 3)

¶ 405 "AT THE TIME OF APPLICATION"
Index Volume XXXVI (2011): Spain 70; Switzerland 42 (sub 3-7)

ARTICLE V

GROUNDS FOR REFUSAL OF ENFORCEMENT IN GENERAL

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 XXXVI (2011): Brazil 13; Germany 136 (sub 4, 7 and 9-16); Germany 139; Italy 183 (sub 1-6)

¶ 505 *Incapacity of party*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 506 *Law applicable to the arbitration agreement*
Index Volume XXXVI (2011): UK 92

¶ 507 *Miscellaneous*
Index Volume XXXVI (2011): Australia 35 [sub 81-118 and 336-436 (non-signatory)]; Australia 36 [sub 12 and 43-64 (short-form arbitration clause)]; Netherlands 35 [sub 9-12 (applicable rules)]; UK 92 (non-signatory)

GROUND *b*: VIOLATION OF DUE PROCESS

¶ 508 *In general*
Index Volume XXXVI (2011): Austria 23

¶ 509 *"Proper notice"*
Index Volume XXXVI (2011): Australia 35 (sub 119-134, 429-433 and 438-441); Australia 36 (sub 12 and 68-91)

¶ 510 *Time limits and notice periods*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 511 *"Otherwise unable to present his case"*
Index Volume XXXVI (2011): Australia 36 [sub 12 and 92-96 (effect of unrelated dispute)]; Russian Federation 32 [sub 22-23 (non-acceptance of arbitral jurisdiction)]; Switzerland 42 [sub 33-42

(posting of security)]; US 725 [sub 5-7 (no cross-examination of witnesses)]

¶ 512 GROUND *c*: EXCESS BY ARBITRATOR OF HIS OR HER AUTHORITY
Index Volume XXXVI (2011): Australia 35 (sub 135-137); Australia 36 (sub 12 and 43-64); Greece 21 (sub 14-22); Singapore 11 (sub 13-17); Switzerland 44; US 725 (sub 8-21); US 728 (sub 18-21); US 748

¶ 513 GROUND *d*: IRREGULARITY IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL OR ARBITRAL PROCEDURE
Index Volume XXXVI (2011): Australia 35 (sub 138-139); Australia 36 (sub 12 and 43-64); Italy 183 (sub 7-13); Singapore 11 (sub 18-22); Switzerland 41; Switzerland 42 (sub 23-64); US 717; US 725 (sub 5-7)

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

¶ 514 *"Binding"*
Index Volume XXXVI (2011): Netherlands 35 (sub 18); Netherlands 37 (sub 2-9); Russian Federation 30; Ukraine 1 (sub 9-10, 12 and 38-41); UK 93 (sub 11-26)

¶ 515 *Merger of award into judgment*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 516 *"Set aside"*
Index Volume XXXVI (2011): Netherlands 36; Russian Federation 33; UAE 2; US 713; US 727 (sub 8-24)

¶ 517 *"Suspended"*
Index Volume XXXVI (2011): Netherlands 38 (sub 1-9); Russian Federation 33 (sub 10-11)

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 XXXVI (2011): Greece 21 (sub 2-3 and 9); India 46 (sub 21 and 27); Netherlands 35 (sub 15-17); Singapore 11 (sub 23-25); Switzerland 41 (sub 19); Switzerland 42 (sub 17); Ukraine 1 (sub 11 and 43); US 719 (sub 4-8); US 728 (sub 22-24 and 45); US 730 (sub 19); US 731; US 732; US 738

¶ 519 GROUND *a*: ARBITRABILITY
(See also Article II(3) "Arbitrability", ¶ 223 above)
Index Volume XXXVI (2011): Brazil 13 (sub 12)

GROUND *b*: PUBLIC POLICY

¶ 520 *Default of party*
Index Volume XXXVI (2011): No new decisions are reported.

¶ 521 *Lack of impartiality of arbitrator*
Index Volume XXXVI (2011): Switzerland 41

¶ 522 *Lack of reasons in award*
Index Volume XXXVI (2011): Greece 21 (sub 1-13)

¶ 523 *Irregularities in the arbitral procedure*
(See also Article V(1)(*b*))
Index Volume XXXVI (2011): Australia 35 (sub 141-144); Hong Kong 25 (sub 44-86); India 46 (sub 28-30)

¶ 524 *Other cases*
Index Volume XXXVI (2011): Australia 35 [sub 141-144 (natural justice)]; Australia 36 [sub 12 and 97-105 (erroneous reasoning)]; India 46 [sub 22-26 (interpretation of contract)]; Russian Federation 32 [sub 24-30 (disproportionate damages)]; Switzerland 42 [sub 16-22 (monetary obligation already paid)]; Ukraine 1[sub 11 and 42-43 (public interest)]; US 719 [sub 4-8 (award ordering specific performance)]; US 725 [sub 9-14 (criminal law findings)]; US 728 [sub 25-31 (pre-condition to arbitration], 32-34 (derivative claim) and 35-44 (assessment of damages)]; US 730 [sub 19-34 (counsel fees in antitrust action) and 35-44 (manifest disregard of the law)]; US 731 (embargo on Iran); US 732 (requirement to exhaust grievance procedure; seafarers exempt from exhausting grievance procedure); US 738 (fraud and corruption)

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 XXXVI (2011): Netherlands 35 (sub 13-14); Netherlands 38 (sub 1-9); UK 93 (sub 29-74); US 739; US 747

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 XXXVI (2011): Germany 136 (sub 11); Germany 139

¶ 702 DOMESTIC LAW ON ENFORCEMENT OF FOREIGN AWARD
Index Volume XXXVI (2011): Germany 136 (sub 11-15); Germany 139; Netherlands 35 (sub 6-8)

¶ 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 XXXVI (2011): No new decisions are reported.

¶ 703(A) MULTILATERAL TREATIES
Index Volume XXXVI (2011): No new decisions are reported.

See also Part V – C of the Yearbook for decisions applying the Washington (ICSID) Convention 1965.

¶ 704 EUROPEAN CONVENTION OF 1961
Index Volume XXXVI (2011): Germany 136 (sub 11); Russian Federation 33

See also Part V – B of this Yearbook.

¶ 704(A) PANAMA CONVENTION OF 1975
Index Volume XXXVI (2011): Colombia 5 (sub 8); US 739

See also Part V – D of this Yearbook.

¶ 704(B) BILATERAL TREATIES
Index Volume XXXVI (2011): No new decisions are reported.

¶ 704(C) ROME TREATY OF 1958 AND COUNCIL REGULATION (EC) NO. 44/2000
Index Volume XXXVI (2011): No new decisions are reported.

ARTICLE VII(2)

¶ 705 RELATIONSHIP WITH GENEVA TREATIES OF 1923 AND 1927

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

Index Volume XXXVI (2011): 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 XXXVI (2011): 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 XXXVI (2011): No new decisions are reported.

ALBANIA

Accession: 27 June 2001
No Reservations

1. Gjykata e Apelit [Court of Appeals], Tirana, 8 November 2007, Registry No. 104, Decision No. 106[1]

Parties:	Claimants: (1) Joint-stock company (Italy); (2) Joint-stock company (Albania) Respondent: Republic of Albania
Published in:	No information available
Articles:	IV; V (both in general)
Subject matters:	– settlement agreement recorded as award on agreed terms – requirements for enforcement (in general) – grounds for refusal of enforcement (in general) (no)
Topics:	¶ 110 + ¶ 401 + ¶ 500

Summary

The court granted enforcement of an ICC award recording a settlement agreement, finding that the claimant supplied the necessary documents, the sole arbitrator had jurisdiction and there had been no violation of procedural rules or due process in the arbitration.

On 24 May 2004, the Italian joint-stock company and the Albanian joint stock company (collectively, Claimants), entered into two related concession agreements with the Republic of Albania for the construction and operation of

1. The General Editor wishes to thank Mr. Michael Wietzorek, Trainee Lawyer at the *Landgericht* Krefeld, and Ms. Oriola Uka, Association for Integration of Informal Areas, Tirana, for their invaluable assistance in providing this decision and translating it from the Albanian original.

an infrastructure project in Albania. The concession agreements contained a clause providing for International Chamber of Commerce (ICC) arbitration of disputes.

A dispute arose between the parties when the Republic of Albania allegedly failed to transfer a certain real-estate property. On 12 June 2006, Claimants commenced ICC arbitration in Paris as provided for in the concession agreements, seeking enforcement of the Republic of Albania's undertaking to transfer the property and compensation for late performance. A sole arbitrator was appointed on 20 October 2006. At a hearing held in Paris on 18 April 2007, the parties decided to negotiate a settlement agreement. On 11 May 2007, they informed the sole arbitrator that they had reached a settlement and that they wished their agreement to be incorporated in an award by consent. The Council of Ministers of the Republic of Albania had approved the settlement agreement by Decision No. 235 of 27 April 2007. The settlement agreement was incorporated into ICC Award No. 14420/FM, dated 25 July 2007. Claimants sought enforcement of the award in Albania.

The Court of Appeals of Tirana granted enforcement, holding that under Albanian law the ICC sole arbitrator had jurisdiction over the dispute and there had been no procedural irregularity and no violation of due process in the arbitral proceedings. Also, Claimants supplied all the necessary documents for requesting enforcement, such as the settlement agreement and the duly certified award, originally rendered in English, together with a translation into Albanian.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152001-n>.

2. Gjykata e Apelit [Court of Appeals], Tirana, 31 March 2009, Registry No. 23, Decision No. 34[1]

Parties:	Claimant: Limited Liability Company (Turkey) Respondent: General Road Directorate, Ministry of Public Works, Transport and Telecommunications of the Republic of Albania
Published in:	No information available
Articles:	IV; V (both in general)
Subject matters:	– requirements for enforcement (in general) – grounds for refusal of enforcement (in general) (no)
Topics:	¶ 401 + ¶ 500

Summary

The court granted enforcement of an ICC award rendered in France, finding that the claimant supplied the necessary documents, the arbitral tribunal had jurisdiction and there had been no violation of procedural rules or due process in the arbitration.

On 11 August 1998, the Turkish Limited Liability Company (the Turkish Company) entered into a contract with the General Road Directorate, Ministry of Public Work, Transport and Telecommunication of the Republic of Albania (the Albanian Ministry) for the reconstruction of a certain road in Albania. The contract contained a clause for International Chamber of Commerce (ICC) arbitration of disputes.

A dispute arose between the parties. On 19 February 2001, the Albanian Ministry commenced ICC arbitration as provided for in the contract. On 2 April 2008, an ICC arbitral tribunal rendered an award in favor of the Albanian Ministry in respect of the main claim. At the same time, however, the tribunal

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directed the Albanian Ministry to bear the costs of the arbitral proceedings and to compensate the Turkish Company for reasonable costs and other expenses, as well as expert fees. This sum was higher than the sum awarded on the main claim. Consequently, the Turkish Company sought enforcement of the award in Albania.

The Tirana Court of Appeals granted enforcement under the 1958 New York Convention, which applied pursuant to Albanian law. The court held that the ICC tribunal had jurisdiction pursuant to the arbitration clause in the parties' contract; there had been no procedural irregularity and no violation of due process in the arbitral proceedings; and the award was final.

Also, the Turkish Company supplied all the necessary documents for requesting enforcement, such as the duly certified award, originally rendered in English, together with a translation into Albanian.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152002-n>.

AUSTRALIA

Accession: 26 March 1977
No Reservations

35. Supreme Court of Victoria, Commercial and Equity Division, Commercial Court, 28 January 2011 and 3 February 2011, List G No. 03827 of 2010
Supreme Court of Victoria, Court of Appeal, 22 August 2011, S APCI 2011 0017

Parties:	*Commercial Court*: Plaintiff: Altain Khuder LLC (Mongolia) Defendants: (1) IMC Mining Inc (British Virgin Islands); (2) IMC Mining Solutions Pty Ltd (Australia) *Court of Appeal*: Appellant: IMC Aviation Solutions Pty Ltd (Australia) Respondent: Altain Khuder LLC (Mongolia)
Published in:	All decisions available online at <www.austlii.edu.au>
Articles:	III; IV; V(1); V(1)(*a*); V(1)(*b*); V(1)(*c*); V(1)(*d*); V(2)(*b*)
Subject matters:	– nature of application for enforcement – conditions for seeking enforcement – burden of proof establishing existence, validity of arbitration agreement – burden of proof under 1958 New York Convention – estoppel (issue) – nonsignatory defendant (not) bound to arbitration clause – proper notice of arbitration (common address with other defendant)

– public policy and natural justice
– costs for opposition to enforcement

Topics: [1]-[16] + [148]-[166] + [211]-[215] + [456]-[474] = ¶ 301; [21]-[72] + [186]-[210] + [267]-[335] = ¶ 401 + ¶ 503; [26] = ¶ 501; [73]-[78] + [179]-[185] + [445]-[455] = ¶ 303; [81]-[118] + [336]-[436] = ¶ 507 (non-signatory); [119]-[134] + [429]-[433] + [438]-[441] = ¶ 509; [135]-137] = ¶ 512; [138]-[139] = ¶ 513; [141]-[144] = ¶ 523 + ¶ 524 (natural justice)

Summary

First decision: the defense that the second defendant was not a party to the contract containing the arbitration clause was rejected and enforcement of a Mongolian award confirmed. A party seeking enforcement under the New York Convention does not have the additional onus of proving, under the 1974 International Arbitration Act, that the award was made in pursuance of an arbitration agreement validly binding the party against whom enforcement is sought. Second decision: second defendant was directed to pay costs on an indemnity (rather than party-and-party) basis. Third decision: the Court of Appeal reversed both decisions, holding (i) that when it does not appear prima facie from the documents submitted for seeking enforcement that the award creditor and the award debtor are parties to the arbitration agreement, the burden of proving this condition falls on the party seeking enforcement and (ii) that costs are normally awarded on a party-and-party basis and the application of different principles in arbitration is unwarranted.

On 13 February 2008, Altain Khuder LLC (Altain Khuder) and IMC Mining Inc. (IMC Mining) entered into an Operations Management Agreement (OMA) under which IMC Mining agreed to prepare plans and budgets for a proposed iron ore mine at the Bulgan Altain Khuder Iron Project (also known as the Tayan Nuur Iron Ore Project) in Mongolia, and to perform operational services in relation to that mine. Altain Khuder agreed in turn to advance the sum of US$ 6.2 million to IMC Mining for the purpose of carrying out certain specified obligations under the OMA. Clause 16.1 of the OMA was an arbitration clause providing as follows:

> "The resolution of any and all disputes under this Agreement shall first be addressed through good faith negotiations between Altain Khuder LLC and IMC Mining Inc. All disputes between Altain Khuder LLC and IMC Mining Inc arising under this Agreement shall be referred to and considered by arbitration in Mongolia according to Mongolian or Hong Kong law."

IMC Mining subsequently sub-contracted part of its obligations under the OMA with Altain Khuder to IMC Mining Solutions Pty Ltd (IMC Solutions) pursuant to a Consulting Services Agreement. IMC Mining had offices at the Brisbane, Australia premises of IMC Solutions; Mr. Stewart Lewis, the managing director of IMC Mining, was also the CEO and a director of IMC Solutions. IMC Solutions later changed its name to IMC Aviation Solutions Pty Ltd (also, IMC Solutions).

Altain Khuder was dissatisfied with IMC Mining's performance under the OMA; on 5 May 2009, it sent a memorandum to IMC Mining stating that the OMA was terminated with immediate effect. On 20 April 2009, IMC Mining sent a letter to Altain Khuder in response, stating that Altain Khuder had repudiated the OMA by its memorandum and that IMC Mining elected to terminate the OMA on the basis of Altain Khuder's repudiation.

On 12 May 2009, Altain Khuder commenced arbitration proceedings at the Mongolian National Arbitration Centre (MNAC) at the Mongolian National Chamber of Commerce and Industry against "Australian 'IMC Mining Inc' company" for US$ 6.2 million paid pursuant to the OMA and for unliquidated damages. A three-arbitrator panel was appointed. On 2 July 2009, Altain Khuder filed an additional claim, also against "'IMC Mining Inc' company of Australia", for US$ 320,577. On 24 July 2009, "'IMC Mining Inc' company of Australia" filed a counterclaim against Altain Khuder for US$ 1 million. On the same day, the MNAC arbitral tribunal conducted a Preliminary Hearing where the parties agreed that the dispute would be resolved according to Mongolian law and the arbitration hearing would be conducted in Ulaanbaatar City in the Mongolian language. The rulings of the Preliminary Hearing were published in a document entitled Case Dispute Resolution Procedure, which referred to the parties to the arbitration as "G. Batdorj, director of 'Altain Khuder' Co. Ltd, Mongolia", as "Claimant", and "'IMC Mining Inc' company of Australia" as "Respondent".

On 15 September 2009, the arbitral tribunal rendered an award in favor of Altain Khuder. The award named as parties Altain Khuder and "IMC Mining Inc., Australia; Director: Stewart Lewis; Address: British Virgin Islands, of Level 40 Riverside Centre, 123 Eagle Street Brisbane Qld, Australia". The award directed IMC Mining to pay US$ 5,903,098.20 to Altain Khuder and arbitration fees in

the amount of US$ 50,257.70. The tribunal also stated in its arbitral award that IMC Solutions was liable to pay those amounts "for and on behalf of" IMC Mining.

On 23 October 2009, Altain Khuder applied to the Khan-Uul District Court in Mongolia to verify the award. By an order of 23 November 2009, Judge L. Oyun granted Altain Khuder's application, holding that he was satisfied that the request was legitimate and noting that the MNAC award was enforceable under the 1958 New York Convention.

On 14 July 2010, Altain Khuder filed an application to enforce the MNAC award in Australia against IMC Mining and IMC Solutions (collectively, the IMC defendants). On 20 August 2010, the Supreme Court of Victoria, Commercial and Equity Division, Commercial Court, per Croft J, granted enforcement ex parte (*the Ex Parte Decision*). The court reserved to the IMC defendants the right to apply to the court within a given time limit to set aside the Ex Parte Decision. IMC Mining did not reactwithin that time limit, while IMC Solutions applied to set aside the Ex Parte Decision. IMC Solutions argued that the award could not be enforced against it because it was not a party to the arbitration agreement in pursuance of which the award was made.

By the first reported decision, rendered on 28 January 2011, the Commercial Court, again per Croft J, dismissed IMC Solutions's application and reserved a decision on costs (*the Substantive Decision*).

The court noted at the outset that the New York Convention applied as both Mongolia and Australia are parties thereto. The International Arbitration Act 1974 (Cth) (IAA), which implements the Convention in Australia, was also applicable.

Altain Khuder complied with the conditions for requesting enforcement under the New York Convention and the IAA by supplying, together with its application, a duly certified copy of the original award, with a certified translation by a Consular Official of the Mongolian Embassy in Australia, and a copy of the original arbitration agreement, certified by the Consular Department of the Mongolian Ministry of Foreign Affairs and Trade.

IMC Solutions contended however that Altain Khuder should also comply with a further condition, that is, proving that the MNAC award was rendered in pursuance of an arbitration agreement that was validly binding on the party against which enforcement of the award was sought, IMC Solutions. IMC Solutions based its contention on the text of Sect. 8(1) IAA, which provides that a foreign award is binding "on the parties to the arbitration agreement in pursuance of which it was made". IMC Solutions argued that there was no such

valid arbitration agreement as IMC Solutions was not a party to the OMA, which was concluded between Altain Khuder and IMC Mining.

The court disagreed, holding that there is no such onus on a party seeking enforcement under either the IAA or the New York Convention.

Croft J then considered the nature and extent of the burden of proof on IMC Solutions in resisting enforcement. Altain Khuder submitted that, having regard to the essential nature of enforcement proceedings and the overriding pro-enforcement policy underpinning the IAA and the New York Convention, IMC Solutions could only discharge its onus by providing the court with clear, cogent and strict proof in relation to the grounds for refusing enforcement exhaustively listed in the IAA and the Convention. The court agreed, adding that this did not mean, however, that IMC Solutions was entitled to re-litigate the issues which had been decided by the MNAC arbitrators.

The commercial court then examined the grounds raised by IMC Solutions for resisting enforcement. It first dismissed the argument that IMC Solutions was not a party the arbitration agreement in pursuance of which the award was made – that is, the arbitration clause in the OMA – and that there was as a consequence no valid arbitration agreement.

The court noted that it was agreed at the Preliminary Hearing on 24 July 2009 that the MNAC arbitral tribunal had jurisdiction over the dispute between IMC Mining and IMC Solutions, on the one hand, and Altain Khuder, on the other. Further, the arbitral tribunal held that it had jurisdiction to make an award against IMC Solutions; this award was verified by the Mongolian courts and neither the award nor the court order verifying the award was challenged or was still open to challenge. The court concluded that "it is not the role of this court to review a finding of consent to arbitrate, or at the least, a finding of common enterprise, or some other relationship of legal responsibility, made by both the Tribunal and the reviewing, supervising, court in the arbitral seat". As a consequence, an issue estoppel arose.

The court had earlier in the decision noted that it appears from, inter alia, the English judgments in the *Dallah* case that a ruling by a supervisory court at the arbitral seat may raise an issue estoppel that is binding on the enforcement court under common law principles.

IMC Solutions further claimed that enforcement should be refused because it was not properly informed of the arbitration. The court again disagreed, finding that the notice of the arbitration sent to IMC Mining could be held to suffice for IMC Solutions, because the evidence in the proceedings showed that IMC Mining, in spite of its British Virgin Islands registration, had the same office

address in Brisbane as IMC Solutions and both companies were, for all intents and purposes, treated as the same entity.

The commercial court also rejected IMC Solutions's objection that since the statement in defense in the arbitration – headed "IMC Response to [Altain] Arbitration Claim" – neither referred to IMC Solutions nor did it submit to arbitration any dispute as to whether or not IMC Solutions should be ordered to pay the sum charged against IMC Mining, the award was beyond the scope of the submission to arbitration. The court again noted that it was open to the arbitral tribunal to find that the OMA and the arbitration agreement therein extended to IMC Solutions. Even if the dispute as raised initially extended only to IMC Mining, it did not follow that as a result of the subsequent conduct of the arbitration the dispute was not extended by agreement or applied as a result of an estoppel against IMC Solutions, as a result of its participation in the arbitration proceedings and, notably, in the Preliminary Hearing held on 24 July 2009. IMC Solutions failed to prove that it was not involved in any relevantly significant way in the arbitration.

As a consequence of its findings, the commercial court finally dismissed the public policy argument raised by IMC Solutions that it was denied natural justice in the arbitration.

In expectation that an appeal would be filed, the court stayed its enforcement order in so far as it concerned IMC Solutions until 4:00 pm on 4 February 2011. This is the first decision reported.

Following this first decision, Altain Khuder applied to the court asking that IMC Solutions be directed to pay Altain's costs in the proceedings on an indemnity basis for having unsuccessfully resisted enforcement.

By the second reported decision, rendered on 3 February 2011, the commercial court, again per Croft J, granted Altain Khuder's request (*the First Costs Decision*).

The court reasoned that a court will only depart from the usual rule that costs will be ordered on a party-and-party basis if the case is exceptional or there is some special or unusual feature which justifies the exercise of the court's discretion to order costs on an indemnity basis. It then relied on a decision of the Hong Kong Court of First Instance in *A v. R* where the court held that parties who obtain an award in their favor are entitled to expect that the award will be complied with and that the courts will enforce the award as a matter of course. Applications to set aside the award or refuse its enforcement should be exceptional events and a party making such application should in principle expect to have to pay costs on a higher basis.

The commercial court found that in the circumstances of the present case, it was appropriate to order costs on an indemnity, rather than party-and-party, basis. The court again stayed its order until 4:00 pm on 4 February 2011. This is the second decision reported.

On the same day, IMC Solutions sought leave to appeal the Ex Parte Decision of 20 August 2010, the Substantive Decision of 28 January 2011 and the First Costs Decision of 3 February 2011 to the Court of Appeal. The Court of Appeal having nominated a return date of 11 February 2011, IMC Solutions applied to the commercial court for a further stay of the enforcement orders and the First Costs Decision until 11 February 2011.

The commercial court dismissed that application, finding that IMC Solutions had not acted with due expedition in the circumstances. The court also refused to extend either stay and further ordered ordered IMC Solutions to pay Altain Khuder's costs of the application on an indemnity basis (*the Second Costs Decision*).

On 11 February 2011, the Court of Appeal granted IMC Solutions leave to appeal all decisions below and stayed all orders until the determination of the appeal.

By the third reported decision, rendered on 22 August 2011, the Court of Appeal, before Warren CJ, Hansen JA and Kyrou AJA, allowed IMC Solutions's appeal and set aside the enforcement orders in respect of IMC Solutions. It also annulled the costs decisions directing IMC Solutions to pay costs on an indemnity basis.

Warren CJ filed an opinion in favor of allowing the appeal. He first dealt with the issue of estoppel, noting that Croft J held that an issue estoppel arose in respect of IMC Solutions's argument that it was not a party to the arbitration agreement because IMC Solutions participated in the arbitration proceedings. The Chief Judge reasoned that this factual finding was mainly based on two affidavits by Mr. Gendenpil Batdorj, Altain Khuder's director. IMC Solutions objected to the admissibility of this evidence during the proceedings before the commercial court, but Judge Croft failed to rule on those objections.

Warren CJ held that Judge Croft erred in doing so. Many, if not most, of IMC Solutions's objections against the Batdorj affidavits were "strongly arguable", because Batdorj asserted his opinions and drew conclusions at critical points in the two affidavits, rather than simply describing the events of which he had first-hand knowledge. Reliance on these affidavits therefore required as a necessary precondition an examination of the objections raised by IMC Solutions. Because Croft J failed to examine these objections, his decision on the issue of estoppel was determined, at least in part, on the basis of inadmissible evidence and should be set aside.

Warren CJ then held that on a correct construction of the IAA there is a jurisdictional threshold requirement that the party seeking to enforce the award – the award creditor – satisfy the enforcing court, on the balance of probabilities, that the award is binding under Sect. 8(1) of the IAA, that is, that the party against whom enforcement is sought – the award debtor – is a party to the arbitration agreement in pursuance of which the award was made.

The commercial court erred in reaching the opposite conclusion. The burden of proving that IMC Solutions was a party to the arbitration agreement fell on Altain Khuder, the award debtor.

As a consequence of these findings, both the issue of whether IMC Solutions was a party to the arbitration agreement in the OMA and the issue of estoppel needed to be re-decided on the merits.

Warren CJ noted that the parties invited the Court of Appeal to re-decide the application for enforcement rather than remit the matter to the commercial court if the appeal was successful. While believing that this "time-consuming process of re-conducting a trial at first instance" was inappropriate, the Chief Judge added that the majority of the Court accepted "that burdensome invitation".

In their opinion, Hansen JA and Kyrou AJA (the majority of the Court), decided therefore on the merits of the case, re-hearing as if at first instance Altain Khuder's request to enforce the Mongolian award. They concluded against enforcement.

The majority first held that the party seeking enforcement bears the burden of satisfying the enforcement court, on a prima facie basis, that (a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor; (b) the award was made pursuant to an arbitration agreement; and (c) the award creditor and the award debtor are parties to the arbitration agreement. Only when these elements are proven does the court have jurisdiction to make an order enforcing a foreign arbitral award.

Where the court determines that the documents filed in accordance with Sect. 9(1) of the IAA (which corresponds to Art. IV(1) of the New York Convention) do not satisfy those prima facie evidential requirements, the award creditor has the onus of proving those requirements. Proof is to be given on a balance of probabilities.

In respect of the conclusion reached by the commercial court that there was issue estoppel, the majority agreed with Warren CJ that Croft J, who based his finding that IMC Solutions had been a party to the arbitration on Mr. Batdorj's affidavits, should have ruled on the objections raised by IMC Solutions against those affidavits, and should have done so promptly so that the parties knew the extent of the admissible evidence before final addresses. The majority noted that

it has long been the general rule that a party is entitled to have questions of admissibility determined as they arise.

The majority then examined the merits of this issue and concluded that significant parts of Mr. Batdorj's affidavits were hearsay or opinion, or were misleading. As a consequence, IMC Solutions's objections against them were well founded. The majority held that Croft J should not have admitted those parts of Mr. Batdorj's affidavits as evidence and should not have placed any reliance on them.

The majority added that this, however, was actually irrelevant, because even if Croft J had rejected all of IMC Solutions's objections to the admissibility of Mr. Batdorj's affidavits, it appeared from the key documents in this case, the OMA and the award, that IMC Solutions was not a party to the arbitration agreement.

The Judges held that although there was some confusion between IMC Mining and IMC Solutions, considered as a whole the OMA could not sensibly be read as being between Altain Khuder and IMC Solutions. Also, it appeared clearly from the award that the arbitral tribunal did not interpret the OMA in this manner, since the award drew a clear distinction between IMC Mining as the defendant in the arbitration and IMC Solutions as an entity that was involved in the implementation of the Project.

Hence, Altain Khuder failed to comply with its onus of persuading the court that IMC Solutions was a party to the arbitration agreement in the OMA, in pursuance of which the award was made.

The majority then noted that a court may refuse enforcement of a foreign arbitral award if the arbitration agreement in pursuance of which it was made was not valid under the applicable law; here, Mongolian law. The issue for the Court's determination in the present case was thus whether the MNAC arbitral tribunal had jurisdiction over IMC Solutions under Mongolian law.

The majority concluded that it appeared clearly from the award that the arbitrators did not in fact find that IMC Solutions was a party to the arbitration agreement. Throughout the award, the arbitral tribunal maintained a clear distinction between IMC Mining, as the party to the arbitration agreement in the OMA, and IMC Solutions.

As to the last paragraph of the award, in which the arbitrators directed IMC Solutions to pay an amount of money to Altain Khuder "for and on behalf of" IMC Mining, the majority reasoned that this formulation indicated that IMC Solutions, as an associate of IMC Mining, was being treated as a guarantor of IMC Mining's obligations under the OMA. However, added the majority, this was a mere speculation, because the MNAC tribunal did not identify in what capacity

IMC Solutions was mentioned in the award and directed to pay "for and on behalf of" IMC Mining.

Finally, the majority held that the commercial court erred in applying the principle in the Hong Kong decision in *A v. R*. Nothing in the law warrants costs being awarded against an unsuccessful award debtor on a basis different from that on which they would be awarded against unsuccessful parties to other civil proceedings.

In civil proceedings, costs will ordinarily be awarded against the unsuccessful party on a party-and-party basis unless the successful party can establish well-determined special circumstances. The majority was of the view that there were no such special circumstances here. This is the third decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152003-n>.

36. Federal Court of Australia, New South Wales District Registry, General Division, 22 February 2011, NSD 171 of 2010

Parties:	Claimant: Uganda Telecom Limited (Uganda) Defendant: Hi-Tech Telecom Pty Ltd (Australia)
Published in:	Available online at <www.austlii.edu.au>
Articles:	I(1); V(1); V(1)(*a*); V(1)(*b*); V(1)(*c*); V(1)(*d*); V(2)(*b*)
Subject matters:	– short-form arbitration clause – proper notice – due process and fear of traveling to seat of arbitration due to unrelated dispute with Government – error *in iudicando* no ground for refusal under 1958 New York Convention – narrow concept of public policy – stay of enforcement pending determination of set-off (no)
Topics:	[13] = ¶ 503; [12] + [43]-[64] = ¶ 507 (short-form arbitration clause) + ¶ 512 + ¶ 513; [12] + [65]-[67] = ¶ 101; [12] + [68]-[91] = ¶ 509; [12] + [92]-[96] = ¶ 511 (effect of unrelated dispute); [12] + [97]-[105] = ¶ 502 + ¶ 524 (erroneous reasoning); [106]-[108] = ¶ 301 + ¶ 304

Summary

A Ugandan award was granted enforcement. The arbitration clause was not void for uncertainty, since the Ugandan Arbitration Act provided the necessary details in respect of the commencement and conduct of the arbitration. Also, the dispute related to the contract between the parties and thus fell under the arbitration clause therein, and the award was a foreign award falling within the scope of the New York Convention. There was no indication that the defendant was not aware of the arbitration because it did not receive the relevant communications, and it was unproven that it was unable to present its case because its CEO was afraid to travel to Uganda due to an unrelated dispute with the Ugandan Minister of State. The court further rejected the contention that enforcement should be refused because

the award was arrived at by an erroneous reasoning process involving errors of fact and law. It held that no such review is allowed and that even if Australian courts found in the past that they had a general discretion not to enforce, the International Arbitration Act Amendment Act 2010 makes clear that no such general discretion exists. Finally, enforcement should not be stayed pending determination of the defendant's claim for set-off.

On 15 November 2007, Uganda Telecom Limited (UTL) and Hi-Tech Telecom Pty Ltd (Hi-Tech) entered into a Telecommunication Service Contract for the supply by UTL of telecommunications switching services and facilities to Hi-Tech. The Contract provided that it was governed by Ugandan law. Clause 14.2 further provided that:

> "Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration."

Hi-Tech paid the first monthly invoice under the Contract in December 2007 but failed to pay the January 2008 and February 2008 invoices. It also failed to provide the irrevocable bank guarantee required under the Contract. UTL continued to provide services. On 27 August 2008, it sent notice to Hi-Tech of its intent to sue for the unpaid invoices. On 19 November 2008, UTL sent a further letter to Hi-Tech, proposing the appointment of a sole arbitrator to decide the dispute. Hi-Tech did not respond to either letter.

On 19 December 2008, UTL filed a request for the appointment of an arbitrator with CADER, the Centre for Arbitration and Dispute Resolution in Kampala, Uganda. Hi-Tech did not react and the arbitration proceeded in its absence. On 29 April 2009, the sole arbitrator issued an award in favor of UTL in the amount of US$ 433,695 for general damages (reflecting nine unbilled months – March to November 2008), US$ 140,944.65 in special damages (being the two unpaid invoices for January and February 2008), the costs of the arbitration, interest at the rate of 8 percent on the amount of the general damages and interest at the rate of 24 percent on the amount of the special damages. On 28 July 2009, the award was registered at the Commercial Division of the High Court of Uganda, in accordance with the Ugandan Arbitration Act (UAA). UTL sought enforcement of the Ugandan award in Australia.

The Federal Court of Australia, per Foster, J, granted enforcement, dismissing all of Hi-Tech's objections.

Hi-Tech first submitted that clause 14.2 was uncertain and thus void because it did not specify the seat of the arbitration, the identity and number of the arbitrator(s), the service of documents by which the arbitration was initiated, the manner in which any dispute concerning the appointment of the arbitrator(s) was

to be resolved, the rules applicable to the arbitration and the law governing the arbitration.

The Federal Court noted that the Contract was governed by Ugandan law and that the UAA covered "in detail and adequately" all the matters which Hi-Tech contended were omitted from clause 14.2. Although "the arbitration clause in the Contract was infelicitously expressed", it clearly meant that all disputes under or in relation to the Contract must be referred to arbitration. Once the arbitration clause was engaged, the UAA provided "the machinery to facilitate arbitration". The Court also found that the dispute referred to arbitration was within the scope of clause 14.2, as it involved claims arising in relation to the Contract.

The Court then noted that the Ugandan award met the requirements for being deemed a foreign award falling within the scope of application of the 1958 New York Convention.

Hi-Tech argued that it never became aware of the commencement of the arbitration or of the procedural requirements laid down by the arbitrator and that in any case the letter of 19 November 2008 which commenced the arbitration and the subsequent documents concerning the arbitration were not served upon Hi-Tech as required by the Contract and the UAA. The Court disagreed with both contentions, finding that all communications were sent to Hi-Tech's registered address and no return communication was ever received suggesting that they had not actually been received; nor did such record exist in respect of e-mails. Further, the letter initiating the arbitration was the letter of 19 November 2008, in which UTL suggested the name of a sole arbitrator, rather than the letter of 27 August 2008. The 19 November 2008 letter was a valid notice under the Contract and the UAA and had been validly communicated.

The Federal Court also dismissed as unproven Hi-Tech's argument that it was unable to present its case in the arbitration because its Chief Executive Officer and sole Director was not prepared to travel to Uganda because he feared for his own personal safety and would not have received a fair hearing there due to an unrelated dispute with the Ugandan Minister of State.

Hi-Tech next contended that the amount of general damages awarded by the sole arbitrator was arrived at by an erroneous reasoning process involving errors of fact and law. The Federal Court held that the Australian International Arbitration Act does not permit a party to a foreign award to resist enforcement on such a ground, nor is it against public policy for a foreign award to be enforced without examining the correctness of its reasoning or result. Some Australian courts held in the past that there was a general discretion to refuse to enforce a foreign award; however, the amendments introduced by the

International Arbitration Act Amendment Act 2010 make clear that no such general discretion exists. The Court noted that although enforcement can still be refused on grounds of public policy, public policy must be interpreted narrowly. Such narrow interpretation is in accordance with the purposes of the New York Convention and the objects of the International Arbitration Act. Hi-Tech's complaint in the present case that the assessment of general damages in the award was excessive because the arbitrator failed to consider UTL's costs and expenses in generating the gross income which he found was likely to be earned "is quintessentially the type of complaint which ought not be allowed to be raised as a reason for refusing to enforce a foreign award". This matter should have been raised during the arbitration proceedings.

The Federal Court finally rejected Hi-Tech's request to defer enforcement of the award pending determination of its claim for set-off, reasoning that there is no basis under the International Arbitration Act for refusing to enforce a foreign award or for delaying or deferring the enforcement of a foreign award because the party liable under the award has a set-off claim against the other party.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152004-n>.

AUSTRIA

Accession: 2 May 1996
No Reservations

23. Oberster Gerichtshof [Supreme Court], 1 September 2010, 3Ob122/10b[1]

Parties:	Claimant: D (nationality not indicated) Defendant: Franz J. (nationality not indicated)
Published in:	Available online at <www.ris.bka.gv.at>
Articles:	V(1); V(1)(*b*)
Subject matters:	– due process and incapacity to attend hearing – due process and not duly empowered representative – burden of proof on respondent
Topics:	¶ 508; [9] = ¶ 503

Summary

Enforcement of a Ukrainian ICAC award was granted, dismissing an objection of violation of due process. The Court confirmed its opinion that the New York Convention requires only that defendants be informed of the arbitration proceedings; it is irrelevant whether they choose not to avail themselves of the opportunity to present their case. Here, the defendant was undisputedly informed of the arbitration and simply stated that he was "unable" to attend. Nor did he give a valid reason why his representative at the first-instance arbitration hearing was not duly empowered.

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1. *Note General Editor*. The numbering of Austrian court decisions applying the 1958 New York Convention resumes in this Volume XXXVI (2011) with Austria no. 23. The Austrian decisions published in Yearbook XXXV (2010) were incorrectly numbered and should be referred to as Austria no. 21 (not 19) – Oberster Gerichtshof, 30 March 2009 (*C GmbH v. S Aktiengesellschaft*) pp. 325-327 – and Austria no. 22 (not 20) – Oberster Gerichtshof, 22 July 2009 (*L AS v. Jürgen H, et al.*) pp. 328-329.

Claimant sold Defendant twenty tons of coriander seed. Defendant refused to pay the purchase price, claiming that the goods were defective. On 23 June 2008, an arbitral tribunal of the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce rendered an award in favor of Claimant. The first-instance award was confirmed in appellate arbitration proceedings.

On 11 February 2009, the Court of First Instance (*Bezirksgericht*) of Josefstadt granted enforcement of the ICAC award. On 11 January 2010, the Regional Court of First Instance (*Landesgericht*) in Vienna affirmed the lower court's decision, denying Defendant's argument that there had been a violation of due process in the arbitration because Defendant had been "unable" to attend the arbitration hearing, his request for a postponement had been denied and his representative was not admitted to the first-instance hearing (though he could participate in the appellate arbitration) because he lacked the necessary documents.

The Supreme Court dismissed the appeal against the enforcement decision. It confirmed its opinion that the ground for refusal of due process under Art. V(1)(*b*) of the 1958 New York Convention requires that the defendant is not duly informed of the arbitration or is otherwise unable to present its case and that if the party has been duly informed, its failure to avail itself of the possibility of presenting its case before the arbitrators is no violation of due process. Here, Defendant was undisputedly informed of the arbitration.

The Court added that it was not necessary to discuss in the enforcement proceeding whether a different conclusion would have been reached if Defendant had suitably explained why he could not attend the hearing or send a duly empowered representative to the first-instance arbitration hearing, instead of simply stating that he was "unable" to attend.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152005-n>.

BRAZIL

Accession: 7 June 2002
No reservations

13. Superior Tribunal de Justiça [Superior Court of Justice], 2 August 2010, SEC No. 885 - US (2005/0034898-7)

Parties:	Claimant: Kanematsu USA Inc. (US) Defendant: ATS – Advanced Telecommunications Systems do Brasil Ltda (Brazil)
Published in:	Diário da Justiça Eletrônico (DJE) 10 September 2010 and 220 Revista do Superior Tribunal de Justiça (RSTJ) p.72
Articles:	IV; V(1)(*a*); V(2)(*a*)
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

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.

Kanematsu USA Inc. (Kanematsu) and ATS – Advanced Telecommunications Systems do Brasil Ltda (ATS) entered into a contract under which Kanematsu sold and ATS purchased telecommunications equipment and other products.

Kanematsu supplied in the enforcement proceedings an unsigned copy of a contract that contained, inter alia, a clause for arbitration of disputes at the American Arbitration Association (AAA).

A dispute arose between the parties in respect of ATS's payments under the contract and Kanematsu commenced AAA arbitration. An AAA sole arbitrator held that ATS was in breach and rendered an award in favor of Kanematsu, directing ATS to pay US$ 1,348,939.05, together with interest, costs and fees. Kanematsu sought enforcement of the AAA award in Brazil.

The Superior Court of Justice, per Judge Francisco Falcão, denied enforcement (*homologação* – homologation). 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 9.307/96 of 23 September 1996, which applies to the homologation 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.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152006-n>.

14. Superior Tribunal de Justiça [Superior Court of Justice], 24 May 2011, Special Recourse no. 1.231.554

Parties:	Petitioner: Nuovo Pignone SpA (nationality not indicated) Respondent: Petromec Inc (nationality not indicated) et al.
Published in:	Diário da Justiça Eletrônico (DJE) no. 882 of 1 June 2011
Articles:	I(1)
Subject matter:	– non-domestic award
Topics:	¶ 102

Summary

An award rendered in Brazil is always domestic. It is irrelevant that the arbitration was conducted under the auspices of the International Chamber of Commerce, with seat in Paris.

A dispute opposed Nuovo Pignone SpA (Nuovo Pignone), on the one hand, and Petromec Inc. and Marítima Petróleo e Engenharia Ltda (collectively, Respondents) on the other hand. Following arbitration proceedings held in Rio de Janeiro and in the Portuguese language, the Brazilian sole arbitrator – applying Brazilian law – rendered an award in favor of Nuovo Pignone. Nuovo Pignone applied to the courts to execute the award.

The court of first instance granted attachment of assets of Respondents, holding that the award was a domestic award and was thus an enforceable instrument which did not need to be recognized (homologated) first by the Brazilian courts. On appeal by Respondents, the Court of Justice (*Tribunal de Justiça*) of Rio de Janeiro reversed the lower court's decision, finding that the award was a foreign award because it was rendered under the auspices of the International Court of Arbitration of the International Chamber of Commerce, whose seat is in France rather than Brazil. The court reasoned that the parties's choice for a foreign arbitral institution to decide their dispute must be respected. As a consequence, the award was non-domestic and required homologation

before becoming an enforceable instrument on which execution could be granted. Nuovo Pignone filed a special recourse (*recurso especial*) to the Superior Court of Justice.

The Superior Court of Justice, in an opinion by Judge Nancy Andrighi, reversed the decision of the appellate court, holding that the award was domestic.

The Court reasoned that Art. I of the 1958 New York Convention leaves the Contracting States free to determine what is considered a non-domestic award. The Brazilian legislator clearly adopted the territorial criterion, based on the place where the arbitral award was rendered. Thus, an award rendered outside Brazil is a foreign award, while an award rendered in Brazil is a domestic award, even if this means that an award deciding a dispute involving international commerce and even different legal systems is considered domestic.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152007-n>.

BRITISH VIRGIN ISLANDS[1]

3. Court of Appeal, Territory of the Virgin Islands, 20 September 2010, HCVAP 2010/007

Parties:	Appellant: Pacific China Holdings Ltd (British Virgin Islands) Respondent: Grand Pacific Holdings Limited (Hong Kong)
Published in:	Available online at <www.eccourts.org>
Articles:	V
Subject matter:	– discretion to enforce award where there is ground for refusal under 1958 New York Convention
Topics:	¶ 500A

Summary

A court's discretion to grant enforcement where there is a ground for refusal under the 1958 New York Convention is narrow; it exists only where there has been waiver, there are circumstances giving rise to estoppel or the error is minor and prejudicially irrelevant ("de minimis"). The court below (BVI no. 2, Yearbook 2010) erred in exercising a broader discretion and reviewing the award on the merits to ascertain whether the alleged violations would have changed the outcome of the award (and concluding that they would not).

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 332-334 (British Virgin Islands no. 2). On 23 May 2001, Grand Pacific Holdings Limited (Grand Pacific) entered into a Loan Agreement with Pacific China Holdings Limited (Pacific China), under which Pacific China would pay to Grand Pacific the sum of US$ 40 million by 31 May 2006, together with interest. The Loan

1. The British Virgin Islands, which are not included in the list of territories to which the United Kingdom extended the application of the 1958 New York Convention upon its accession thereto in 1975, incorporated the Convention into its Arbitration Ordinance of 6 September 1976.

Agreement provided for the application of the laws of the State of New York. It also referred disputes to arbitration in Hong Kong according to the rules of the International Chamber of Commerce.

Pacific China made some payments under the Loan Agreement up to 31 May 2002. By 31 May 2006, about US$ 34 million of principal and US$ 14 million of interest remained unpaid. Grand Pacific commenced ICC arbitration in Hong Kong as provided for under the Loan Agreement. By an award of 24 August 2009, an arbitral tribunal found in favor of Grand Pacific. On 15 September 2009, Grand Pacific requested Pacific China to honor the award; Pacific China failed to do so. On 11 November 2009, Grand Pacific issued an application in the courts of the British Virgin Islands to make a winding-up order and appoint liquidators over Pacific China, claiming that Pacific China failed to pay its debt under the award as it fell due and was therefore insolvent.

On 11 January 2010, the High Court of Justice granted the winding-up order and appointed liquidators. Courts may not appoint liquidators on the application of a creditor unless the debt is free from substantial challenge, or the creditor's status is undisputed. Here, Pacific China argued that the debt was disputed because (alleged) defects in the arbitration meant that the award was open to challenge, either directly, in an annulment action in Hong Kong, or indirectly through 1958 New York Convention defenses raised in enforcement proceedings. The court agreed on the principle but disagreed on the facts. It held that if it is shown that there are substantial grounds why an award should not be enforced, that would indeed mean that the debt and the status of the successful party as a creditor are disputed. In the present case, however, the grounds raised by Pacific China against the award – violation of due process and an allegation that the arbitrators did not act in accordance with the agreement of the parties, which grounds would both result in enforcement of the award contravening public policy – were not sufficiently substantial to raise a real question whether the award should be enforced. Consequently, they did not bring into play any of the grounds for refusal of enforcement under the Arbitration Ordinance of the British Virgin Islands (the Ordinance), which reflect Art. V of the Convention. The court considered on the record of the case that even if it were established that the arbitral tribunal acted unfairly, made it impossible for Pacific China to present its case or was in breach of the parties' procedural protocol, that could have had no impact on the outcome of the arbitration. This decision is reported in Yearbook XXXV (2010) pp. 332-334 (British Virgin Islands no. 2).

By the present decision, the Court of Appeal for the Territory of the Virgin Islands, before Hugh A. Rawlins, Chief Justice, and Janice George Creque and Davidson Baptiste, Justices of Appeal, in an opinion by Janice George Creque,

set aside the lower court's decision. The court held that the discretion of the court to override a Convention defence and grant enforcement is narrow and exists only where there has been waiver or there are circumstances giving rise to an estoppel, or where the error is minor and prejudicially irrelevant ("de minimis"). The court below erred in exercising a broader discretion and undertaking a merits review of the award by examining whether the alleged violations were material to the outcome of the award, that is, by examining whether the outcome of the award would have been the same even if the violations had not occurred (and concluding that it would).

The Court of Appeal noted at the outset that under the Ordinance (Sect. 36) and Art. V of the Convention, courts undoubtedly have discretion to enforce an award even where there is a ground for refusal of enforcement. Case law on the precise scope of that discretion, however, is "in a state of evolution".

Before examining this case law in detail, the court stressed that it is undisputed that no review of the merits of an award is allowed under the Convention and the Ordinance.

The court then considered that relevant English court decisions generally hold that discretion to grant enforcement of a Convention award where there is a ground for refusal is limited to cases where the relevant defence has been waived or where an estoppel has arisen precluding the party from advancing that defence at all. This approach, in the court's opinion, is in accordance with the pro-enforcement policy in respect of Convention awards. Grand Pacific argued in this respect that, in addition, discretion may also be exercised where the breach is de minimis, finding support for its thesis, in particular, in the UK Court of Appeal's decision in *Dallah* and in legal writings.

Asian court decisions – which the court below followed – mostly take a different direction, allowing for an examination of the impact that the defense could have had on the award (the "materiality" element). The first decision to import the materiality element in the exercise of the discretion to enforce notwithstanding the existence of a ground for refusal was the High Court of Hong Kong decision in *Paklito*. In that decision, the court refused to enforce a Chinese award but stated obiter that it could envisage circumstances where the court might exercise its discretion to enforce in the presence of a ground for refusal, if it were to conclude, having seen the new material which the defendant wished to put forward, that that material would not affect the outcome of the dispute.

The Court of Appeal concluded that it was "more comfortable adapting the approach" of the English courts, because both the Convention and the Ordinance are silent as to requiring a materiality element in the establishment of Convention

defences and because the materiality requirement would weaken the universally accepted prohibition to review an award on its merits at the enforcement stage. It therefore held that this discretion is a narrow one in which a court is justified in overriding a Convention defence only where there has been waiver or there is estoppel, or where, as held in *Dallah*, the error is de minimis.

In the present case, there was no ground for estoppel, nor had there been waiver: Pacific China, though participating in the arbitration after the alleged procedural breach occurred, did so under reservations of all its rights. Also, the court below did not find that the breach was de minimis. The court found that the grounds raised were capable of giving rise to a substantial dispute as to enforceability; it would have been odd if it had then concluded that the objections were de minimis. Rather, the court below held that Pacific China did not succeed because the outcome of the award would have been the same even if the violations had not occurred.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152008-n>.

COLOMBIA

Accession: 25 September 1979
No Reservations

5. Tribunal Superior [Superior Court], Civil Chamber, Bogotá, 10 March 2010 and Two-Judge Panel, 21 May 2010

Parties:	Appellant/Defendant: Industria y Distribuidora Indistri S.A. (nationality not indicated) Respondent/Claimant: SAP Andina y del Caribe C.A. Colombia (nationality not indicated)
Published in:	No information available
Articles:	II(1); III
Subject matters:	– availability of appeal against arbitral award – finality of award through adoption of International Centre for Dispute Resolution (ICDR) Rules – 1958 New York Convention requires compliance with arbitration agreement – 1958 New York Convention requires respect of foreign award – 1975 Panama Convention
Topics:	General reference; [8] = ¶ 704(A)

Summary

The Single Judge held that no recourse for setting aside was available against an AAA/ICDR award rendered in Colombia because by referring to the ICDR rules the parties agreed that the award would be final. This conclusion was reinforced by the respect that is due to the agreement of the parties and the ensuing award under the New York Convention, as well as by the provision in the Panama Convention that means of appeal can be excluded. The Two-Judge Panel affirmed the conclusion not to allow the recourse, though finding that such recourse was available because the parties' autonomy cannot rule out a review of whether the

procedure they agreed on was complied with. However, under Colombian law a recourse for setting aside is to be filed with the arbitrators not the court.

On 10 January 2006, Industria y Distribuidora Indistri S.A. (Indistri) and SAP Andina y del Caribe C.A. (SAP Andina) entered into a Professional Services Agreement. Clause 14.6 provided that the Agreement was governed by Colombian law. Clause 16 provided for arbitration of disputes in Bogotá under the International Arbitration Rules of the American Arbitration Association.

A dispute arose between the parties. On 17 December 2009, an arbitral tribunal, in an arbitration administered by the AAA's International Centre for Dispute Resolution (ICDR), rendered an award in favor of Indistri. SAP Andina sought annulment of the award before the Superior Court of Bogotá.

By the first reported decision, rendered on 10 March 2010, the Single Judge Ruth Elen Galvis held that no extraordinary recourse for setting aside (*recurso extraordinario de anulación*) was available against the award because by agreeing on the application of the AAA/ICDR Rules, the parties agreed that the award will be final and binding as provided for in those Rules.

The Single Judge noted that full compliance with the relevant clauses in the Agreement, which is required by Art. II of the 1958 New York Convention, pointed in the same direction. Also, the AAA/ICDR award had to be fully respected by the Colombian authorities pursuant to Art. III Convention. Further, the 1975 Panama Convention obliges the court to respect an agreement of the parties to make the final decision in the arbitral award non-appealable through their submission to arbitration rules that so provide.

The Single Judge added, for the sake of completeness, that if Colombian procedural law applied, a recourse for setting aside would in any event have to be filed before the arbitral tribunal that rendered the award rather than a state court. This is the first decision reported.

By the second reported decision, rendered on 21 May 2010, a Two-Judge panel of the Superior Court, in an opinion by Judge Alvaro Fernando Garcia Restrepo, agreed with the conclusion of the Single Judge, though holding that a recourse for setting aside was in principle available because the parties' autonomy does not extend to excluding "a due process of law aiming to ascertain whether the procedure provided for by the parties was (not) complied with". However, as correctly held by the Single Judge, a recourse for setting aside should be filed with the arbitral tribunal. This is the second decision reported.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152009-n>.

ECUADOR

Ratification: 3 January 1962
1st and 2nd Reservation

1. Juzgado Octavo de lo Civil [Eighth Magistrate's Civil Court], Guayaquil, 25 May 2009, No. 469-2009-J

Parties:	Petitioner: Daewoo Electronics America Inc. (nationality not indicated) Respondent: Expocarga S.A. (nationality not indicated)
Published in:	No information available
Articles:	In general; IV(1)(*a*) (by implication)
Subject matters:	– certified copy of arbitral award – foreign award has same effect as domestic award
Topics:	¶ 404

Summary

The court held that the formal requirements for seeking enforcement were met by supplying a duly certified copy of the ICC award rendered in the United States. It also noted that foreign awards have the same effects and are enforced in Ecuador in the same manner as domestic awards, that is, as final court decisions rendered in final instance.

Daewoo Electronics America Inc. (Daewoo) and Expocarga S.A. were parties to an International Chamber of Commerce (ICC) arbitration in Miami. On 21 July 2008, the arbitral tribunal rendered an award in favor of Daewoo.

The Guayaquil Magistrate's Court granted enforcement of the ICC award. The court first held that Daewoo met the formal requirements by supplying the duly certified award. It then reasoned that foreign arbitral awards "have the same effects and shall be enforced" in Ecuador in the same manner as domestic awards

which, pursuant to Ecuadorian law, have the res judicata effect of a final court decision rendered in final instance.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152010-n>.

FRANCE

Accession: 26 June 1959
1st Reservation

50. Cour d'Appel [Court of Appeal], Paris, First Chamber, 18 November 2010

Parties:	Claimant: Government of the Region of Kaliningrad (Russian Federation) Defendant: Republic of Lithuania
Published in:	Available online at <www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=4510> (subscription required)
Articles:	In general
Subject matters:	– object and purpose of 1958 New York Convention – arbitrator's decision on jurisdiction subject to court control – 1969 Vienna Convention on the Law of Treaties
Topics:	¶ 001

Summary

Claimant's real estate in Lithuania was sold in execution of an LCIA award. Claimant commenced ICC arbitration under the Russian Federation-Lithuanian BIT seeking compensation for this "expropriation". The arbitrators concluded that they lacked jurisdiction. The court of appeal agreed. It reasoned that as the BIT does not specifically state whether it covers the execution of an international award, this question of interpretation must be answered under the relevant international conventions – the 1969 Vienna Convention on the Law of Treaties and the 1958 New York Convention. Under the Vienna Convention, "the effective execution of the object and purpose of the treaty as a whole" must not be affected. If arbitrators had the power under the BIT to examine a State's liability for complying with its obligations under the New York Convention, that Convention's overall object and

purpose – the circulation of international awards subject to an exhaustive list of grounds for refusal of enforcement – would be frustrated.

In 1997, the Region of Kaliningrad negotiated a loan with the Republic of Lithuania (Lithuania). The loan agreement contained a clause for arbitration of disputes at the London Court of International Arbitration (LCIA).

A dispute arose between the parties when the Region of Kaliningrad failed to repay the loan. Lithuania ceded its credit to Duke Investment (Duke), a Cypriot company, which then commenced LCIA arbitration against the Region of Kaliningrad. On 1 October 2004, an LCIA arbitral tribunal rendered an award in favor of Duke in the amount of US$ 10,000,000 and interest thereon. Duke sought enforcement of the LCIA award in Lithuania, where the Region of Kaliningrad had assets.

On 3 November 2005, a Lithuanian court of first instance granted enforcement of the LCIA award. On 7 March 2006, the Vilnius Court of Appeal affirmed the enforcement decision. Appeal to the Lithuanian Supreme Court was denied. Based on the enforcement decisions, real estate belonging to the Region of Kaliningrad in Lithuania, which had been previously attached, was sold for about € 685,000 on 18 December 2006 and the money was paid out to Duke.

On 30 October 2006, the Government of the Region of Kaliningrad (GRK) filed a request for arbitration against Lithuania at the International Chamber of Commerce on the basis of the bilateral investment treaty in force between the Russian Federation and Lithuania (the BIT).[1] GRK sought indemnification for the sale of the real estate owned by the Region of Kaliningrad in Lithuania in execution of the decisions of the Lithuanian courts which, it argued, amounted to expropriation within the meaning of the BIT.

By an order dated 28 January 2009, an ICC arbitral tribunal with seat in Paris found that it lacked jurisdiction to decide the dispute. The present decision concerns GRK's application to set aside that order.

The Paris Court of Appeal denied GRK's request for annulment. The court held at the outset that a court seized with a request for annulment of an arbitral award may review the arbitral tribunal's findings in respect of its own jurisdiction, even where the arbitration is based, as it was here, on the arbitration provision in a BIT.

The court then noted that the arbitrators, when examining the issue of their own jurisdiction, considered whether GRK was an investor and the properties

1. Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of Investments, 29 June 1999.

at issue an investment within the meaning of the BIT. They also considered whether a court decision can be deemed to be an act of expropriation within the meaning of the BIT. The arbitrators reasoned that this last conclusion cannot be ruled out in principle, as an act of a State organ carrying out a legislative, executive or judicial function is deemed to be an act of the State. The arbitrators concluded, however, that there was no need to decide this point, since they found they lacked jurisdiction because the proceedings before them amounted to an appeal against the LCIA award, which is not provided for in the 1958 New York Convention.

The Paris court of appeal agreed with this conclusion. It reasoned that had the ICC arbitrators found that the BIT gave them jurisdiction over the dispute, which concerned an expropriation allegedly resulting from the execution of the LCIA award, they would have implied that the execution of an international arbitral award falls within the scope of the BIT. The BIT, however, does not specifically provide for such case. Hence, the BIT's provisions must be examined in the light of the principles of interpretation set out in the relevant conventions in force between the Russian Federation and Lithuania: the 1969 Vienna Convention on the Law of Treaties and the New York Convention.

The Vienna Convention provides that treaties must be interpreted in the light of their object and purpose and that any modification must not affect "the effective execution of the object and purpose of the treaty as a whole".

The object and purpose of the New York Convention is promoting the circulation of international awards by providing that Contracting States shall recognize them as binding and enforce them in principle unless exhaustively listed grounds for refusal of enforcement are proved. The effective execution of the object and purpose of the New York Convention as a whole would be affected if the BIT were to give arbitrators the power to examine the liability of a State party under the BIT for complying with its obligations under the New York Convention.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152011-n>.

GERMANY

Ratification: 30 June 1961
No Reservations

136. Oberlandesgericht [Court of Appeal], Munich, 23 November 2009, 34 Sch 13/09
Bundesgerichtshof [Federal Supreme Court], Third Civil Chamber, 16 December 2010, III ZB 100/09

Parties:	Claimant: Seller (France) Defendant: Buyer (Germany)
Published in:	*Court of Appeal*: Rechtsprechung Kaufmännischer Schiedsgerichte, A4 a No. 119 *Federal Supreme Court*: Rechtsprechung Kaufmännischer Schiedsgerichte, A4 a No. 129 Both decisions available online at <www.hk24.de> and <www.dis-arb.de>
Articles:	III; IV(1)(*a*); V(1); V(1)(*a*); VII(1)
Subject matters:	– copy of non-authenticated arbitral award – valid arbitration agreement referred to in Art. II 1958 New York Convention (no) – letter of confirmation – more-favorable-right provision – estoppel from raising 1958 New York Convention defense not raised in the arbitration – estoppel from raising 1958 New York Convention defense not (timely) raised in annulment action in country of origin (no) – European Convention of 1961 – abuse of process (no)

Topics: [2] + [6] = ¶ 301; [3] = ¶ 402 + ¶ 404; [4] + [7] + [9]-[16] = ¶ 504; [7] = ¶ 503; [8] = ¶ 303; [11] = ¶ 701 + ¶ 704; [11]-[15] = ¶ 702

Summary

Enforcement of a French award was denied for lack of a valid arbitration agreement. The court of appeal found that submission of a duly certified copy of the non-authenticated original award sufficed; however, the arbitration clause in a sale confirmation sent to the broker did not meet the requirements of the New York Convention as the sale confirmation was neither signed nor contained in a mutual exchange of communications. It was irrelevant that the agreement could be valid under German law, applicable under the Convention's more-favorable-right provision, as claimant did not prove that the sale confirmation was sent to defendant in connection with the conclusion of the contract. Defendant was not precluded from raising this objection because it had already raised it in the arbitration. The Federal Supreme Court confirmed the latter finding. It further held that the failure to challenge the award in the country of rendition is no ground for preclusion under either German law or the 1961 European Convention and that this failure, together with a plea of lack of a valid arbitration agreement, was not a violation of good faith because such violation presupposes that the other party has a legitimate expectation, which was not the case here. Also, the German law provision that a domestic arbitral award can be set aside for lack of a valid arbitration agreement did not apply under the more-favorable-right provision because the setting aside of foreign arbitral awards is outside the competence of the German legislator.

The German Buyer, a fruit wholesaler, bought apricots from the French Seller. On 8 June 2007, Seller sent Buyer a confirmation of sale through a broker. The copy of the sale confirmation supplied by the broker in the present proceedings contained the following clause: "The Commercial Court (*Tribunal de Commerce*) of the sender shall have jurisdiction over all disputes under the present contract. Only COFREUROP sales … Strasbourg Arbitration Chamber." The COFREUROP (Common European Usages for the Domestic and International Sale of Fresh Fruits and Vegetables) Conditions provide for arbitration of disputes at the International Arbitration Chamber for Fruits and Vegetables (*Chambre Arbitrale Internationale pour les Fruits et Légumes* – CAIFL), previously called the Strasbourg Arbitration Chamber (*Chambre Arbitrale de Strasbourg*). Also on 8 June 2007, Seller sent Buyer an invoice that also referred to the COFREUROP Conditions and the *Tribunal de Commerce* of Seller.

On 11 June 2007, the apricots were delivered to Buyer. On 14 June 2007, Buyer informed Seller that they were defective; on 15 June 2007, they were re-classified as second class by the competent German authorities after a sample

inspection. Buyer eventually paid only about one fourth of the sale price. On 5 December 2007, Seller commenced arbitration at the Arbitration Chamber of Paris, which manages CAIFL arbitration proceedings, seeking payment of the balance of the sale price. A sole arbitrator denied Buyer's objection to the Chamber's jurisdiction and rendered an award in Seller's favor, finding that Buyer failed to object to the quality of the apricots within six hours of delivery as provided for in the COFREUROP Conditions.[1] On 21 April 2009, Seller sought a declaration of enforceability of the French award in Germany.

By the first reported decision, rendered on 23 November 2009, the Munich Court of Appeal refused to declare the French award enforceable. The court first noted that Seller complied with the formal conditions for seeking enforcement under the 1958 New York Convention, since it supplied a certified copy of the award. Though the copy was not of a "duly authenticated" original – that is, an original certified by a German notary public or a German consular representative – the court followed the prevailing practice that accepts the submission of a duly certified copy of a non-authenticated original.

The court then denied enforcement, holding that the sale confirmation did not meet the requirements of the Convention for a valid arbitration agreement. The clause referring to the *Chambre Arbitrale de Strasbourg* appeared only on the copy of the sale confirmation of the broker acting on behalf of Seller. Although Buyer did rely on the sale confirmation in the subsequent exchange of communications relating to its claim that the apricots were defective, Art. II(2) Convention requires that there is mutuality in the exchange, that the intentions of the parties are congruent and that it can be gathered from the behavior of the party that it meant to conclude an arbitration agreement. This was not the case here.

The court noted that under the more-favorable-right provision of Art. VII(1), the formal validity of an arbitration agreement may be examined according to the less strict requirements of the 1961 European Convention when both parties are nationals of Member States that do not require that arbitration agreements be in writing. Under German law, silence in respect of a confirmation letter between merchants equals acceptance, while according to the information available to the court this issue is not settled in French law. However, concluded the court, this aspect was irrelevant because Seller did not prove that the sale confirmation was sent to Buyer in connection with the conclusion of the contract.

The court of appeal also held that Buyer was not precluded (*präkludiert*) from raising the objection of jurisdiction in the enforcement proceedings because it had already raised it in the arbitration. This is the first decision reported.

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1. This award is reported in this Yearbook XXXVI (2011) at pp. 39-46.

By the second reported decision, rendered on 16 December 2010, the Federal Supreme Court dismissed Seller's appeal, holding that after the entry into force of the 1998 German Arbitration Law Reform, the defendant's failure to challenge the award in the state of rendition through an appeal to be filed within a given time limit is no obstacle to opposing enforcement on the ground that the award is not based on a (valid) arbitration agreement.

In application of the more-favorable-right principle, the Court also examined the question of preclusion under the 1961 European Convention. This Convention provides that the party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void shall do so during the arbitration proceedings, not later than the delivery of its statement relating to the substance of the dispute. Otherwise the party is prevented from raising this plea during subsequent proceedings before a state court. In the present case, Defendant argued from the beginning in the arbitration that there was no arbitration agreement, so that the objection of lack of jurisdiction was admissible under the European Convention. The court of appeal added that this Convention does not provide for preclusion where the party fails to challenge the award.

German domestic arbitration law, which is also relevant in application of the more-favorable-right principle, also did not prevent Defendant from raising an objection of lack of jurisdiction. In particular, the provision of German law that a domestic arbitral award can be set aside for lack of a valid arbitration agreement, by an application to be filed within three months of rendition of the award, does not apply to foreign arbitral awards because the setting aside of foreign arbitral awards falls outside the competence of the German legislator.

Finally, Defendant's failure to challenge the award in France did not amount to a violation of good faith and thus to an abuse of process for contradictory behavior, because such violation presupposes that the other party has a legitimate expectation. This was not the case here, where the court of appeal found on the merits that Claimant had no reason to believe in good faith that Defendant would not oppose a declaration of enforceability in Germany on the ground of the lack of jurisdiction of the arbitral tribunal. Nor did it appear from other circumstances that Defendant exercised its procedural right ro raise the objection of lack of jurisdiction in bad faith. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152012-n>.

137. Bundesgerichtshof [Federal Supreme Court], 29 July 2010, III ZB 48/09

Parties:	Claimant: Buyer (nationality not indicated) Defendant: Seller (nationality not indicated)
Published in:	Rechtsprechung Kaufmännischer Schiedsgerichte, A4 a No. 124; available online at <www.hk24.de> and <www.dis-arb.de>
Articles:	III
Subject matter:	– availability of set-off in enforcement proceedings
Topics:	¶ 304

Summary

A court of appeal granted enforcement of a foreign award and denied the defendant's request for a set-off holding that the claim, which was not decided in arbitration, fell under the arbitration agreement between the parties and should therefore be referred to arbitration. The Federal Supreme Court refused to hear the appeal on a point of law from this decision. It reasoned that there is no need to clarify the uniformly accepted principle followed by the court of appeal that a set-off is inadmissible in enforcement proceedings where, as here, the claim falls within the scope of the arbitration agreement. Nor was clarification necessary in respect of the issue whether the principle above also applies when the claim relied on for set-off is undisputed. While this principle would not apply because if the claim is undisputed a decision by the enforcement court would not affect the parties' intention to refer their disputes to arbitration, the claim in the present case was actually disputed, as it was argued that it had already been set off against another claim.

Claimant, as the buyer, and Defendant, as the seller, concluded sale and purchase contracts. When a dispute arose, Claimant sought damages in arbitration. Defendant sought a set-off with a claim for the purchase price of certain goods; Claimant argued that this claim, though undisputed, was extinguished through an earlier set-off declared by Claimant. The arbitral tribunal found in favor of Claimant and did not decide on the issue of set-off.

Claimant sought enforcement of the award in Germany. The Schleswig Court of Appeal granted enforcement, dismissing Defendant's objection that the claim granted in the award was extinguished by set-off. The court reasoned that as the claim on which set-off was sought was disputed and fell within the scope of the arbitration agreement between the parties, it should be referred to and decided in arbitration.

The Federal Supreme Court refused to hear Defendant's appeal on a point of law (*Rechtsbeschwerde*) against this decision, holding that a decision by the Supreme Court was not necessary here for "the development of the law or the protection of uniform jurisprudence" as required by German law for a *Rechtsbeschwerde*.

First, the Schleswig court correctly held that, although a claim for set-off can be raised in enforcement proceedings where it was not decided in arbitration, such claim cannot be made where it falls within the scope of an arbitration agreement. Jurisprudence in this respect is uniform and no further clarification in a *Rechtsbeschwerde* was needed.

Second, nor was a clarification needed in respect of the issue raised by Defendant in the appeal that a set-off may be considered in enforcement proceedings where the claim, though falling within the scope of the arbitration agreement, is undisputed. The Court reasoned that the uniform jurisprudence mentioned above, which concerned cases where the claim on which the request for set-off was based was disputed, does not apply where the claim is undisputed because it is based on the consideration that arbitration agreements have the effect of excluding the jurisdiction of state courts over the existence of a claim and the quantification of damages thereunder. However, if the claim is undisputed, the parties' intention to refer their disputes to arbitration is not affected. However, in the present case the claim for set-off was at any event disputed in that while the amount in itself was undisputed, it was argued that the claim had been already set off against another claim for set-off made by Claimant.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152013-n>.

138. Bundesgerichtshof [Federal Supreme Court], 30 September 2010, III ZB 57/10

Parties:	Claimant: Seller (nationality not indicated) Defendant: Buyer (nationality not indicated)
Published in:	SchiedsVZ (*Zeitschrift für Schiedsverfahren* – German Arbitration Journal) 2010, 330; Rechtsprechung Kaufmännischer Schiedsgerichte, A4 a No. 128; available online at <www.hk24.de> and <www.dis-arb.de>
Articles:	III
Subject matter:	– availability of set-off in enforcement proceedings
Topics:	¶ 304

Summary

The Court confirmed its jurisprudence that set-off may be sought in proceedings for a declaration of enforceability. It clarified that this is also possible where the ground for set-off arose before the arbitration was concluded, if set-off was sought in the arbitration but the arbitral tribunal did not deal with it. The Court further held that the finding of the arbitral tribunal that the claims on which set-off was sought were arbitrable was not binding on the enforcement court, which should examine this issue independently in the context of a claim for set-off.

Claimant, as the seller, and Defendant, as the buyer, concluded several contracts for the supply of sugar. All contracts contained an arbitration clause. The present dispute concerned a contract concluded on 20 June 2005, which provided that "all disputes arising out of this Contract" would be referred to arbitration at a trade council.

A dispute arose between the parties when Defendant sought to set off Claimant's invoice for a delivery in December 2005 – € 97,921.60 – against certain disputed claims for damages under three other contracts, which amounted to a total of € 149,025.60. Claimant commenced arbitration at the trade council as provided for in the 20 June 2005 contract.

By an award of 24 February 2009, an arbitral tribunal found in favor of Claimant and directed Defendant to pay € 97,921.60 with interest and costs. The arbitral tribunal did not decide on the request for set-off, on the ground that it lacked jurisdiction because the claims on which set-off was sought did not arise out of the contract of 20 June 2005; rather, they arose out of other contracts and fell within the scope of the arbitration clauses in those contracts.

Claimant sought a declaration of enforceability of the award before the *Kammergericht* (Court of Appeal) in Berlin. Defendant objected that the claim was extinguished by set-off; Claimant argued in turn that the claims on which set-off was sought were subject to arbitration agreements and the court therefore lacked jurisdiction. By an order of 18 January 2010, confirmed by a decision of 29 April 2010, the *Kammergericht* declared the award enforceable. It did not decide on the objection of set-off, finding that a substantive objection such as set-off is to be raised in an action opposing execution (*Vollstreckungsabwehrklage*) rather than in the proceedings for a declaration of enforceability. Also, the court held that it was bound by the arbitral tribunal's finding that the claims were arbitrable.

The Federal Supreme Court annulled this decision and sent the case back to the lower court for an independent examination whether the claims on which set-off was sought fell within the scope of arbitration clauses.

The Court noted first that, contrary to the lower court's opinion, according to its constant jurisprudence substantive objections – such as the objection of set-off – may be raised in proceedings for a declaration of enforceability. Further, the general rule that the grounds on which such objections are founded must have arisen subsequent to the arbitral proceedings allows for exceptions. In particular, the objection of set-off may be raised before the enforcement court if it was raised in the arbitration but the arbitral tribunal (irrespective of whether correctly or incorrectly) decided not to deal with it. This was the case here.

The Federal Supreme Court also addressed the *Kammergericht*'s opinion that no substantive objections may be raised in proceedings for a declaration of enforceability because the courts of appeal – which decide in such proceedings since the 1998 German Arbitration Law Reform – are not equally competent to hear an action for an opposition to execution (*Vollstreckungsabwehrklage*). In the lower court's opinion, substantive objections to enforcement may be raised solely in the latter proceedings, in respect of which, after the 1998 Reform, the competent courts are the local courts and the courts of first instance.

The Federal Supreme Court disagreed. It reasoned that under the provision of German procedural law regarding the execution of court decisions, which applies also to decisions declaring an award enforceable, the court before which proceedings for an opposition to execution must be commenced is the court in

which the enforcement title was originally obtained. In respect of foreign awards, this title is the declaration of enforceability, which is rendered by the court of appeal. As a consequence, the court of appeal is competent.

Having found that the objection of set-off can be raised in proceedings for a declaration of enforceability, and that it can be validly raised before the court of appeal, the Court added that the situation is however different when the claim on which set-off is sought falls within the scope of an arbitration agreement, in which case the arbitral tribunal, rather than a court, has jurisdiction.

The *Kammergericht* held that the claims in this case were arbitrable because this had been the finding of the arbitral tribunal. The Federal Supreme Court deemed this conclusion incorrect, reasoning that the court of appeal must examine the objection of the existence of an arbitration agreement independently.

The Federal Supreme Court therefore annulled the attacked decision and sent the case back to the *Kammergericht* for an examination of whether the claims on which Defendant sought a set-off fell within the scope of arbitration clauses. If not, the court of appeal would have to determine whether these claims existed and set-off could be granted.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152014-n>.

139. Bundesgerichtshof [Federal Supreme Court], 30 September 2010, III ZB 69/09

Parties:	Claimant: Not indicated Defendant: Not indicated
Published in:	SchiedsVZ (*Zeitschrift für Schiedsverfahren* – German Arbitration Journal) 2010, 332; Rechtsprechung Kaufmännischer Schiedsgerichte, A4 a No. 127; available online at <www.hk24.de> and <www.dis-arb.de>
Articles:	V(1)(*a*); VII(1)
Subject matters:	– arbitration agreement "in writing" – letter of confirmation – more-favorable-right provision applies to enforcement of arbitration agreement
Topics:	¶ 504 + ¶ 701 + ¶ 702

Summary

Enforcement of an English award was granted. The more-favorable-right provision in the New York Convention applies also to arbitration agreements; as a consequence, the arbitration agreement at issue here, which was contained in an unsigned confirmation letter between merchants, was valid. The reference in the German Code of Civil Procedure to the Convention does not make the mfr-provision moot.

Claimant and Defendant concluded a contract for the sale of cotton. The contents of the contract were confirmed in a confirmation letter.

A dispute arose in respect of Defendant's failure to make a delivery and was referred to arbitration in England. An arbitral tribunal found in favor of Claimant and awarded damages. Claimant sought enforcement in Germany.

The Court of Appeal in Frankfurt/Main declared the award enforceable, holding that although there was no arbitration agreement in writing within the meaning of Art. II of the 1958 New York Convention, the agreement was

contained in a confirmation letter between merchants (*kaufmännisches Bestätigungsschreiben*) and was therefore valid under the less strict requirements of German law, which applied pursuant to the more-favorable-right provision in Art. VII(1) Convention.

The Federal Supreme Court affirmed the lower court's decision, agreeing with its conclusion that the more-favorable-right principle applies also in respect of arbitration agreements. The Court examined for the first time, and rejected, the opinion expressed by some authors that Sect. 1061 of the German Code of Civil Procedure, which refers to the Convention for the enforcement of foreign awards, has made the reference to national law in Art. VII(1) moot. On the contrary, the majority of courts of appeal hold that the more-favorable-right principle interrupts the reference by national law back to the Convention and allows the application of less strict domestic provisions. The Court agreed with this latter opinion, which does not contradict, as the former does, the meaning and purpose of the Convention. Hence, the more liberal provisions of German law applying in principle to domestic awards and agreements also apply to foreign awards and agreements.

The Federal Supreme Court also noted that the UNCITRAL Recommendation 2006 recommends that the more-favorable-right provision be applied to arbitration agreements, and that the two options of Art. 7 of the UNCITRAL Model Law either ease the written form requirement or do away with it completely. The Court added that it did not appear that the German legislator intended to eliminate the existing possibility to apply the less strict formal requirements of German law when enacting the 1998 Arbitration Law Reform.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152015-n>.

GREECE

Accession: 16 July 1962
1st and 2nd Reservations

21. Areios Pagos [Supreme Court], Civil Chamber D, 30 June 2009, No. 1665/2009[1]

Parties:	Appellant/Defendant: Distributor Limited Liability Company (Greece) Appellee/Claimant: Manufacturer Company (nationality not indicated)
Published in:	Available online in the NOMOS database <http://lawdb.intrasoftnet.com> (subscription required)
Articles:	IV(1)(*b*); V(1)(*c*); V(2)(*b*)
Subject matters:	– lack of reasons for award (no) – public policy and lack of reasons – international public policy – excess of authority of arbitrators (no) – identity of party seeking enforcement
Topics:	[1]-[13] = ¶ 522; [2]-[3] + [9] = ¶ 518; [14]-[22] = ¶ 512; [19]-[22] = ¶ 403

Summary

A court of first instance enforced an AAA award, denying defendant's objections that the claimant in the arbitration was not the party to the contract containing the arbitration clause and that the award failed to give reasons as to why certain counterclaims were rejected.

1. The General Editor wishes to thank Mr. Ioannis Vassardanis, of Alexander Vassardanis & Partners, Athens, for his invaluable assistance in providing this decision and translating it from the Greek original.

A court of appeal affirmed this decision. The Supreme Court dismissed the claim that the appellate court violated Art. V(2)(b) New York Convention by failing to ascertain whether enforcement would be contrary to (international) public policy, holding that this ground for appeal fell outside the scope of this provision as it concerned counterclaims that had been rejected rather than the award. Further, there was no reason to criticize the court's finding that (i) the arbitrator's failure to give reasons, even if proved, would not constitute a breach under Art. V(1)(c) Convention and that (ii) the company that concluded the distributorship contract merely changed its trade name.

On 1 January 1998, a non-Greek limited liability company (the Foreign Manufacturer) and a Greek company (the Greek Distributor) concluded a distribution agreement under which the Foreign Manufacturer granted to the Greek Distributor the exclusive right to distribute certain medical equipment in Greece. The distributorship agreement contained a clause referring disputes to arbitration at the American Arbitration Association (AAA); the clause further provided that the award contain reasons.

A dispute arose between the parties. On 29 October 2004, the Foreign Manufacturer (which had changed its name in the meantime) filed a request for arbitration with the AAA as provided for in the agreement, seeking payment of certain unpaid invoices. The Greek Distributor filed counterclaims seeking damages for breach of the exclusive distributorship agreement, discriminatory tariffs and violation of the obligation to act in good faith. On 6 September 2005, a sole AAA arbitrator rendered an award in favor of the Foreign Manufacturer, directing the Greek Distributor to pay US$ 1,137,117, being the sum claimed by the Foreign Manufacturer minus a set-off with the Greek Distributor's counterclaim based on the breach of the exclusive distributorship agreement. The sole arbitrator denied the other counterclaims filed by the Greek Distributor. On 16 February 2006, the Foreign Manufacturer sought enforcement of the award in Greece.

The Court of First Instance, Single Judge in Thessaloniki granted enforcement. The court rejected, inter alia, the Greek Distributor's objection that enforcement should be denied because the award lacked reasons and because the company that commenced the arbitration was not the same company that concluded the distributorship agreement. The enforcement decision was affirmed by the Court of Appeal of Thessaloniki. On 2 January 2007, the Greek Distributor filed a cassation appeal before the Greek Supreme Court.

The Supreme Court denied the appeal. It first dealt with the Greek Distributor's public policy argument, reasoning at the outset that enforcement can be refused under Art. V(2)(*b*) of the 1958 New York Convention if it would violate Greek public policy, by which it must be understood "the fundamental

rules and principles" of Greek society, that is, international public policy, which includes European Community law on competition and the European Convention on Human Rights. The Greek Distributor argued that the court of appeal directly and indirectly violated the relevant provisions of the Convention, the EU Treaty and the Human Rights Convention because, though finding that the AAA sole arbitrator's reasons in respect of his rejection of part of the Greek Distributor's counterclaims (and consequently of part of its request for set-off) were insufficient, the court of appeal failed to examine whether enforcement would violate Greek public policy.

The majority of the Supreme Court dismissed this ground for appeal, holding that it was inadmissible because it concerned the Greek Distributor's counterclaims, which were rejected in part by the sole arbitrator, rather than the claim of the Foreign Manufacturer, which was granted in the award whose enforcement was sought. One of the judges filed a dissenting opinion in respect of this issue. This opinion is also reported.

The Supreme Court then dismissed the Greek Distributor's claim that enforcement should be denied under Art. V(1)(*c*) Convention because the sole arbitrator did not give (specific) reasons for his decision, despite the fact that the arbitration agreement provided that reasons be given. The Court held that the court below did not directly violate Art. V(1)(*c*), as it found that even if the award did breach the parties' agreement in respect of the reasons to be given in the award, this breach did not fall within the scope of Art. V(1)(*c*) Convention.

The Supreme Court finally dismissed the Greek Distributor's contention that the court of appeal violated Art. IV(1)(*b*) and Art. V(1)(*c*) Convention because it failed to recognize that the party in whose favor the award was issued was not the same party that entered into the exclusive distributorship contract containing the arbitration clause, and because it did not give sufficient reasons for its decision. The Court held that there was no such violation, as the court of appeal found that only the trade name of the company with which the Greek Distributor concluded the contracts and the arbitration changed.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152016-n>.

HONG KONG

Accession: 24 September 1975[*]
1st Reservation

25. Court of Appeal, Hong Kong SAR, 13 June 2011, 25 July 2011 and 11 August 2011, Civil Appeal No. 31 of 2011

Parties:	Applicant: Shandong Hongri Acron Chemical Joint Stock Company Limited (PR China) Respondent: PetroChina International (Hong Kong) Corporation Limited (Hong Kong SAR)
Published in:	All decisions available online at <www.hklii.org> and <http://legalref.judiciary.gov.hk>
Articles:	III; V; V(2)(*b*)
Subject matters:	– security for costs of (appeal in) enforcement proceedings – enforcement of 1958 New York Convention awards no more onerous than enforcement of domestic awards – limited review of award – additional award
Topics:	[1]-[43] + [87]-[92] = ¶ 301; [44]-[86] = ¶ 110 + ¶ 500 + ¶ 502 + ¶ 523

Summary

By the first decision, the court exercised its discretion not to order the foreign applicant to give security, because requiring security would mean imposing a more onerous condition on the enforcement of an award under the 1958 New York Convention than are imposed on a

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* Accession by PR China on 22 January 1987 and extended to Hong Kong with the 1st Reservation, to replace the previous extension by the United Kingdom.

domestic award. By the second decision, the court found that the CIETAC award should be enforced "on its terms" and refused to consider additional awards three letters from CIETAC that specified a sequence in the performance of the parties' obligations under the award, because two of these letters came from the secretariat rather than the arbitrators and in two cases the correspondence had not been forwarded to the other party. By the third decision, the court affirmed its holding in the first decision that the respondent pay the costs of the proceedings, finding that there was no reason to depart from the general rule that costs follow the event.

On 4 July 2008, Shandong Hongri Acron Chemical Joint Stock Company Limited (Hongri) and PetroChina International (Hong Kong) Corporation Limited (PetroChina) entered into a supply contract under which PetroChina sold and Hongri bought lump sulphur with certain specifications. The contract contained a clause for arbitration of disputes by an arbitral tribunal of the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing.

PetroChina supplied 3,937.448 tons of sulphur under the contract and Hongri paid US$ 3,051,522.20. When the sulphur was delivered, however, Hongri rejected most of it (3,810.578 tons) as being of the wrong specifications and only accepted 126.87 tons. Hongri then asked PetroChina to return US$ 2,953,198 of the purchase price in respect of the rejected sulphur. When PetroChina did not return this sum, CIETAC arbitration followed.

By a "final award", "effective on the date when [it] is made", issued on 21 September 2009, a CIETAC arbitral tribunal rendered a majority decision in favor of Hongri. The award consisted of six paragraphs: under Paragraph 1, Hongri was directed to return the rejected 3,810.578 tons of sulphur to PetroChina; under Paragraphs 2 to 6, PetroChina was directed to return US$ 2,953,198 to Hongri, being the part of the purchase price relating to the rejected sulphur; to indemnify Hongri's costs incurred in respect of the rejected goods; to pay damages (an examination and certification fee and the insurance premium paid by Hongri for the rejected goods); and to pay 70 percent of the costs of the arbitration. The award stated that the sums mentioned in Paragraphs 2 to 6 "shall be paid … within 30 days from the date of this award", after which interest would accrue.

When the parties could not agree on the inspection and return of the rejected sulphur, PetroChina claimed that repayment of part of the purchase price and payment of the other sums ordered in the award were conditional upon the return of the sulphur to PetroChina "in the same status and quality" as and when the sulphur was delivered to Hongri. Hongri disagreed.

PetroChina requested a clarification from CIETAC. On 18 November 2009, the CIETAC Secretariat wrote a letter to PetroChina stating that Hongri should

perform its obligation under Paragraph 1 "immediately after the arbitral award comes into effect", while PetroChina could discharge its obligations "within the period indicated in the arbitral award, that is, within 30 days from the date of the arbitral award". Both letters were copied to Hongri.

PetroChina wrote to CIETAC requesting confirmation of its understanding that the parties should first perform under Paragraph 1 and then continue to execute Paragraphs 2 to 6. On 20 November 2009, the CIETAC Secretariat replied by a second letter, stating that "the arbitral tribunal is of the view that if [Hongri] fails to return to [PetroChina] the goods under the disputed contract in this case at the status when the goods were originally received, then [Hongri] does not have the right to demand the return of the payment for the goods from the respondent". Neither PetroChina's letter nor CIETAC's reply to PetroChina was copied to Hongri.

On 30 March 2010, PetroChina received a third letter, sent this time by the arbitrators. The letter stated that the arbitral tribunal confirmed that the two previous CIETAC letters were "supplementary explanations of the Arbitral Award of the arbitration proceedings and form part of the said Arbitration Award". Also this letter was not copied to Hongri.

In the meantime, on 17 November 2009, Hongri obtained an ex parte leave to enforce Paragraph 1 of the CIETAC award from the High Court of Hong Kong SAR, Saunders, J (the Ex Parte Order). On 4 December 2009, PetroChina applied to set aside the order, contending that by reason of the supplemental award of CIETAC in the first two letters, the return of the goods in the same status as and when they were originally received was a condition precedent to its obligation to pay the amounts ordered under the award. PetroChina alleged that Hongri had refused to discharge its obligation to return the goods under Paragraph 1 of the award.

On 16 December 2009, Saunders J ordered that the sum of US$ 2,953,198 – the part of the purchase price that PetroChina was to return to Hongri under the award – be paid into court pending a joint inspection of the goods by each party's expert. PetroChina paid this sum on 23 December. Notwithstanding this payment, no successful arrangement was made to enable the return of the goods and the funds remained in court.

On 16 March 2010, Hongri applied for trial of preliminary issues (1) whether the obligation of Hongri in Paragraph 1 and the obligation of PetroChina in Paragraph 2 of the award were to be performed independently of each other and (2) whether the two CIETAC letters of 18 and 20 November 2009 constituted a supplementary award.

On 17 May 2010, Saunders J gave leave to PetroChina to amend its summons of 4 December 2009 to add seeking leave to enforce the whole of the award including Paragraph 1. On 6 August 2010, the judge made an order to vary the Ex Parte Order by granting leave to PetroChina to enforce Paragraph 1 of the award against Hongri and ordered Hongri to return the 3,810.578 tons of sulphur to PetroChina immediately.

On 25 January 2011, the Judge gave his ruling on the issues presented by Hongri in its 16 March 2010 application. He held that PetroChina's obligation in Paragraph 2 of the award was subsequent to and conditional upon the performance of Hongri's obligation to return the sulphur, and that the two CIETAC letters – and the third CIETAC letter that had been sent in the meantime – did not form part of the arbitral award. Hongri appealed.

On 17 March 2011, PetroChina wrote to Hongri requesting security for costs of the appeal, on the basis that Hongri was not a resident of Hong Kong and that its appeal had no merits. Hongri refused to provide security.

By the first reported decision, rendered on 13 June 2011, the Court of Appeal, before Susan Kwan, JA in Chambers, exercised its discretion not to order Hongri to give security for the costs of the appeal. The court reasoned that the court has discretion not to order security, even if the defendant resides abroad, if there are countervailing factors. A common countervailing factor is the soundness of the merits of the appeal. This factor was of no help to Hongri here as the court found on a preliminary assessment that Hongri's grounds of appeal were reasonably arguable but did not meet "the higher threshold of strong grounds of appeal".

Based on the decision of the English Court of Appeal in *Gater Assets*, Hongri submitted however that another countervailing factor was that security should not be ordered in the context of the enforcement of a foreign arbitral award as a matter of discretion. Hongri argued that as security is not required for domestic awards, such a requirement would violate the provision in Art. III of the 1958 New York Convention that no substantially more onerous conditions may be imposed on Convention awards than are imposed in the case of domestic awards. PetroChina replied that the Convention did not apply because Hongri was actually appealing against the determination of preliminary issues made by the court below, rather than the enforcement of the award, as the award had already been made a judgment of the court by the Ex Parte Order.

The court was persuaded by Hongri's submissions. It reasoned first that although the CIETAC award was indeed entered as a judgment, that judgment had not been executed yet, so that the decision of the Court of Appeal on the preliminary issues decided by Judge Saunders would have a bearing on the

execution of the judgment and the award. The court then exercised its discretion not to order Hongri to post security. This is the first decision reported.

By the second reported decision, rendered on 25 July 2011, the Court of Appeal, before Cheung CJHC, Kwan JA and Lam J, in an opinion by Cheung, reversed the 25 January 2011 decision of Saunders J in respect of the finding that PetroChina's obligation in Paragraph 2 of the award was subsequent to and conditional upon the performance of Hongri's obligation to return the sulphur, while agreeing with the Judge's finding that the three CIETAC letters were not part of the award.

The court reasoned that there are two different stages in the enforcement of an arbitral award: the recognition stage at which an award is converted into a judgment and the execution stage at which the judgment is enforced. At the recognition stage, the court's task is to decide whether leave should be granted to enter judgment "in terms of the award"; this task should be "as mechanistic as possible". Here, the CIETAC award clearly did not say that PetroChina's payments in Paragraphs 2 to 6 were conditional or dependent on Hongri's performance under Paragraph 1. Hence, there was no question of imposing this condition, which would alter, rather than enforce, the award.

The court dismissed PetroChina's argument that the three CIETAC letters were or amounted to an additional or supplemental award made by the arbitral tribunal – though accepting the general principle that an arbitral tribunal becomes *functus officio* after publication of the award. PetroChina relied on both Art. 56 of the Chinese Arbitration Law – which deals with the situation where the arbitrators have reached a decision on a particular issue but have omitted to set out this decision in the award – and Art. 48 of the CIETAC Arbitration Rules – which covers the case where the arbitral tribunal has failed to deal with and decide upon a matter or issue under arbitration.

The court held that it appeared from the record that the situation envisaged by Art. 56 was plainly not at issue, since there was no evidence that the arbitrators dealt with and decided on the sequence of Hongri's and PetroChina's respective obligations, but failed to set out their decision in the award. Nor did the present case fall under Art. 48 of the CIETAC Arbitration Rules, because this issue was never raised before the arbitrators. The court also noted that two of the CIETAC letters were actually sent by the Secretariat, not by the arbitrators, and that Hongri had no opportunity to present its comments.

PetroChina also argued that all questions about the validity of the three letters as supplemental awards should have been dealt with in Beijing and that the (Hong Kong) enforcement court should not usurp the function of the supervising court at the seat of arbitration. The court held that although there is of course a

distinction between the role of the supervising court and that of the enforcement court, the enforcement court "must [not] accept every piece of paper placed before it that is said to be an arbitral award or supplemental award as such, despite glaring discrepancies between the description of what amounts to an arbitral award or supplemental award in the relevant law or rules and what the court finds on the face of the so called award or supplemental award". Also, the enforcement court is entitled to look at its own public policy relating to enforcement of foreign or Mainland awards. Here, there would be a violation of natural justice – due process – if the second and third letters, which were never forwarded to Hongri, were deemed to be additional awards. This is the second decision reported.

By the third reported decision, rendered on 11 August 2011, the Court of Appeal, before Kwan JA in Chambers, affirmed its holding in the 13 June 2011 decision that PetroChina should pay costs, because there was no reason to depart from the general rule that costs should follow the event. This is the third decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152017-n>.

INDIA

Ratification: 13 July 1960
1st and 2nd Reservation

46. High Court, New Delhi, 11 January 2011, E.A. No. 705/2009

Parties:	Claimant: Penn Racquet Sports (US) Defendant: Mayor International Ltd (India)
Published in:	Available online at <http://indiankanoon.org> and <http://lobis.nic.in/dhc/VS/judgement/14-01-2011/VS11012011EX3862008.pdf>
Articles:	V(2)(*b*)
Subject matters:	– narrow concept of public policy – public policy and erroneous interpretation of contract by arbitrator(s) – due process as ground for violation of public policy – public policy and failure to hear counterclaim
Topics:	[21] + [27] = ¶ 518; [22]-[26] = ¶ 524 (interpretation of contract); [28]-[30] = ¶ 523

Summary

The court granted enforcement of a Swiss ICC award, dismissing the public policy argument that the arbitrator erred in the interpretation of a contractual term. Unless proof is given that the arbitrator's interpretation is at odds with the applicable law, the court will not interfere with that interpretation, which falls squarely within the arbitral jurisdiction. Here, no proof was given that the arbitrator's conclusion was wrong under the applicable Austrian law. Even if foreign awards can be challenged in India under the Supreme Court case law, the award at issue was not patently illegal as the arbitrator's interpretation of the contractual term was plausible. Further, there was no violation of public policy (in the narrow meaning applicable in respect of foreign awards) because of a violation of due process, since the terms of reference were discussed with and circulated between the parties, or because

the defendant's counterclaim was not heard. The arbitrator did not deal with the counterclaim because the defendant failed to make the required advance payment.

On 1 January 2003, Penn Racquet Sports (Penn) and Mayor International Ltd (Mayor) entered into a Trade Mark License Agreement (TLA) under which Penn granted Mayor license to use the trademark "Penn" in certain territories for certain products. In consideration of the license, Mayor agreed to pay an annual royalty to Penn. The TLA was entered into for a period of two years. On 1 January 2006, a second TLA was executed for a period of three years on similar terms and conditions. The license was non-transferrable and exclusive; however, Penn Racquet was allowed under Clause 2.2.2 to grant a license to a third party for the purpose of supplying the licensed products "to consume either free or at a reduced cost, as a reward in retailer loyalty and continuity programmes approved by" Penn Racquet. Clause 17 of both TLAs provided that the agreement between the parties was governed by Austrian law. Clause 18 provided for International Chamber of Commerce (ICC) arbitration of disputes.

A dispute arose between the parties when Mayor failed to pay royalties. On 13 June 2006, Penn Racquet terminated the second TLA and appointed another licensee. On 20 September 2006, it also filed a request for arbitration with the ICC, seeking payment of the unpaid royalties. A sole arbitrator was appointed; arbitration proceedings took place in Switzerland. By an award of 27 March 2008, the sole arbitrator found in favor of Penn Racquet, rejecting Mayor's argument that it was not liable to pay royalties because Penn Racquet had breached the TLAs by granting a license for Europe to Nebus Loyalty Limited (Nebus), a Dutch company that was Mayor's sub-licensee, on 26 July 2005. The arbitrator held that Penn Racquet was not in breach of contract by granting a license for loyalty programmes to Nebus, since the grant of such license was allowed under the TLAs. Penn Racquet sought enforcement of the ICC award in India.

The High Court at New Delhi, per Mr. Justice Vipin Sanghi, granted enforcement, dismissing Mayor's claim that the award was contrary to the express terms of the TLA and thus to the public policy of India because the arbitrator erroneously interpreted the expression "retailer loyalty" in the contract as allowing Penn Raquet's agreement with Nebus. The court noted first that "public policy of India" has a narrow meaning in the context of the enforcement of foreign awards and is limited to cases of a violation of the fundamental policy of Indian law. It then reasoned that the interpretation of a term of a contract squarely falls within the scope of the jurisdiction of the arbitral tribunal and that the court does not interfere with the arbitrator's conclusion unless it is shown that it goes against the contractual terms. Here, no proof was submitted that the

arbitrator's interpretation was at odds with the applicable Austrian law. Mayor's reliance on Indian law was misplaced.

The court added that even if it were to accept Mayor's submission that because of the decision of the Indian Supreme Court in *Venture Global* a foreign award can be challenged in India, the award at issue did not suffer "from a patent illegality". The interpretation given by the sole arbitrator was a plausible interpretation of the contractual term at issue.

Nor was the award in breach of the principles of natural justice because of an alleged violation of Mayor's right to due process. The court held that it appeared from the award that the arbitrator drafted terms of reference and discussed them with parties, though Mayor failed to sign them despite several reminders.

Finally, there was no violation of public policy because Mayor allegedly could not pursue a counterclaim before the arbitrator. The court found that the sole arbitrator did not deal with the counterclaim only because Mayor failed to make the required advance payments.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152018-n>.

ITALY

Accession: 31 January 1969
No Reservations

183. Corte di Appello [Court of Appeal], Florence, 15 January 2008

Parties:	Appellant: Third Millennium Company srl (Italy) Respondent: Guess? Inc. (US)
Published in:	No information available
Articles:	V(1)(*a*); V(1)(*d*)
Subject matters:	– renewal of contract (*novatio*) – irregularities in arbitration (communications sent to counsel)
Topics:	[1]-[6] = ¶ 504; [7]-[13] = ¶ 513

Summary

An AAA/ICDR award was granted enforcement. The dispute arose out of an additional agreement to the original agreement containing an arbitration clause. The court held that as there had been no renewal, the original clause covered the additional agreement. Further, it was not proved that the fact that communications relating to the arbitration were initially sent to the party's lawyer rather than directly to the party – allegedly affecting the composition of the arbitral tribunal and the regularity of the proceedings – was a violation under the applicable arbitration rules and US law justifying refusal of enforcement under Art. V(1)(d) New York Convention and its corresponding article in the Italian CCP.

On 1 January 1996, Third Millennium Company srl (TMC) and Guess? Inc. (Guess) concluded a Manufacturing License Agreement (MLA) pursuant to which TMC would manufacture and market the lingerie and beachwear with the "Guess?" trademark in Italy and other European countries. The parties agreed that the MLA would expire on 30 September 1999 and be renewed tacitly. The

MLA contained a clause providing for arbitration of disputes in Los Angeles under the rules of the American Arbitration Association (AAA).

In June 1997, August 1998 and October 2001 the parties entered into Amendments to the MLA. The MLA was successively extended to 31 December 2002. In 2003, Guess informed TMC that it wished to terminate the MLA because TMC did not meet the agreed minimum sales requirement. On 19 June 2003, the parties concluded the Guess/TMC License Expiration/Limited Sell-Off Agreement (the Expiration Letter Agreement – ELA), terminating the license retroactively as per 31 December 2002 and providing that TMC was allowed to manufacture the garments for which it had already bought materials and sell the stock up to 31 May 2004.

A dispute arose between the parties in respect of the royalties to be paid under the ELA. On 20 October 2004, Guess informed TMC that it intended to commence arbitration at the International Centre for Dispute Resolution (ICDR) of the AAA. Further communications, including the request to appoint an arbitrator, were sent to Mr. Francesco Salesia, TMC's lawyer. When TMC did not react to the request to appoint an arbitrator, the ICDR appointed a sole arbitrator. A first hearing was held in Los Angeles on 4 May 2005, in which the sole arbitrator granted time limits to the parties to file statements and supply evidence. On 5 July 2005, a communication concerning the date for the second arbitration hearing, to be held in Los Angeles on 12 July 2005, was sent directly to TMC; TMC alleges that it only became aware of the arbitration on that date. On 1-3 November 2005, an ICDR sole arbitrator rendered an award in favor of Guess. Guess sought enforcement of the award in Italy. On 9 March 2006, the Florence Court of Appeal granted ex parte enforcement. TMC commenced opposition proceedings.

By the present decision, the Florence court of appeal granted enforcement, dismissing TMC's grounds for opposition. TMC relied on the 1958 New York Convention to argue that enforcement should be denied because: (1) there was no arbitration agreement in writing between the parties because the ELA did not contain an arbitration clause; (2) the ELA did not validly incorporate the arbitration clause in the MLA by specific reference; (3) communications relating to the appointment of arbitrators were sent to Salesia rather than TMC, so that the sole arbitrator was appointed without TMC's agreement; (4) for the same reason, TMC was not informed of the date of the first hearing in which time limits were given for filing statements and submitting evidence.

The court dismissed TMC's first two grounds for opposition, finding that when concluding the ELA the parties did not intend to enter into a new contract

but merely wished to modify the MLA. Hence, the ELA was covered by the arbitration clause in the MLA.

The court then held that TMC's third and fourth grounds for opposition were equally unfounded, reasoning that TMC failed to prove that the communications addressed to Salesia were not sufficient to ensure compliance with the ICDR rules under the applicable US law. The court added for the sake of completeness that there was a presumption that Salesia duly and promptly informed his client of the correspondence he had received. Finding the contrary would mean finding both that Salesia consciously harmed TMC, in violation of professional ethics, for no reason that can be imagined on the facts of the case and that TMC ignored his behavior since it continued to use Salesia and his law firm.

The court of appeal further noted that not all procedural violations justify refusal of enforcement. Rather, the violation must concretely affect a party's right. The court based its conclusion on the Italian Supreme Court's jurisprudence on the system of the New York Convention as well as on the text of Art. 840(3) no. 4 of the Italian Code of Civil Procedure, which mirrors Art. V(1)(*d*) of the Convention. This provision expressly does not concern the invalidity of single procedural acts or omissions but rather the general non-conformity of the composition of the arbitral tribunal or arbitration proceeding with the applicable legal and contractual provisions. This was not the case here.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152019-n>.

NETHERLANDS

Ratification: 24 April 1964
1st Reservation

35. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Dordrecht, 30 June 2010, Case No. 79684 / KG RK 09-85[1]

Parties:	Claimant: Dubai Drydocks (United Arab Emirates) Defendant: Bureau voor Scheeps- en Werktuigbouw [X] B.V. (Netherlands)
Published in:	Available online at <www.jure.nl>
Articles:	III; IV; V(1)(*a*); V(1)(*e*); V(2)(*b*); VI; VII(1)
Subject matters:	– documents for requesting enforcement supplied (in general) – more-favorable-right provision – estoppel from raising 1958 New York Convention defense not raised in the arbitration – international public policy – no requirement of double exequatur – security for award
Topics:	[5] + [20]-[21] = ¶ 301; [6]-[8] = ¶ 401 + ¶ 702; [9]-[12] + [15]-[17] = ¶ 303; [9]-[12] = ¶ 507 (applicable rules); [13]-[14] = ¶ 601; [15]-[17] = ¶ 518; [18] = ¶ 514

1. *Note General Editor*. The President of the District Court is now called the "*Voorzieningenrechter*" which may be translated literally as "interim measures judge" or "provisional measures judge". Since it is still customary in the context of international arbitration in the Netherlands to use the term "President of the District Court", this terminology has been retained.

Summary

The President enforced a DIAC award. He found that claimant supplied the necessary documents under Dutch law, which applied pursuant to the more-favorable-right provision of Art. VII(1) of the New York Convention. He dismissed, inter alia, defendant's objection that the award violated public policy, holding that defendant could have raised this argument in the arbitration and must bear the consequences of its failure to do so. The President granted provisional enforceability to the enforcement decision but also granted defendant's request that claimant be directed to give security in the amount of the award.

On 26 June 2003, Dubai Drydocks and Bureau voor Scheeps- en Werktuigbouw [X] B.V. (Defendant) entered into an agreement in respect of the construction of a Floating Shearleg Crane – 2000 Tonnes Lifting Capacity. The agreement provided that it was governed by the laws of Dubai. It further contained a clause referring all disputes to arbitration in Dubai under "the rules of arbitration of the Dubai Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules".

In 2002, the Centre for Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce had changed its name to the Dubai International Arbitration Centre (DIAC); the Rules of Arbitration of the Dubai Chamber of Commerce remained applicable and were replaced in 2007 by the DIAC Arbitration Rules in respect of arbitration proceedings commenced after 7 May 2007.

A dispute arose between the parties when Dubai Drydocks sustained costs for repair work due to a technical malfunction in the floating crane that it had built based on Defendant's design. Dubai Drydocks informed Defendant that it was contemplating arbitration and suggested Mr. Robert Lindsay Gordon as sole arbitrator. In a fax of 27 March 2007, Defendant stated that it had no objection to the sole arbitrator.

On 17 February 2008, Dubai Drydocks commenced DIAC arbitration proceedings against Defendant, seeking US$ 2,343,989.00 in compensation for the repair costs. Defendant initially participated in the arbitration but later withdrew from it entirely. On 15 December 2008, the sole arbitrator rendered a final award in favor of Dubai Drydocks, which then sought enforcement of the DIAC award in the Netherlands.

The *Voorzieningenrechter* in the Dordrecht Court of First Instance, Mr. P.W. van Baal, granted enforcement, finding that all necessary documents were supplied and that there were no grounds for refusal.

Defendant first argued that it did not appear from the request for enforcement whether Dubai Drydocks supplied all the documents required for seeking

enforcement. The *Voorzieningenrechter* held that under Dutch law, which applied to this issue under the more-favorable-right provision of Art. VII(1) of the 1958 New York Convention, the necessary conditions for enforcement were met, as Dubai Drydocks supplied the authenticated original award and arbitration agreement.

Defendant also contended that the parties did not agree on arbitration pursuant to the DIAC Arbitration Rules and that the arbitration agreement was invalid under Dubai law. The judge disagreed, reasoning that Defendant appeared in the arbitration proceedings and Defendant's counsel repeatedly referred to the DIAC Rules, without objecting to their applicability.

Defendant further alleged that the award violated Dutch public policy because Dubai Drydocks did not comply with its duty to prove its assertions in the arbitration and because the arbitrator found Defendant liable for a sum far higher than its contractually determined maximum liability. The judge held that, leaving aside whether the alleged violations amounted to a violation of the narrower concept of international (rather than Dutch) public policy, which applied here, Defendant could have raised this argument in the arbitration and must bear the consequences of its failure to do so.

The *Voorzieningenrechter* also dismissed as unfounded Defendant's argument that a double exequatur was needed and did not consider Defendant's argument that it intended to file an annulment action in Dubai against the award, finding that it was neither asserted nor proved that such action had been commenced.

Subsidiarily, Defendant asked the *Voorzieningenrechter* not to make enforcement provisionally enforceable or to make it provisionally enforceable against security. The judge granted this request and directed Dubai Drydocks to issue a bank guarantee in the amount of the sum to be paid by Defendant to Dubai Drydocks under the DIAC award. The judge noted that Dubai Drydocks did not dispute Defendant's assertion that Dubai Drydocks appeared to have ceased operations and that its assets could not be attached under Dubai law.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152020-n>.

36. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Middelburg, 3 September 2010, Case No. 74867 / KG ZA 10-155[1]

Parties:	Claimant: Northern River Shipping Lines (Russian Federation) Defendant: Kompas Overseas Inc. (Panama)
Published in:	Available online at <www.jure.nl>
Articles:	V(1)(*e*)
Subject matter:	– refusal of enforcement by rendition state foreign court
Topics:	¶ 516

Summary

In the context of a request to lift the arrest of a vessel based on an ICAC award that had been refused enforcement in the Russian Federation, the country of rendition, the President held that a Dutch court asked to enforce that award would deny enforcement under Art. V(1)(e) New York Convention.

On 26 March 2002, an arbitral tribunal of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (ICAC) rendered an award in favor of Kompas Overseas Inc. (Kompas) in a dispute between Kompas and Northern River Shipping Lines (NRSL).

The ICAC award was denied enforcement in the Russian Federation, last by the Moscow *Arbitrazh* (Commercial) Court on 15 December 2004. Kompas did not appeal from this decision. NRSL did not meet its obligations under the award.

1. *Note General Editor*. The President of the District Court is now called the "*Voorzieningenrechter*" which may be translated literally as "interim measures judge" or "provisional measures judge". Since it is still customary in the context of international arbitration in the Netherlands to use the term "President of the District Court", this terminology has been retained.

Kompas sought arrest of the *AMUR 2526*, a vessels owned by NRSL, in the Middelburg Court of Instance. On 8 June 2010, the *Voorzieningenrechter* of the court granted leave and the vessel was arrested on 2 September 2010.

By the present decision, the *Voorzieningenrechter* M.C. de Regt granted NRSL's request to lift the arrest, finding that Kompas's underlying claim was "prima facie unsubstantial". The judge reasoned that the ICAC award was undisputedly unenforceable in the country of rendition, the Russian Federation. He therefore "provisionally" concluded that enforcement would be denied in the Netherlands pursuant to Art. V(1)(*e*) of the 1958 New York Convention. Kompas did not prove facts or circumstances that could lead an enforcement court to a different conclusion.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152021-n>.

37. Hoge Raad [Supreme Court], First Chamber, 24 December 2010, No. 09/01984

Parties:	Petitioner: Vastint Holding BV (Netherlands) Respondent: (1) Respondent no. 1 (Poland); (2) Respondent no. 2 (Poland); (3) Scanproduct Ltd (UK)
Published in:	Available online at <www.jure.nl>
Articles:	I(1); III; V(1)(*e*)
Subject matters:	– recognition of interim award – award "not (yet) binding" – interest to seek recognition
Topics:	[2]-[9] = ¶ 110 + ¶ 514; [10]-[14] = ¶ 301

Summary

The Supreme Court denied a cassation appeal against the recognition of an SCC award. The Dutch party's argument that the award was an interim award and thus incapable of recognition had not been dealt with in the proceedings on the merits and could not be raised for the first time in the cassation proceedings. Nor was the Dutch party successful with its argument that the court below, on its own initiative, should have denied recognition on grounds of public policy because the award was not yet binding. This ground for refusal of recognition does not pertain to public policy; also, the (non-)binding nature of the award would entail an assessment of its legal effects under a foreign (Swedish) law, which is explicitly forbidden to the Supreme Court under Dutch law. Finally, the Dutch party failed to prove why the attacked decision's finding that the respondents had a legitimate interest to have the award recognized was incomprehensible: the court below had held that there was an interest even if the award – which appointed a valuer and directed the Dutch party to supply information – contained no enforceable obligations.

Vastint Holding BV (Vastint) and Respondents no. 1 and no. 2 (Respondents) entered into a contract in respect of Swedecenter, a joint venture under Polish law. The contract was governed by Swedish law. It provided, inter alia, that should Vastint choose to exercise its right to purchase Respondents' shares in

Swedecenter, the value of the shares was to be determined by three "mutually independent international property valuers of good repute" to be appointed by the parties. If the parties could not reach an agreement on the names of the valuers, the determination of the shares' value was to be made in arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) according to Swedish law.

A dispute arose between the parties when Vastint made use of its right to purchase Respondents' shares in the joint venture and the parties could not agree on the valuers. The dispute was referred to SCC arbitration as provided for in the contract. By an award of 11 May 2007, the arbitral tribunal appointed a valuer; it also directed Vastint to provide certain relevant information to the valuer. Vastint allegedly failed to do so, whereupon Respondents sought recognition of the SCC award in the Netherlands. On 7 August 2008, the *Voorzieningenrechter*[1] of the Amsterdam court of first instance granted recognition. On 17 March 2009, the Amsterdam Court of Appeal affirmed the lower court's decision.

The Supreme Court dismissed Vastint's cassation appeal. It first refused to deal with Vastint's argument that the SCC award was an interim award that was not capable of recognition in the Netherlands. The court of appeal left this question open to the extent that Vastint claimed before that court that recognition should be denied because the award was not yet binding on the parties. The court of appeal therefore examined whether a means of appeal was still available against the award and did not deem the characterization of the award as an interim award to be crucial, nor had it stated in its decision that the SCC award was an interim award. As a consequence, Vastint's argument before the Supreme Court that the award was an interim award concerned a factual issue that could not be dealt with in cassation proceedings, which only concern matters of law.

Vastint also argued that the court of appeal should have held that the award was not yet binding and should have denied recognition on grounds of public policy, on its own initiative. The Supreme Court disagreed, holding that the argument that the award is not yet binding on the parties does not pertain to public policy. Further, if the Supreme Court were to examine the correctness of this argument, it would have to assess the legal effects of the award at issue under Swedish law. This is explicitly prohibited under Dutch law, which forbids the

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Supreme Court to annul lower courts' decisions because of a violation of the law of foreign states.

The Supreme Court finally dismissed Vastint's argument that the court of appeal erred in finding that Respondents had an interest to have the SCC award recognized because recognition would make it easier for them to take legal measures thereunder. Vastint had argued that there was no interest because the award contained no obligations whose performance could be ordered. The Supreme Court held that Vastint failed to explain why the court of appeal's conclusion was incomprehensible.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152022-n>.

38. Voorzieningenrechter [President], Rechtbank [Court of First Instance], Amsterdam, 9 June 2011, Case no. 457047/KG RK 10-1605[1]

Parties:	Claimants: (1) Naonis Costruzioni s.r.l. (Italy); (2) Cimolai S.p.A. (Italy) Defendant: Krakom Advies BV (Netherlands)
Published in:	Available online at <http://zoeken.rechtspraak.nl> (LJN: BR4040)
Articles:	III; IV(1)(*a*); V(1)(*e*); VI
Subject matters:	– stay of enforcement of suspended award – stay of enforcement proceedings pending annulment action (no) – security for restitution of sum paid under award (no)
Topics:	[1]-[9] = ¶ 517 + ¶ 601; [9] = ¶ 402; [10]-[12] = ¶ 301

Summary

Enforcement of an Italian award in the Netherlands was first stayed because the award was suspended in Italy pending an annulment action there. When the Italian suspension order was lifted, the President refused to renew the suspension and granted enforcement. Because the award was no longer suspended in Italy the defendant could not seek refusal or suspension of enforcement under Art. V(1)(e) and Art. VI of the New York Convention, respectively. The defendant could rely on the stay provisions of Dutch law, since application of national law is allowed under the Convention; however, the conditions for suspension under Dutch law were not met: the pending annulment action was not likely to succeed and the defendant did not prove that a stay should be granted on the balance of the parties' respective interests. The President refused to order claimants to post security, because the defendant failed to support its request to this aim.

1. *Note General Editor*. The President of the 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", this terminology has been retained.

On 21 April 2009, an arbitral award was rendered in Italy in a dispute between Naonis Costruzioni s.r.l. and Costruzioni Armando Cimolai S.p.A. (collectively, Claimants) on the one hand and Naos S.p.A. on the other hand. Claimants sought enforcement of the award in the Netherlands against Krakom Advies BV (Krakom).[2]

In turn, on 8 April 2010, Krakom sought annulment of the award in Italy; the Rome Court of Appeal temporarily suspended the award pending the annulment action. Krakom then sought and obtained a suspension of the Dutch enforcement proceeding on the basis of the Rome court's suspension order.

On 27 October 2010, the Rome court of appeal lifted the temporary suspension order. On 2 March 2011, the court rejected Krakom's appeal against that decision, holding that no means of appeal was available against the suspension order.

By the reported decision, the *Voorzieningenrechter* (President) of the Amsterdam Court of First Instance, P.J. van Eekeren, enforced the Italian award in the Netherlands, denying Krakom's request for a new suspension of the enforcement proceedings.

The President first held that Krakom could not ask for a denial of enforcement under Art. V(1)(*e*) or a suspension under Art. VI of the 1958 New York Convention, because the arbitral award at issue was no longer "suspended" in Italy.

Krakom, however, sought a suspension under the applicable provisions of Dutch law.

The President noted at the outset that Claimants were wrong in arguing that Krakom could not rely on those Dutch law provisions because only the New York Convention applied. The Convention, he reasoned, allows for the application of the national law of the country where enforcement of the award is sought.

The President then reasoned that when asked to decide on a request for suspension of enforcement of a foreign arbitral award under Dutch law, on the ground that an annulment action is pending before a foreign court, a court must ascertain whether that action is likely to succeed. It must also balance the respective interests of the parties.

In the present case, the Rome court finally rejected the request for annulment; hence, it was not likely that the request for annulment would eventually be successful. Also, Krakom merely argued that enforcement of the award, which

2. *Note General Editor*. The reason enforcement was sought against Krakom is not indicated in the decision.

awarded Claimants a substantial sum, would imperil its existence. However, it did not support its allegation further.

Finally, the President dismissed Krakom's request that Claimants be required to post security, because Krakom failed to support its request, even in the light of Claimants' assertion at the oral hearing before the court that repayment of the sum in the award would not be a problem.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152023-n>.

POLAND

Ratification: 3 Oct. 1961
1st and 2nd Reservation

1. Sąd Najwyszy [Supreme Court], 6 November 2009, Case No. I CSK 159/09[1]

Parties:	Appellant: E.T. Sp. z o.o. (Poland) Appellees: (1) T.M.D. GmbH (Germany); (2) Administrator of the Bankruptcy Estate of E. SA (Poland); (3) Regional Office of the Public Prosecutor in Warsaw (Poland)
Published in:	OSNC-ZD [Orzecznictwo Sądu Najwyższego Izba Cywilna – Zeszyt Dodatkowy (Judicature of the Supreme Court Civil Law Chamber – Additional Collection)] 2010/3/71; English translation available online at <www.arbitration.pl>
Articles:	V; V(1)(*e*)
Subject matters:	– recognition of court decision denying setting aside of award – grounds for refusal of enforcement are exhaustive
Topics:	¶ 001 + ¶ 501

1. The General Editor wishes to thank Ms. Justyna Szpara and Mr. Maciej Łaszczuk, Łaszczuk & Wspólnicy, Warsaw, for their invaluable assistance in providing this decision and translating it from the Polish original.

Summary

The Supreme Court decided in the negative the open question whether foreign court decisions refusing to set aside an arbitral award may be recognized in Poland. Decisions that can have no legal effect in Poland are not capable of recognition. The Court held that a foreign court decision refusing to annul an award can have no impact on Polish courts because no additional element can be brought, even indirectly, into the "precise, closed" enforcement system established by the 1958 New York Convention. As the Convention is silent in respect of decisions refusing to annul an award, such decisions have no legal effect in Poland and are as a consequence not capable of being recognized. The Court added that such decisions may still be supplied as evidence in Polish enforcement proceedings.

On 26 November 2004, an arbitral tribunal of the International Arbitral Centre at the Austrian Federal Economic Chamber in Vienna rendered an award in favor of T.M.D. GmbH (TMD) and E SA in an arbitration against E.T. Sp. z o.o. (ET).

ET commenced an action to set aside the award in the Austrian courts. On 20 December 2005, the Vienna Commercial Court annulled the award. On 10 October 2006, the Vienna Court of Appeal (*Oberlandesgericht* – OLG) reversed the lower court's decision. On 18 December 2006, the Austrian Supreme Court denied ET's request for an extraordinary review of the OLG decision.

ET sought recognition of the OLG decision refusing to set the award aside before the Polish courts. On 18 January 2008, the Warsaw Regional Court denied the motion. On 30 September 2008, the Warsaw Court of Appeal affirmed the lower court's decision.

The Polish Supreme Court, before Jan Górowski (President), Józef Frąckowiak and Irena Gromska-Szuster, Supreme Court Judges, in an opinion by Frąckowiak, denied ET's appeal and affirmed the appellate decision that refused to recognize the Austrian OLG decision denying annulment of the award, finding that such decisions are not capable of recognition in the Polish legal system.

The Supreme Court first dismissed ET's arguments based on Community law, noting that Council Regulation (EC) No. 44/2001 expressly excludes arbitration from its scope of application and therefore cannot be the basis for holding that a decision on the setting aside of an arbitral award is capable of recognition in another EU State. Nor did ET succeed in its argument that denial of recognition of the OLG decision deprived it of its right to access to a court. The Court reasoned that this argument would be founded only if ET had no forum in which to seek setting aside of the award, which was obviously not the case here.

The Supreme Court then examined whether a foreign court decision refusing to annul an arbitral award is capable of recognition in Poland and should be taken into account by a Polish court deciding on the enforcement of the same award.

The Court noted that this is an open question as there is no relevant jurisprudence and no doctrinal consensus. It then reasoned that both the 1958 New York Convention and the Polish Code of Civil Procedure, which reflects the Convention's principles, provide that the setting aside of an award is a ground for refusing its enforcement but are silent as to the effects of a foreign court decision denying annulment.

In the "precise, closed system" established by the Convention for the enforcement of foreign awards, no element may be introduced, even indirectly, in addition to the grounds for refusal of enforcement exhaustively listed in the Convention. The Convention's silence in respect of the denial of a request to set aside the award must therefore be read – according to the Supreme Court – to mean that the existence of such a decision has no impact at all on the enforcement court's decision.

Therefore, a foreign court decision refusing to set aside the award can have no legal effect in Poland and is not capable of recognition. The Supreme Court added that the decision and the reasons therefor can still be supplied as evidence in the enforcement proceeding, to be freely assessed as such by the court.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152024-n>.

PORTUGAL

Accession: 18 October 1994
1st Reservation

2. Supremo Tribunal de Justiça [Supreme Court of Justice], Civil Section, 19 March 2009, Case no. 299/09[1]

Parties:	Appellant/Claimant: S.A. (Belgium) Respondent/Defendant: B Sociedade Nacional, S.A. (Portugal)
Published in:	214 Colectânea de Jurisprudência, Volume I/2009 (January/April)
Articles:	III; IV
Subject matters:	– confirmation of award by court of state of enforcement before seeking enforcement (no) – enforcement of 1958 New York Convention awards no more onerous than enforcement of domestic awards
Topics:	¶ 301; [17] = ¶ 401

Summary

There is no need to obtain recognition of a foreign arbitral award from a Portuguese court prior to commencing enforcement proceedings in Portugal, as no such requirement exists for domestic awards and Art. III of the New York Convention requires contracting states not to impose more onerous conditions on the enforcement of Convention awards than are imposed on the enforcement of domestic awards.

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1. The General Editor wishes to thank Mr. José Miguel Júdice, PLMJ Sociedade de Advogados RL, Lisbon, for his invaluable assistance in providing this decision and translating it from the Portuguese original.

On 5 February 2002, an International Chamber of Commerce (ICC) arbitral tribunal in Zurich rendered an award in favor of the Belgian S.A. in a dispute with B Sociedade Nacional, S.A.

On 2 February 2005, the Belgian S.A. sought enforcement of the ICC award in Portugal before the Lisbon Secretariat-General for Enforcement (*Secretaria-Geral de Execuções de Lisboa*). The court denied enforcement, finding that the award was not an enforceable instrument as it had not been recognized in prior recognition proceedings. The Lisbon Court of Appeal affirmed the first-instance decision.

The Supreme Court, before Judges Silva Salazar, Nuno Cameira and Sousa Leite, in an opinion by Silva Salazar, reversed the lower courts' decisions. The Court reasoned that in principle foreign arbitral awards must be recognized in Portugal in the same manner as foreign court decisions – that is, they must be reviewed and confirmed by a Portuguese court prior to becoming an enforceable instrument and thus providing an appropriate basis for enforcement proceedings. However, this principle only applies "unless otherwise provided" in, inter alia, international conventions to which Portugal is a party. One such convention is the 1958 New York Convention, whose Art. III requires contracting states not to subject recognition and enforcement of foreign awards to conditions and costs that are substantially more onerous than those applied for the recognition or enforcement of domestic arbitral awards. Since no prior recognition is necessary for Portuguese domestic awards to be enforceable in Portugal, no such requirement exists equally for foreign arbitral awards. Thus, as Appellant supplied the necessary documents under Art. IV Convention, enforcement should be granted.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152025-n>.

RUSSIAN FEDERATION

Ratification: 24 August 1960
1st Reservation

29. Supreme *Arbitrazh* Court of the Russian Federation, 22 March 2010, Resolution No. VAS-3174/10[1]

Parties:	Petitioner: OAO Company Neftyanaya Company Rosneft (Russian Federation) Respondent: OOO Neftyanoy Terminal Belokamenka (Russian Federation)
Published in:	English translation available online at <www.arbitrations.ru>
Articles:	II(3) (by implication)
Subject matter:	– arbitrability of tax disputes
Topics:	¶ 223

Summary

A claim for unjust enrichment based on the allegedly improper addition of VAT to the price of services rendered could not be referred to arbitration notwithstanding the arbitration clause in the underlying contract, which became unenforceable because tax matters are not arbitrable.

Between February 2004 and September 2006, OAO Company Neftyanaya Company Rosneft (Rosneft) and OOO Neftyanoy Terminal Belokamenka (Belokamenka) performed under a contract according to which Belokamenka

1. The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.

transported oil products for Rosneft and Rosneft paid for Belokamenka's services. The contract provided that disputes that could not be settled amicably shall be referred to arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

A dispute arose when Rosneft objected to Value Added Tax (VAT) being added to the price it paid for Belokamenka's services and commenced an action for unjust enrichment in the State *Arbitrazh* (Commercial) Court of Murmansk *Oblast* (Region). On 27 April 2009, the Murmansk court declined to hear the claim because of the arbitration clause in the contract between the parties. On 17 July 2009, the Thirteenth State *Arbitrazh* Appellate Court affirmed the first instance decision. On 4 December 2009, the Federal *Arbitrazh* Court for the Northwestern District 4 reversed, holding that the arbitration clause in the contract could not be enforced because the matter was not arbitrable.

By the present decision, a Chamber of the Supreme *Arbitrazh* Court of the Russian Federation held that there was no ground to refer the case to the Presidium of the Supreme *Arbitrazh* Court. The Chamber reasoned that disputes falling within the scope of an arbitration agreement shall be referred to arbitration unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

The dispute at hand, though a civil law dispute, concerned the recovery of unjust enrichment due to the allegedly improper addition of VAT to the price of the services invoiced by Belokamenka. Thus, any body deciding the dispute would have to assess the validity of Belokamenka's application of Russian tax laws and the Federal *Arbitrazh* Court correctly held that that body could not be an SCC arbitral tribunal.

The Chamber added that the present case had no international connection and therefore was not a case of international commercial arbitration.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152026-n>.

30. Presidium of the Supreme *Arbitrazh* Court of the Russian Federation, 5 October 2010, No. 6547/10[1]

Parties:	Petitioner: AB Living Design (Sweden) Respondent: Sokos Hotels Saint Petersburg (Russian Federation)
Published in:	English translation available online at <www.arbitrations.ru>
Articles:	I; V(1)(*e*)
Subject matter:	– enforcement of interim award (no)
Topics:	¶ 110 + ¶ 514

Summary

The Presidium reaffirmed its position that only awards finally deciding (part of) the merits of a dispute can be enforced in the Russian Federation. The SCC award at issue here directed the Russian respondent, which had failed to pay its share of the advance payment for the costs of the arbitration, to reimburse the Swedish petitioner which had paid on its behalf, and explicitly stated that it did not affect the final allocation of costs to be made in the final award. It was therefore an interim award. The Presidium relied on Art. V(1)(e) New York Convention to deny enforcement.

On 10 January 2007, Limited Liability Company Sokos Hotels Saint Petersburg, the predecessor of Sokos Hotels Saint Petersburg (Sokotel), entered into an Agreement with AB Living Design, under which AB Living Design was to supply and install interior decoration elements in hotel rooms owned by Sokotel. The Agreement provided that it was governed by Swedish law. It further provided for arbitration of disputes at the Arbitration Institute of the Stockholm Chamber of Commerce.

1. The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.

A dispute arose between the parties. On 22 October 2007, AB Living Design and Sokotel concluded a Settlement Agreement. On 19 November 2007, AB Living Design was liquidated. Its successor, Living Consulting Group AB (Living Consulting Group), commenced arbitration against Sokotel at the Stockholm Arbitration Institute as provided for in the Agreement. When Sokotel did not make the required advance payment for its 50 percent share of the costs of the arbitration, Living Consulting Group paid Sokotel's share in addition to its own. It then sought compensation in the arbitration proceedings.

On 4 June 2009, the arbitral tribunal issued an award directing Sokotel to reimburse Living Consulting Group for its advance payment. The award stated that it did not affect the final allocation of costs between the parties, which was to be determined in the final award on the merits of the case.

Living Consulting Group sought enforcement of the award on the advance payment in the State *Arbitrazh* (Commercial) Court of Saint Petersburg and Leningrad *Oblast* (Region). On 11 December 2009, the court granted enforcement. On 9 February 2010, the Federal *Arbitrazh* Court for the Northwestern District affirmed this decision.

The Presidium of the Supreme *Arbitrazh* Court of the Russian Federation reversed the lower court's decision, holding that the award at issue was not binding and as such could not be enforced pursuant to Art. V(1)(*e*) of the 1958 New York Convention.

The Presidium reasoned that according to the Law on International Arbitration of the Russian Federation, an award is an arbitral decision by which the merits of a dispute – or part of the merits – are finally decided. In the present case, the award explicitly did not affect the final allocation of costs between the parties. Thus, it was an interim decision that could not be enforced.

The Presidium noted that this position – that only final awards on the merits can be recognized – was set out in the Informational Letter it had issued in 2004.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152027-n>.

31. Presidium of the Supreme *Arbitrazh* Court of the Russian Federation, 13 December 2010, Resolution No. VAS-13211/09[1]

Parties:	Petitioner: Lugana Handelsgesellschaft mbH (Germany) Respondent: OAO Ryazan Metal-Ceramic Instrument Factory (Russian Federation)
Published in:	English translation available online at <www.arbitrations.ru>
Articles:	III
Subject matter:	– clarification of writ of execution v. clarification of award
Topics:	¶ 301

Summary

A request to clarify the writ of execution issued for the enforcement of three DIS awards may not be heard by the Russian court that issued the writ when the ambiguities concern the merits of the awards. Clarification in this respect should be sought from the DIS arbitral tribunal.

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 429-431 (Russian Federation no. 26). On 14 December 2000 and 10 January 2001, Lugana Handelsgesellschaft mbH (Lugana) and OAO Ryazan Metal-Ceramic Instrument Factory (Ryazan Ceramic) entered into a Contract and an Exclusive Distributor Agreement, respectively, for the supply of magnetically operated sealed switches.

When a dispute arose, the parties referred it to arbitration at the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* – DIS) rather than the Arbitration Institute of the Stockholm Chamber of Commerce as

1. The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.

provided for both in the Contract and the Agreement. The DIS arbitral tribunal issued three awards in favor of Lugana: on 11 August 2005, an award directing Ryazan Ceramic to pay Lugana US$ 463,317.63 and interest thereon, to provide information to Lugana on certain contracts it had concluded after entering into the Agreement and to supply 500,000 switches to Lugana at the price of US$ 0.072 per switch; on 14 October 2005, an award directing Ryazan Ceramic to compensate Lugana for the arbitration fees it had advanced and for counsel fees; on 27 December 2005, an award on other costs of the arbitration and counsel fees.

Lugana sought and eventually obtained enforcement of the three DIS awards in the Russian Federation. Three decisions concerning this action are reported in Yearbook XXXV (2010) at pp. 429-431 (Russian Federation no. 26).

The present decision concerns the execution of the three DIS awards. On 23 March 2010, Lugana obtained a writ of execution for the awards from the State *Arbitrazh* (Commercial) Court of Ryazan *Oblast* (Region). Alleging that the writ contained ambiguities in respect of the applicable interest rates and the order to supply switches and provide information on contracts concluded after 10 January 2001, Lugana then sought a clarification of the writ from the Ryazan *Oblast* Court.

On 12 April 2010, the Ryazan *Oblast* Court dismissed Lugana's request for clarification, holding that the writ of execution was unambiguous. Also, as the writ reproduced the dispositive part (the dictum) of the DIS awards, Lugana's request amounted to a request for a clarification of the DIS awards, which could only be made by the DIS arbitral tribunal. This decision was affirmed on 27 July 2010 by the Twelfth State *Arbitrazh* Appellate Court and on 29 September 2010 by the Federal *Arbitrazh* Court for the Central District.

By the reported decision, the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation affirmed the lower courts' decisions, finding that the conditions for a review in supervisory proceedings by the Presidium were not met as the court decisions at issue did not breach "the uniformity in the interpretation and application of laws" by state *arbitrazh* courts nor did they breach personal rights or other public interests.

The Supreme Court noted that under Russian law a debtor may apply to a court with a request for clarification if there are ambiguities in a writ of execution or in its performance. However, courts may clarify only their own decisions and only if these decisions are ambiguous in respect of the merits of the dispute.

This was not the case here, since the State *Arbitrazh* Court of Ryazan *Oblast* did not decide the merits of the dispute but merely issued a writ for the execution of the DIS awards. According to the DIS Arbitration Rules, DIS arbitral awards are to be interpreted by the DIS arbitrators, at the request of a party.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152028-n>.

32. Federal *Arbitrazh* Court, Northwestern District, 10 March 2011, Case No. A05-10560/2010[1]

Parties:	Petitioner: Odfjell SE (Norway) Respondent: OAO Northern Machine Building Enterprise (Russian Federation)
Published in:	English translation available online at <www.arbitrations.ru>
Articles:	III; V; V(1)(*b*); V(2)(*b*)
Subject matters:	– review of merits of award (no) – due process and non-acceptance of arbitral jurisdiction – public policy and disproportionate damages
Topics:	[13]-[17] = ¶ 301 + ¶ 500; [18]-[21] = ¶ 502; [22]-[23] = ¶ 511 (non-acceptance of arbitral jurisdiction); [24]-[30] = ¶ 524 (disproportionate damages)

Summary

The court affirmed the decision of the court of first instance granting enforcement of an SCC award. It refused to review, as pertaining to the merits, the arbitrators' decision that the dispute fell within the scope of the arbitration agreement. It also dismissed the contention that there was a violation of public policy because the damages were awarded in excess of the contractually agreed liability, holding that the arbitrators awarded damages on the basis of Swedish law following principles that are also recognized in Russian law.

On 5 November 2004, OAO Northern Machine Building Enterprise (Sevmash) and Odfjell SE (Odfjell) entered into three contracts for the building and supply of chemical tanker ships (Contracts No. 1, No. 2 and No. 3 – the Contracts). Each contract concerned four tankers, for a total of twelve vessels. Contract No.

1. The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.

1 provided that the first vessel was to be delivered before 30 September 2007; in case of a delay of over 180 days, Odfjell could terminate all contracts, which were deemed to be a whole. The Contracts provided that they were governed by Swedish law. They also provided for arbitration of disputes at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

On 21 February 2008, when the date for delivery under Contract No. 1 had expired by more than the allowed 180 days, Odfjell informed Sevmash that it terminated the Contracts and requested that Sevmash return the advance payment made under Contract No. 1, and interest thereon. Sevmash duly returned US$ 30,800,000, with interest in the amount of US$ 4,447,440.

Odfjell then filed a request for SCC arbitration, seeking US$ 303,860,000 in damages incurred because of the termination of the Contracts due to Sevmash's breach. Sevmash filed a counterclaim, seeking a declaration that Odfjell's termination of Contract No. 1 was invalid. On 30 December 2009, an SCC arbitral tribunal denied Sevmash's counterclaim and granted Odfjell's claim in part, directing Sevmash to pay Odfjell US$ 43,760,000 in damages, plus the costs of the arbitration and counsel fees. Odfjell sought enforcement of the SCC award in the Russian Federation. On 10 December 2010, the State *Arbitrazh* (Commercial) Court of Arkhangel'sk *Oblast* (Region) granted enforcement.

The Federal *Arbitrazh* Court for the Northwestern District affirmed the lower court's decision. The Court stated at the outset that the 1958 New York Convention applies to the recognition and enforcement of foreign arbitral awards in the Russian Federation; it referred to a Contracting State's obligation under Art. III Convention to recognize arbitral awards as binding and enforce them in accordance with national procedural rules under the terms and conditions provided for in the Convention, and quoted the grounds for refusal of enforcement in Art. V, noting that similar rules are set out in the 1993 Law of the Russian Federation on International Commercial Arbitration and stressing that enforcement courts may not review the merits of the arbitral award.

The Federal *Arbitrazh* Court then dealt with Sevmash's objections to enforcement of the SCC award. It first dismissed Sevmash's argument that the arbitral tribunal had no jurisdiction over disputes arising in respect of Contracts No. 2 and No. 3, reasoning that it could not review the arbitral tribunal's conclusion that there was a direct causal connection between the termination of Contract No. 1 and the damages incurred for the termination of Contracts Nos. 2 and 3.

Sevmash also argued that it had been unable to defend itself before the arbitrators in respect of Odfjell's claim for damages under Contract No. 2, because it did not accept the jurisdiction of the arbitral tribunal over this dispute.

The Court referred to Informational Letter No. 96 issued in 2005 by the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation in respect of the practice of enforcement of foreign awards by state *arbitrazh* courts, which states that enforcement may not be denied when the party is duly notified of the date of the arbitration hearings and defends its case. This was the case here.

Nor were Sevmash's public policy objections successful. Sevmash contended that the damages awarded to Odfjell exceeded the liability agreed on contractually by ten times and thus violated the principle of proportionality and, consequently, public policy. The Court disagreed. It reasoned that the arbitrators examined the evidence before them and awarded damages on the basis of Swedish law following principles that are also recognized in Russian law. Hence, their decision did not contradict the public policy of the Russian Federation.

Last, the Federal *Arbitrazh* Court held that the lower court correctly dismissed Sevmash's argument that the arbitrators should have deducted the interest on the advance payment that Sevmash returned to Odfjell under Contract No. 1 from the amount of damages awarded to Odfjell. The Court held that such interest – which is also provided for in Russian law – is basically a compensation for the temporary use of foreign cash funds, that is, the advance payment.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152029-n>.

33. *Arbitrazh* Court, Kemerovskaya Region, 20 July 2011, Case No. A27-781/2011[1]

Parties:	Petitioner: Ciments Français (France) Respondent: Holding Company Sibirskiy Cement OJSC (Russian Federation)
Published in:	English translation available online at <www.arbitrations.ru>
Articles:	III; V(1); V(1)(*c*); V(1)(*e*)
Subject matters:	– European Convention of 1961 – award set aside – suspension of enforcement in country of origin (Turkey) – annulment action on public policy grounds irrelevant for recognition – recognition, not award, contrary to public policy – domestic court decision on validity of contract containing arbitration agreement
Topics:	¶ 516 + ¶ 704; [10]-[11] = ¶ 517; [21]-[23] = ¶ 301; [38] = ¶ 502

Summary

An ICC partial award rendered in Turkey held that the contract between the parties was valid and binding. The court granted recognition. It was irrelevant that the award had been set aside in Turkey as the setting aside was granted on grounds not listed in the 1961 European Convention, which limits the cases in which enforcement can be denied under Art. V(1)(e) of the New York Convention. In particular, the defendant's argument that recognition should be refused on grounds of public policy because the award was annulled for being at odds with Turkish public policy – by providing that it was provisionally enforceable and because of the

1. The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing this decision and translating it from the Russian original.

parties' undertaking in the arbitration clause not to challenge it – also failed. Violation of the public policy of the country of rendition is not a ground listed in the European Convention and a violation of public policy within the meaning of the New York Convention and the European Convention must occur at the moment of enforcement. A violation of the public policy of the state of rendition has no impact at the enforcement stage. (Automatic) suspension of enforcement pending appeal against the annulment decision in the Turkish courts is also not a ground under the European Convention. Nor was the defendant's reliance on an earlier decision by the same Russian court finding that the contract between the parties was invalid successful. The court noted that this decision was under appeal and not yet res judicata.

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 provided, inter alia, that Sibirskiy would pay an initial sum of € 50,000,000 (the Sum of the Initial Payment) to Ciments Français upon execution of the SSPA. The SSPA contained a clause referring all 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 Sum of the Initial Payment 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, asking the tribunal to declare that it had jurisdiction over Tsement and the issue of the SSPA's validity, that the SSPA was valid and binding on all signatories and that Ciments Français properly exercised its right to terminate the SSPA for Sibirskiy's breach and, as a consequence, had a right to withhold the Sum of the Initial Payment. Sibirskiy filed a counterclaim, claiming that Ciments Français violated the SSPA by failing to disclose all relevant information to Sibirskiy before the SSPA was executed, that it did not perform under the SSPA, that its termination of the SSPA was unlawful and that it failed to negotiate in good faith after the SSPA's termination. Sibirskiy therefore requested restitution of the Sum of the Initial Payment; it also sought damages.

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, including Tsement, 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 Sum of the Initial Payment. The arbitrators dismissed Sibirskiy's counterclaim and ordered the

provisional enforcement of the partial award. 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.

In the meantime, court proceedings on the SSPA were commenced in the *Arbitrazh* (Commercial) Court for the Kemerovskaya Region (*Oblast*) in the Russian Federation. In the Russian proceedings, another entity involved in the relationship between Ciments Français and Sibirskiy, OOO FPS Sibkonkord, sought 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 Sum of the Initial Payment – € 50,000,000 – to Sibirskiy (the 13 August 2010 Decision). Ciments Français appealed. A hearing in this case was scheduled before the Seventh *Arbitrazh* Court of Appeal on 19 July 2011, the day before the present decision.

Following rendition of the ICC award in Turkey, Sibirskiy applied to the Turkish courts to have the award set aside. On 31 May 2011, the Court of First Instance for the Kadiköy District granted the application and annulled the award. This decision was under appeal in Turkey at the time of the present decision.

In turn, Ciments Français applied to the same *Arbitrazh* Court for the Kemerovskaya Region, seeking recognition of the ICC partial award. Sibirskiy opposed in response, inter alia, that recognition would violate public policy because of the existence of the 13 August 2010 Decision and that the ICC partial award was not final and binding on the parties because (i) it had been set aside by the Turkish courts and (ii) it did not bear the required official certification stamp of a Turkish judge. Sibirskiy noted that the Turkish annulment decision was being appealed but claimed that it was nonetheless enforceable under Turkish law. Further, (iii) the award's enforceability was automatically suspended as a consequence of the first-instance annulment decision.

By the present decision, the Kemerovskaya *Arbitrazh* Court granted enforcement of the ICC partial award, dismissing Sibirskiy's annulment, suspension and public policy objections.

The court first reasoned that under the combined application of the 1958 New York Convention and the 1961 European Convention, which both applied here, the annulment of an arbitral award in the country of rendition constitutes a ground for refusal of its recognition and enforcement only if the annulment was made on the grounds set out in the European Convention. Thus, unless the award has been set aside on the grounds limitatively listed in the European Convention, recognition and enforcement cannot be denied under Art. V(1)(*e*) of the New York Convention on the ground that the award has been set aside.

Here, the Turkish court annulled the ICC award because it found that the award had not been rendered within the prescribed time limit. The court noted that this ground for annulment, which is provided for in Turkish law, is not among the grounds listed in the European Convention. Further, the Turkish court held that the arbitral tribunal did not examine Sibirskiy's arguments in respect of the termination of the SSPA from the point of view of good faith and therefore exceeded its authority. The court held that though the excess of authority by an arbitrator or arbitral tribunal is provided for as a ground for the setting aside of an arbitral award in Turkish Law, "this ground is not provided for in Art. IX(1) of the European Convention, so that equally it does not lead to a refusal to recognize an arbitral award in the Russian Federation". Finally, the Turkish court found that the ICC award violated public policy because it provided for its provisional enforcement and because of the parties' undertaking, in the arbitration [clause], not to challenge the award. The court noted that violation of the public policy of the country of rendition is not a ground listed in the European Convention and that a violation of public policy within the meaning of the New York Convention and the European Convention must occur at the moment of enforcement; the violation of the public policy of the state of rendition is irrelevant at the enforcement stage.

The court therefore concluded that the award had been set aside in Turkey (by a non-final decision) on grounds not provided for in the European Convention. Hence, recognition could not be denied under Art. V(1)(*e*) of the New York Convention.

The court added that the (automatic) suspension of an award's enforceability pending setting aside proceedings in the country of rendition is also not a ground listed in the European Convention.

Finally, the *arbitrazh* court held that Sibirskiy's reference to the 13 August 2010 Decision was without merit because that decision had not yet acquired legal force.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152030-n>.

SINGAPORE

Accession: 21 August 1986
1st Reservation

11. High Court, 14 October 2010

Parties:	Appellant/Defendant: Galsworthy Ltd (Liberia) Respondent/Plaintiff: Glory Wealth Shipping Pte Ltd (Singapore)
Published in:	Available online at <www.lawnet.com.sg> (subscription required)
Articles:	III; V(1); V(1)(*c*); V(1)(*d*); V(2)(*b*)
Subject matters:	– comity – burden of proof on respondent – excess of authority of arbitrators (no) – irregularities in arbitration (evidence obtained in parallel arbitration) – narrow concept of public policy
Topics:	[2]-[7] = ¶ 303; [8]-[12] = ¶ 503; [13]-[17] = ¶ 512; [18]-[22] = ¶ 513; [23]-[25] = ¶ 518

Summary

The court dismissed an appeal against an order enforcing a London award, holding that under principles of comity the defendant was not entitled to oppose enforcement as it had already unsuccessfully challenged the award on the same grounds in England. At any event, the defendant failed to meet its burden to prove the grounds for refusal: the arbitrators did not decide ultra petita because the defendant itself raised the relevant issue; the arbitration procedure was not at odds with the parties' agreement because the arbitrators relied on evidence obtained in a parallel arbitration, since the defendant agreed that both disputes be heard together by the same panel; none of the alleged defects, even if proven, would offend notions of justice and morality and thus violate public policy.

By a time charter of 7 May 2008 (the Head Charter), Glory Wealth Shipping Pte Ltd (GWS) chartered the vessel *JIN TONG* from Galsworthy Ltd of the Republic of Liberia (Galsworthy) for a period of sixty to sixty-three months at US$ 35,500 per day. The Head Charter was governed by English law. By a time charter of 11 July 2008 (the Sub-Charter), GWS sub-chartered the vessel to Worldlink Shipping Limited (Worldlink) for a period of fourteen to sixteen months.

Both charters were not performed and two separate arbitrations were commenced in London, one in the dispute between GWS and Galsworthy under the Head Charter and one in the dispute between GWS and Worldlink under the Sub-Charter. In its arbitration against GWS, Galsworthy claimed hire and damages arising from GWS's failure to perform under the Head Charter, with damages to be quantified by the difference between the charterparty rate and the market rate at the date of termination of the charter for the remaining period.

The same arbitral tribunal was appointed in both arbitrations. On 14 October 2009, the tribunal issued two final awards but only one set of reasons, because it was of the view that many of the issues concerned were common to both arbitrations. In particular, the tribunal awarded Galsworthy US$ 1,114,406.82 and US$ 39,393,745.03 for hire and damages respectively. These figures were derived from the tribunal's finding that the applicable market rate for an equivalent fixture was US$ 11,000 per day.

On 23 December 2009, GWS challenged the final award in the Galsworthy/GWS arbitration (the Final Award) in the English courts. GWS's challenge was two-pronged: (1) on the basis of Sect. 68 of the UK Arbitration Act 1996, GWS argued that the arbitral tribunal's finding on the applicable market rate was wrong and as a result the tribunal failed to comply with its general duty to act fairly and impartially (Sect. 33 UK Arbitration Act), that the tribunal exceeded its powers and that it did not conduct the proceedings in accordance with the procedure agreed by the parties; (2) on the basis of Sect. 69 of the UK Arbitration Act, GWS filed an appeal on a point of law against the Final Award. Both challenges were unsuccessful. The Sect. 68 challenge was dismissed on 25 March 2010 because GWS failed to post security as requested by Galsworthy; on 16 February 2010, the High Court dismissed the Sect. 69 application, holding that the arbitral tribunal's decision was correct.

On 6 April 2010, Galsworthy obtained leave to enforce the Final Award in Singapore. On 5 May 2010, GWS applied to set aside the enforcement order. On 2 July 2010, Assistant Registrar Peh Aik Hin dismissed the application.

The High Court, per Choo Han Teck J, dismissed the appeal against the 2 July 2010 decision. The reported decision contains the court's reasons for its dismissal.

The court first dealt with a preliminary issue that had arisen before the Assistant Registrar, namely whether GWS was entitled to apply to set aside the enforcement order since it had already challenged the Final Award in the English courts. The court reasoned that action for setting aside and opposition to enforcement are alternative, not cumulative, options. Here, GWS challenged the award in England on similar grounds to those on which it now relied in opposing enforcement; hence, its present opposition was an abuse of process and should be dismissed on principles of comity. The court noted that GWS's application to set aside the enforcement order was "a considered decision … to avoid the need to furnish security to the English court".

The court then proceeded, in the alternative, to examine GWS's objections to enforcement. It first held that GWS failed to meet its burden of proving the alleged grounds for refusing enforcement, reasoning that while the first stage of enforcement – the initial grant of leave to enforce – is a "mechanistic process", at the second stage of enforcement – the opposition proceedings – the party resisting enforcement must prove those grounds to the court on a balance of probabilities.

The court then dismissed GWS's argument that the arbitral tribunal decided on matters beyond the scope of the submission to arbitration because although it acknowledged the absence of a market for the vessel at the relevant time it nevertheless found that the applicable market rate was US$ 11,000 daily. The court disagreed, noting that GWS itself asked for damages to be assessed at US$ 12,000 in the event that GWS were found to be liable.

Nor was the arbitral procedure not in accordance with the parties' agreement because the arbitrators based their finding on evidence obtained in the arbitration between GWS and Worldlink. Since GWS agreed that the Head Charter arbitration and the Sub-Charter arbitration be heard together, the court held that this argument was without merit.

Finally, the court dismissed GWS's contention that because of the above defects the award could not be enforced in Singapore on grounds of public policy. As the court found that there were no such defects, this argument failed. However, even if proven, those complaints would offend no "notion of justice and morality" and thus would not be in violation of public policy.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152031-n>.

SPAIN

Accession: 12 May 1977
No Reservations

70. Audiencia Provincial [Court of Appeal], First Section, Soria, 17 September 2010, No. 59/2010

Parties:	Appellant: Ventus Aliance S.R.O. (nationality not indicated) Respondent: Not indicated
Published in:	Available online at <www.laley.es> (JUR\2010\391731) (subscription required)
Articles:	IV(1)(*b*)
Subject matter:	– original arbitration agreement not submitted "at the time of application"
Topics:	¶ 405

Summary

A court of first instance refused to hear claimant's request for enforcement because claimant did not supply the original arbitration agreement or a duly certified copy thereof together with a certified translation. Claimant appealed and cured this defect by supplying the necessary documents before the court of appeal.

Ventus Aliance S.R.O. (Ventus) entered into a contract with Wild Fungi S.A. (Wild Fungi). The contract contained an arbitration clause. A dispute arose between the parties and an arbitral tribunal eventually rendered an award in favor of Ventus, which then sought enforcement in Spain.

On 30 April 2010, the Court of First Instance no. 4 of Soria refused to accept the request for enforcement, finding that Ventus failed to supply the original arbitration agreement or a certified copy thereof, together with a certified translation, as required under the 1958 New York Convention. Ventus appealed.

The Soria Court of Appeal noted that Ventus supplied the original arbitration agreement and a duly certified translation thereof in the appellate proceedings. It therefore allowed the appeal and instructed the court of first instance to examine Ventus's request for enforcement.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152032-n>.

SWEDEN

Accession: 28 January 1972
No Reservations

8. Högsta Domstolen [Supreme Court], 12 November 2010, Case No. Ö 2301-09[1]

Parties:	Appellant: RosInvestCo UK Ltd (UK) Respondent: The Russian Federation
Published in:	NJA (Nytt Juridiskt Arkiv) I as No. 2010:57 ("NJA 2010 p. 508")
Articles:	II(3)
Subject matters:	– competence-competence – arbitrator's decision on jurisdiction subject to court control – declaratory judgment whether arbitrators have jurisdiction – EU Council Regulation (EC) No. 44/2001
Topics:	¶ 224

Summary

Following an award on jurisdiction holding that the SCC arbitral tribunal could hear the dispute between the parties, the Russian Federation sought a declaration from the Swedish courts that the arbitrators lacked jurisdiction. The Supreme Court held that (1) the Swedish Arbitration Act allows courts to assist arbitral tribunals, inter alia, by hearing challenges to the arbitrators' jurisdiction even if the arbitration is still pending; (2) the requirements for a declaratory action were met because there was an "uncertainty" in the parties' legal

1. The General Editor wishes to thank Dr. Gisela Knuts and Ms. Jeanette Björk, Roschier, Sweden, for their invaluable assistance in providing this decision and translating it from the Swedish original.

relationship that could negatively affect the Russian Federation if arbitration should proceed to the end and lead to an award that could later be successfully challenged, and (3) a declaratory action was also appropriate because an award on the merits was not expected within a short time and the award on jurisdiction itself could not be impugned by means of an annulment action, since it was only "a decision on jurisdiction rendered during the arbitration". Further, there could be no referral to the ECJ for a preliminary ruling because the arbitration exception in Regulation No. 44/2001 also applies to an action seeking a declaratory judgment on the arbitrators' jurisdiction.

RosInvestCo UK Ltd (RosInvestCo) owned shares in Yukos, an oil company owned by the Russian Federation. In 2004, the Russian Federation sold shares in a Yukos subsidiary and levied an execution on certain Yukos assets in order to cover its tax claims against Yukos. A dispute arose between the parties in respect of this sale and execution. In 2005, RosInvestCo commenced arbitration against the Russian Federation at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) under the arbitration clause in the Bilateral Investment Treaty between the United Kingdom and the Russian Federation. The parties agreed on Stockholm as the seat of the arbitration. By an Award on Jurisdiction rendered in 2007, the SCC arbitral tribunal held that it had jurisdiction; it then proceeded to hear the merits of the dispute.

The Russian Federation commenced an action in the Swedish courts, requesting a declaration that, on the contrary, the arbitrators lacked jurisdiction. RosInvestCo moved to dismiss the action. On 16 April 2009, the Svea Court of Appeal held that it had jurisdiction and heard the merits of the dispute.

By the present decision, the Swedish Supreme Court, per Torgny Håstad, Kerstin Calissendorff, Per Virdesten, Lena Moore and Johnny Herre, Supreme Court Justices, affirmed the lower court's decision and held that the Russian Federation could seek a decision from the Swedish courts on the jurisdiction of the SCC arbitral tribunal while the arbitration was still pending.

The Supreme Court first held that there was "Swedish judicial interest in and Swedish jurisdiction over" the Russian Federation's request. It noted that under the Swedish Arbitration Act – which applies to arbitrations held in Sweden also if the dispute has an international character, as in the present case – Swedish courts may assist arbitral tribunals, inter alia, by hearing challenges to the arbitrator's jurisdiction. They may do so while the arbitration is still pending.

The Supreme Court then examined whether the requirements for a declaratory decision under Swedish law were fulfilled and held that they were, as there was "an uncertainty as to the legal relationship" – here, an uncertainty as to whether the arbitrators had jurisdiction – and this uncertainty could

negatively affect the Russian Federation if arbitration were to proceed until rendition of an award on the merits that could later be successfully challenged.

The requirements above are to be freely assessed by the court, which must decide whether it is appropriate to allow a declaratory action. In the present case, it was appropriate to allow the Russian Federation to seek a declaration on the jurisdiction of the arbitrators, because an award on the merits was not expected within a short time and the Award on Jurisdiction itself could not be impugned by means of an action for setting aside, being, under the Swedish Arbitration Act, only "a decision on jurisdiction rendered during the arbitration".

The Supreme Court finally decided not to grant leave for appeal in respect of RosInvestCo's argument that Council Regulation (EC) No. 44/2001 applied and therefore the matter should be referred to the Court of Justice of the European Union for a preliminary ruling. The Court noted that Regulation No. 44/2001 explicitly excludes arbitration and that this exception also applies to an action seeking a declaratory judgment in respect of the arbitrators' jurisdiction.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152033-n>.

SWITZERLAND

Ratification: 1 June 1965
No Reservations

41. Tribunal Fédéral [Federal Supreme Court], 28 July 2010, No. 4A 233/2010

Parties:	Appellant: X SA (Switzerland) Respondent: Y (US)
Published in:	Available online at <www.bger.ch>; English translation available online at <www.praetor.ch>
Articles:	III; V(1)(*d*); V(2)(*b*)
Subject matters:	– (appearance of) bias of arbitrator – narrow concept of public policy – estoppel from raising 1958 New York Convention defense not raised in the arbitration
Topics:	¶ 513 + ¶ 521; [19] = ¶ 518; [22] = ¶ 303

Summary

The Court affirmed the decision enforcing a US award, holding that the objection of bias of the sole arbitrator was meritless. The fact that the arbitrator and counsel for the other party met socially on two occasions and practiced before the same circuit in the United States was no indication of bias meeting the strict requirements of international public policy. Also, grounds for challenge are forfeited unless raised immediately; here, respondent was informed of the acquaintance and chose to continue with the arbitration.

On 22 November 2002, X SA and Y entered into a contract for the maintenance and servicing of three aircraft. The contract contained an arbitration clause.

A dispute arose between the parties and Y commenced arbitration in the United States. Although the arbitration clause provided for three arbitrators, Y

proposed and X SA accepted to submit the dispute to a sole arbitrator, A. On 24 October 2006, the day of the preliminary meeting, the arbitrator submitted a statement in which he mentioned having met C, counsel for Y, on an earlier occasion. At the meeting, C confirmed that he met A once at a time when he and A's daughter were working in the same law firm. Counsel for X stated that he had no objection to proceeding with the arbitration. On 13 February 2008, sole arbitrator A issued an award in favor of Y. On 1 April 2008, the United States District Court for the Central District of Illinois recognized the award.

When X SA did not comply with the award, Y obtained an order to pay (*commandement de payer*) in Switzerland on 8 December 2008. X SA filed an opposition against the order, whereupon on 16 October 2009 Y applied to the Geneva Court of First Instance to have the opposition set aside, preliminarily seeking recognition and enforcement of the arbitral award and of the US district court decision. X SA opposed enforcement, arguing that the composition of the arbitral tribunal – a sole arbitrator instead of a panel of three – was not in accordance with the agreement of the parties. On 30 November 2009, the court of first instance granted enforcement of the US award and the US court decision and definitively set aside X SA's opposition to the order to pay. The court held that X SA was estopped from relying on the alleged irregular composition of the arbitral tribunal as it had participated in the proceedings without reservations and filed a counterclaim.

On 14 December 2009, X SA appealed to the Court of Appeal of Canton Geneva. In the appellate proceedings, X SA submitted as new evidence an e-mail sent by B on 2 December 2009, which showed that both C and the sole arbitrator had practiced before the US Court of Appeals for the Tenth Circuit, as well as an affidavit by its counsel D, dated 26 January 2010, stating that C had said in a phone conference held between the arbitrator and counsel for the parties on 19 October 2006 that he had accompanied the arbitrator's daughter to a social event once and that on that occasion he had briefly met her father at her domicile; this particular meeting was not mentioned by the arbitrator in the letter he sent on 24 October 2006, the day of the preliminary meeting.

On 25 March 2010, the Geneva court of appeal dismissed the appeal, holding that Appellant's late filing of evidence was inadmissible and that in any case it did not cast doubt on the arbitrator's impartiality. The court noted that the minutes of the preliminary meeting of 24 October 2006, filed by Y, were on the contrary admissible in that they answered an unexpected argument raised by X SA and showed that X SA's counsel was aware of and did not object to C and A, the sole arbitrator, having met.

The Federal Supreme Court dismissed the appeal from this decision. It rejected first Appellant's argument that the court of appeal's refusal to admit the 26 January 2010 affidavit as evidence violated its right to be heard. The Court found that the refusal relied on a specific provision of Geneva civil procedure law and that in any event the court of appeal found that the affidavit would not have had any impact as it appeared from the evidence submitted by Y that X SA was informed of the previous acquaintance of the sole arbitrator and C and agreed to continue with the arbitration.

The Federal Supreme Court then rejected X SA's claim that enforcement should be denied under Art. V(1)(*d*) of the 1958 New York Convention because the composition of the arbitral tribunal was not in accordance with the agreement of the parties and under Art. V(2)(*b*) Convention because of a violation of public policy. X SA based both contentions on the same facts, namely, the sole arbitrator's two previous meetings with counsel for Y and their having practiced before the same circuit in the United States.

The Federal Supreme Court held that neither circumstance cast doubt on the arbitrator's impartiality and independence, particularly in the light of the narrow scope of the public policy exception at the international level. In fact, the meeting that was not mentioned in the arbitrator's statement was brought to the attention of counsel for X SA at the hearing and deemed irrelevant, and no further detail was given as to when the arbitrator and counsel for Y practiced before the same circuit or as to the nature of their work in that jurisdiction.

The Court added that under the good-faith principle, the right to rely on the objection of the irregular composition of the arbitral tribunal is forfeited unless the party raises it immediately in the course of the arbitration.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152034-n>.

42. Bundesgerichtshof [Federal Supreme Court], 4 October 2010, No. 4A 124/2010

Parties:	Appellant: X AG (nationality not indicated) Respondent: Y AS (Czech Republic)
Published in:	Available online at <www.bger.ch>
Articles:	III; V(1)(*b*); V(1)(*d*); V(2)(*b*)
Subject matters:	– "at the time of application" – authenticated original arbitral award – successor arbitral institution – irregular composition of arbitral tribunal – due process and requirement to give security – estoppel from raising 1958 New York Convention defense not raised in the arbitration
Topics:	[3]-[7] = ¶ 405; [8]-[15] = ¶ 402; [16]-[22] = ¶ 524 (monetary obligation already paid); [17] = ¶ 518; [23]-[64] = ¶ 513; [33]-[42] = ¶ 511 (posting of security); [50]-[53] + [60] = ¶ 303

Summary

Enforcement of a Czech award was confirmed. The Court held: (i) the failure to supply the necessary documents at the time of requesting enforcement does not prevent the application from being filed again; (ii) authentication of an award is unnecessary where authenticity is not disputed; (iii) the legal successor to the arbitral institution originally chosen by the parties has jurisdiction; (iv) the requirement in the successor institution's rules that a party give security does not substantially reduce that party's right to defend itself; (vi) parties are estopped from raising at the enforcement stage objections relating to the composition of the arbitral tribunal and the Arbitration Court Board deciding on issues of jurisdiction that they did not raise in the arbitration.

On 7 October 1992, X AG (Appellant) bought 10,000 tonnes of iron sheet for from the predecessor of Y AS (Respondent). The contract provided for the application of Czech law. It also provided that disputes under the contract be

referred to the Arbitration Court attached to the Czechoslovak Chamber of Commerce and Industry in Prague.

A dispute arose between the parties. On 17 January 1996, Respondent commenced arbitration at the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic in Prague (the Arbitration Court). By an interim decision of 27 February 1997, the Arbitration Court Board, whose task it is to decide on jurisdictional issues, dismissed Appellant's objection and held that the Arbitration Court had jurisdiction. By an award of 17 June 1998, a three-member arbitral tribunal found in favour of Respondent and directed Appellant to pay Respondent US$ 685,418.58, together with the costs of the arbitration and part of Respondent's legal costs. Respondent sought enforcement of the Czech award in Switzerland.

On 31 August 2009, a Single Judge of the Summary Hearings Office of the Zurich Court of First Instance granted enforcement. On 25 January 2010, the Court of Appeal of Canton Zurich dismissed Appellant's appeal from the enforcement decision.

The Federal Supreme Court affirmed the appellate court's decision. It first dismissed Appellant's argument that Respondent failed to supply the necessary documents under the 1958 New York Convention together with its application, or at the latest together with its oral statement of claim, and that as a consequence the application should be dismissed and could not be filed again. The Court disagreed. It reasoned that it does not follow from the Convention that a request for enforcement that has been withdrawn for whatever reason may not be filed again. This conclusion is shared by international jurisprudence and doctrine. A different conclusion would run contrary to the pro-enforcement spirit of the Convention.

Appellant claimed that the copy of the award submitted in the proceeding, which was certified by a Czech notary public, was not duly certified because the apostille stated that the award was signed by the president of the arbitral tribunal, whereas also the names of the chairman and the acting secretary of the Arbitration Court Board appeared on the award. Thus, the original award was not duly authenticated. The Federal Supreme Court noted that the main aim of authentication is to confirm the authenticity of the arbitral award. Thus, according to the prevailing jurisprudence and doctrine authentication is unnecessary where, as here, the authenticity of the arbitral award is not disputed.

The Court then dismissed Appellant's argument that enforcement would violate public policy because it would result in Appellant paying the same sum twice: before the arbitration, Appellant paid Respondent US$ 1.35 million in satisfaction of all claims. The Court noted that the appellate court found on the

facts of the case that no settlement covering all contractual relations between the parties, in particular the relation at issue in the arbitration, was reached.

The Federal Supreme Court also relied on the factual findings of the lower courts to reject two further claims by Appellant. First, Appellant claimed that the arbitral tribunal that rendered the award was not the tribunal chosen by the parties. However, both the appellate court and the court of first instance found that the Arbitration Court was the successor to the institution originally chosen. Second, Appellant objected that the rules of the Arbitration Court were not in accordance with the agreement of the parties; in particular, they required Appellant to post security, a requirement that was not contained in the rules of the earlier arbitral institution. In this respect, the lower court found that under the applicable Czech procedural law it is assumed unless otherwise agreed by the parties that the parties accept the arbitration rules of a permanent arbitral institution as in force at the time of the filing of the claim. Appellant argued however that the posting of security fundamentally and substantially reduced its rights of defense. The Court held that Appellant did not substantiate its claim. Nor was such violation of due process apparent.

Appellant also raised an objection concerning the composition of the arbitral tribunal, namely, that the Arbitration Court Board, which decided on jurisdiction, consisted of the even number of ten arbitrators, which was not in accordance with the law and was at odds with the applicable arbitration rules. The Court referred on this point to the undisputed findings of the court below that the parties only agreed on a three-person panel for the arbitral award and that there is no uneven-number requirement for the Board in the applicable arbitration rules and Czech law. Further, Appellant did not raise this objection in the arbitration and was therefore estopped from raising it at the enforcement stage. For the same reason, it was equally estopped from arguing that the president of the arbitral tribunal was a member of the Board which decided on the issue of jurisdiction.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152035-n>.

43. Bundesgerichtshof [Federal Supreme Court], 25 October 2010, No. 4A 279/2010

Parties:	Appellants: (1) X Holding AG (Switzerland); (2) X Management SA (nationality not indicated); (3) A (nationality not indicated); (4) B (nationality not indicated) Respondent: Y Investments NV (Netherlands Antilles)
Published in:	Available online at <www.bger.ch>; English translation available online at <www.praetor.ch>
Articles:	II(3)
Subject matters:	– ambiguous wording of arbitration clause – arbitration agreement "incapable of being performed"
Topics:	¶ 220; [7]-[8] = ¶ 221

Summary

The Court affirmed the lower court's decision that there was no valid arbitration agreement between the parties requiring referral to arbitration. The clause at issue provided that disputes be referred to AAA arbitration or "to any other US court". It was irrelevant that the clause was headed "Arbitration" and referred to the rules of the ICC.

On 21 January 2008, Y Investments NV (Respondent), an investment company, entered into an Asset Management Facilitation Agreement (AMFA) with X Holding AG (First Appellant) as to a certain investment; X Management SA (Second Appellant) was also involved in the investment, though not a party to the AMFA. The AMFA was signed on behalf of Respondent by C, its former treasurer. Clause 22 AMFA provided (English original):

> "Arbitration. In the event of disputes concerning any aspect of the Agreement, including claim of breach, remedy shall first be sought by communication between parties. If such communication fails to resolve the dispute then the parties agree in advance to have the dispute submitted to binding arbitration through The American Arbitration Association or to

> any other US court. The prevailing party shall be entitled to attorney's fees and costs. The arbitration may be entered as a judgment in any court of competent jurisdiction. The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500)."

A dispute arose between the parties. On 18 July 2008, First Appellant obtained an attachment for US$ 209.3 million against Respondent in the Netherlands Antilles for an alleged breach of the AMFA. On 15 October 2008, it sought to commence arbitration at the International Center for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) in New York. The ICDR did not accept the claim, because of the reference to the ICC Rules in Clause 22 of the AMFA. First Appellant then filed a request to compel arbitration with the United States District Court of the Southern District of New York. The request was denied on 2 April 2009 because the court found that there was no valid arbitration clause between the parties. On 27 October 2009, the United States Court of Appeals for the Second Circuit reversed and remanded this decision, finding that the clause in dispute was only ambiguous.

In the meantime, Respondent commenced two actions in Switzerland. On 25 July 2008, it filed a criminal complaint against C, as well as A and B, former members of the Board of First Appellant (Third and Fourth Appellants) for embezzlement or unfaithful management. On 6 January 2009, it also filed a claim before the Court of First Instance in Zug, seeking payment of US$ 1.5 million and a declaration that the AMFA was null and void or, alternatively, had been terminated. On 14 December 2009, the court rejected Appellants' objection of lack of jurisdiction, based on the arbitration clause in the AMFA; it also denied their request to stay proceedings pending the Swiss criminal action and the action in the United States. On 8 April 2010, the Zug Court of Appeal affirmed this decision, holding that the arbitration clause in the AMFA did not allow for a clear conclusion that the parties wished to refer their disputes to the exclusive jurisdiction of an arbitral tribunal and that in any case the clause was "incurably pathological" as it failed to clearly indicate an arbitral institution.

The Federal Supreme Court dismissed Appellants' appeal. It found that the lower court did not err in finding that there was no valid arbitration agreement between the parties. The interpretation of an arbitration clause follows the general rules applicable to the interpretation of statements of intention, that is, if no mutual intention can be ascertained, the putative intention of the parties must be determined. When the interpretation shows that the parties intended to arbitrate, but some uncertainty remains as to the implementation of their choice,

the arbitration agreement must be interpreted in such manner as to be allowed to exist.

In the present case, however, no intention of the parties to refer their disputes to arbitration could be ascertained, as the clause also referred to "any other US court" and it could not be concluded that this was meant as a reference to other arbitral institutions in the United States. It was irrelevant that the clause itself was headed "Arbitration" and referred to the ICC rules.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152036-n>.

44. Bundesgerichtshof [Federal Supreme Court], 14 February 2011, No. 4A 508/2010

Parties:	Appellant: X B.V. (Netherlands) Respondent: A (Venezuela)
Published in:	Available online at <www.bger.ch>
Articles:	V(1)(*c*)
Subject matters:	– res judicata of award – excess of authority of arbitrators
Topics:	¶ 501 + ¶ 512

Summary

The respondent obtained an order in Switzerland for the attachment of a sum allegedly owed by the appellant under a contract containing an arbitration clause. In the subsequent ICC arbitration in the Netherlands, appellant counterclaimed for damages for wrongful attachment; the counterclaim was rejected by a partial award. The appellant then claimed damages for wrongful attachment in the Swiss courts, which held that jurisdiction lay with the arbitral tribunal because of the arbitration clause between the parties and that as the counterclaim had been denied by the arbitrators the Swiss courts could not decide on grounds of res judicata. The Federal Supreme Court reversed and remanded, holding that the partial award rejecting the appellant's counterclaim could only have the effect of res judicata if it were recognized in Switzerland. The courts below should have ascertained whether there were grounds refusing recognition, in particular because the award decided on a claim – the claim for damages for wrongful attachment – that had no connection to the contractual claims covered by the arbitration clause.

On 21 April 2000, X B.V. (Appellant) and A (Respondent) entered into a Consultancy Agreement under which Respondent agreed to assist Appellant in obtaining a product testing license in Venezuela. The Agreement contained an ICC arbitration clause.

Appellant obtained the Venezuelan license in 2003. A dispute arose between the parties in respect of unpaid commission fees for a total of US$ 2,625,569.36. Two sets of proceedings followed.

In Switzerland, on 30 November 2005, Respondent obtained an order for the attachment of the equivalent of that sum in Swiss francs. On 30 January 2006, Appellant's opposition to the attachment order was rejected. On 10 February 2006, Appellant filed an appeal against this decision before the Court of Appeal of the Canton Basel-City. On 10 August 2006, the appellate court reversed the lower court's decision.

In the meantime, on 13 December 2005 Respondent commenced ICC arbitration as provided for in the Consultancy Agreement. On 14 February 2006, Appellant filed, together with its statement in reply, a counterclaim requesting damages for wrongful attachment. The arbitration took place in Rotterdam, the Netherlands. On 1 June 2007, the arbitral tribunal rendered a partial award rejecting Appellant's counterclaim.

In Switzerland, on 24 October 2006, Appellant filed a request with the Court of First Instance in Basel-City for reimbursement by Respondent of the attached sum and interest thereon. On 15 May 2008, the court denied the request, holding that jurisdiction to decide on Appellant's claim for damages for wrongful attachment lay with the arbitral tribunal, because the arbitration clause in the Consultancy Agreement provided for the exclusive jurisdiction of the arbitral tribunal in case of disagreement of the parties "in respect of the interpretation or application of the present Agreement". The court added that Appellant had claimed damages for the wrongful attachment as a counterclaim in the arbitration and that this claim had been denied by the partial award of 1 June 2007. Thus, the court could not decide on this claim, both because it lacked jurisdiction and on grounds of res judicata. On 18 June 2010, this decision was confirmed by the court of appeal of the Canton Basel-City.

By the present decision, the Federal Supreme Court reversed the decision of the appellate court and sent the case back for a new examination. The Court held that under the 1958 New York Convention, enforcement may be refused on exhaustively listed grounds, in particular when the arbitral tribunal decided on claims over which it had no jurisdiction because the dispute did not fall within the objective or subjective scope of the arbitration clause. If the conditions for recognizing a foreign decision are met, that decision is treated in the same manner as a domestic decision: it cannot have a more far-reaching effect in Switzerland than in the country of rendition and cannot be given different, substantially more far-reaching effects than a corresponding domestic decision. The partial award, on which Respondent relied for its objection of res judicata, was a foreign arbitral award that had to be recognized in order to have an effect in Switzerland. Hence, in deciding on the objection of res judicata the court below should have ascertained preliminarily whether the conditions for the

recognition of the arbitral award under the Convention were met. Specifically, it should have examined whether recognition should be denied under Art. V(1)(*c*) Convention because, as alleged by Appellant, the claim for damages for wrongful attachment had no connection to the contractual claims which were covered by the arbitration clause. Only the relevant part of the decision is reported.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152037-n>.

UKRAINE

Ratification: 10 October 1960
1st Reservation

1. Court of Appeal, City of Kiev, 17 September 2010, Case No. 22-22616/10
Supreme Court of Ukraine, 24 November 2010[1]

Parties:	Appellant/Defendant: National Joint Stock Company Naftogaz Ukrainy (Ukraine) Appellee/Claimant: RosUkrEnergo AG (Switzerland)
Published in:	Both decisions available online at <www.ligazakon.ua> (subscription required)
Articles:	IV; V; V(1); V(1)(*e*); V(2)(*b*)
Subject matters:	– grounds for refusal of enforcement are exhaustive and strict – award "not (yet) binding" – proof of finality of award (no) – public policy and public interest – (narrow concept of) public policy – review of merits of award (no) – limited review of award to ascertain grounds for refusal – burden of proof on respondent
Topics:	[5]-[8] + [34] = ¶ 500 + ¶ 501; [9]-[10] + [12] + [38]-[41] = ¶ 514; [11] = ¶ 401; [11] + [42]-[43] = ¶ 524 (public interest); [11] + [43] = ¶ 518; [25] = ¶ 502; [35] = ¶ 503

1. The General Editor wishes to thank Dr. Leonila Guglya, Freshfields Bruckhaus Deringer, Paris, for her invaluable assistance in providing these decisions and translating them from the Ukrainian original.

Summary

Both decisions affirmed the enforcement of two awards of the Arbitration Institute of the Stockholm Chamber of Commerce, finding that none of the grounds exhaustively listed in the 1958 New York Convention applied. First, the awards were final as the arbitration clauses in the relevant contracts provided that arbitral awards shall be final and binding, the applicable SCC rules provide the same, the SCC notified that the awards were final and no further proof of finality is required under the Convention or Ukrainian law. Second, the argument that enforcement would violate Ukrainian public policy because the amount of natural gas to be transferred under the awards was more than half the yearly Ukrainian extraction and national need was neither proved nor did it concern the fundamental principles of the Ukrainian legal system.

RosUkrEnergo AG (RosUkrEnergo) and the National Joint Stock Company Naftogaz Ukrainy (Naftogaz) concluded several contracts for the supply of natural gas from Naftogaz to RosUkrEnergo. The contracts provided for the application of substantive Swedish law; they also provided for arbitration of disputes at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

A dispute arose between the parties when Naftogaz deprived RosUkrEnergo of access to natural gas falling under the contracts and RosUkrEnergo delayed or failed to make certain payments. In April 2008, RosUkrEnergo commenced arbitration as provided for in the supply contracts. By a First Award, rendered on 30 March 2010, the SCC arbitral tribunal ordered Naftogaz to pay to RosUkrEnergo over US$ 365 million in penalties for failing to deliver natural gas under Contract 1/04 and Contract 198, together with interest; it also ordered RosUkrEnergo to pay to Naftogaz over US$ 192 million in fines for late payments under Contract 2/04, Contract 3/04 and Contract 198, together with interest. The First Award stated that RosUkrEnergo had paid the amounts claimed in principal by Naftogaz under Contract 2/04 and Contract 3/04 on 15 January 2010, by way of a set-off declaration of the same date. The First Award also expressly stated that it could not be enforced until a final award was rendered in the dispute.

On 8 June 2010, the SCC tribunal rendered a Second Award, holding that Naftogaz had breached Contract 3/04 by depriving RosUkrEnergo of access to 11 billion cubic meters of natural gas belonging to RosUkrEnergo. The arbitrators therefore ordered Naftogaz to deliver to RosUkrEnergo, not later than 1 September 2010, 11 billion cubic meters of the natural gas stored in Ukrainian underground gas storage facilities. The Second Award further provided that Naftogaz was obliged to pay a penalty as provided for in the contract and that

it shall fulfill this obligation by transferring to RosUkrEnergo the property rights to an additional 1.1 billion cubic meters of natural gas. The arbitrators also held that Contract 3/04 was valid and binding and that Naftogaz was not entitled to terminate it. Finally, they ordered that the sums awarded to Naftogaz under the First Award be set off against the interest on the penalties awarded to RosUkrEnergo in the First Award.

When Naftogaz failed to comply with the SCC awards, RosUkrEnergo sought enforcement in Ukraine. On 13 August 2010, the Shevchenkivsky District Court for the City of Kiev granted enforcement.

By the first reported decision, rendered on 17 September 2010, the Court of Appeal for the City of Kiev affirmed the district court's decision. The Court of Appeal noted that under the 1958 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, only on seven exhaustively listed grounds. The court below correctly found that no such ground was proved.

The district court was correct in rejecting Naftogaz's argument that the awards were not final and binding on the parties. The Court of Appeal agreed with the finding that all the contracts at issue contained valid SCC arbitration clauses and provided that "arbitral awards" shall be final, not subject to challenge and binding on the parties. The arbitration clauses made no reservation to the effect that they were not applicable to certain arbitral awards. Hence, pursuant to the arbitration clauses the First and Second Award were final, non-appealable and binding on the parties. Further, letters of the SCC stated that the awards were final and, in accordance with Swedish law, could only be appealed on procedural grounds within a three-month time limit.

The Court of Appeal also dismissed Naftogaz's claim that enforcement of the SCC awards would violate Ukrainian public policy, reasoning that the awards were rendered in a dispute between the parties only and had no impact on the "independence, territorial integrity, state immunity, basic constitutional rights, freedoms and guarantees" that constitute the Ukrainian legal system.

Finally, Nafotgaz's argument that RosUkrEnergo failed to provide an official document testifying that the awards had legal force, as required under the Ukrainian Code of Civil Procedure, was also unsuccessful. The court held that RosUkrEnergo supplied all necessary documents under the New York Convention. This is the first decision reported.

By the second reported decision, rendered on 24 November 2010, the Supreme Court of Ukraine affirmed the decisions of the district court and the Court of Appeal, holding that their conclusions were in accordance with the facts and procedural law. The Court noted at the outset that enforcement proceedings

do not imply a review of the merits of an award but are limited to an examination aimed at ascertaining the existence of procedural grounds preventing enforcement. The courts below correctly refrained from a review of the correctness of the awards.

The Supreme Court then reasoned that the New York Convention sets down an exhaustive list of grounds for refusal of recognition and enforcement; these grounds are not to be interpreted broadly and must be proven by the party opposing enforcement. The same grounds are also listed in the Ukrainian Code of Civil Procedure.

Here, Naftogaz resisted enforcement on two grounds, namely, that the awards were not final and binding and the enforcement would violate Ukrainian public policy. In the Supreme Court's opinion, the courts below did not err in holding that both arguments were without merit.

First, the SCC Arbitration Rules provide that awards are final and binding on the parties from the moment they are rendered, and neither the Ukrainian Law on Arbitration nor the Ukrainian Code of Civil Procedure provides for any additional requirements for the confirmation of finality of an arbitral award.

Second, Naftogaz's public policy objections were both groundless and unproven. Naftogaz claimed that enforcement would violate Ukrainian public policy because the amount of natural gas that would be transferred to RosUkrEnergo under the awards exceeded 50 percent of the yearly volume of natural gas extraction in Ukraine and 50 percent of the annual Ukrainian need. However, Naftogaz failed to provide any evidence supporting this argument. It also admitted during the arbitration that there was no legal justification for its taking possession of the natural gas that was to be supplied to RosUkrEnergo (thereby acknowledging RosUkrEnergo's claims). Further, noted the Court, the public policy exception to enforcement only concerns the core principles and fundamental elements of Ukrainian legal order – here, Naftogaz did not argue that such principles were affected, and the parties were independent players on the marketplace. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152038-n>.

UNITED ARAB EMIRATES

Accession: 21 August 2006
No Reservations

1. Court of First Instance, Fujairah, 27 April 2010, Commercial Case 35/2010[1]

Parties:	Claimant: Shipowners (nationality not indicated) Defendant: Charterers (nationality not indicated)
Published in:	No information available
Articles:	IV; V
Subject matters:	– conditions for seeking enforcement – requirements for enforcement (in general) – review of merits of award (no)
Topics:	¶ 500; [5] = ¶ 401; [9] = ¶ 502

Summary

Enforcement of two LMAA awards based on the arbitration clause in a GENCON charterparty was granted. The duly notified defendants failed to appear and raise any ground for refusing enforcement. The court stressed that no review of the merits of the award is allowed at the enforcement stage.

In February 2006, the shipowners and the charterers entered into a GENCON charterparty in respect of a vessel to transport a certain cargo to Misaued, Qatar in May 2006. The charterparty contained a clause providing for arbitration of disputes in London.

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1. The General Editor wishes to thank Ms. Yasmin Mohammad, Freshfields Bruckhaus Deringer LLP, Dubai (United Arab Emirates), for her invaluable assistance in translating this decision from the Arabic original and summarizing its content.

A dispute arose when the charterers refused to pay a delay penalty. The parties failed to reach an amicable settlement, whereupon the shipowners commenced arbitration at the London Maritime Arbitrators Association (LMAA). On 26 June 2007, a sole arbitrator rendered a final award in favor of the shipowners. On 25 October 2007, he rendered a second award on costs. On 17 January 2010, the shipowners sought enforcement of the LMAA awards in Fujairah, United Arab Emirates. The charterers did not participate in the enforcement proceeding.

The Fujairah Court of First Instance granted enforcement. The court stated at the outset that both the United Arab Emirates and the United Kingdom are parties to the 1958 New York Convention, so that the shipowners correctly sought enforcement under the Convention. It then noted that the shipowners complied with the requirements set by the Convention for seeking enforcement, by submitting the original charterparty and a translation of the arbitration clause therein contained, as well as the original awards and a translation thereof.

In the absence of the duly notified charterers, the court proceeded to examine the shipowners' request. The court referred to constant jurisprudence holding that no review of the merits is allowed at the enforcement stage and concluded that there was "no legal impediment" to enforcement. Hence, the conditions for granting enforcement under Art. 215(1) of the Civil Procedure Law of the United Arab Emirates were met.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152039-n>.

2. Court of First Instance, Dubai, Plenary Session, 12 January 2011 Commercial Action No. 268-2010[1]

Parties:	Claimant/Cross-Defendant: Maxtel International FZE (nationality not indicated) Defendant/Cross-Claimant: Airmech Dubai LLC (nationality not indicated)
Published in:	No information available
Articles:	IV; V(1); V(1)(*e*) (by implication)
Subject matters:	– requirements for enforcement (in general) – grounds for refusal of enforcement (in general) – burden of proof on respondent – setting aside of award only in country of rendition
Topics:	¶ 401 + ¶ 500 + ¶ 503 + ¶ 516

Summary

The court granted enforcement of two LCIA-DIFC awards rendered in London, finding that claimant supplied the necessary documents and defendant failed to meet its burden to prove the existence of grounds for refusal. It also dismissed defendant's cross-action to set aside the awards, holding that Dubai courts lack jurisdiction to annul awards rendered outside Dubai.

On 7 October 2008, Maxtel International FZE (Maxtel) and Airmech Dubai LLC (Airmech) entered into a contract for the sale and purchase of steel sheets (the Contract). The Contract provided that it was governed by English law. It also contained a clause for arbitration of disputes under the rules of the London Court of International Arbitration-Dubai International Financial Centre (LCIA-DIFC).

A dispute arose between the parties in respect of an alleged breach of contract by Airmech. On 26 February 2009, Maxtel commenced LCIA-DIFC arbitration, appointing an arbitrator. When Airmech failed to appoint a second arbitrator, the

1. The General Editor wishes to thank Mr. Essam Al Tamimi, Al Tamimi & Company, Dubai, for his invaluable assistance in providing this decision and translating it from the Arabic original.

arbitrator appointed by Maxtel proceeded to hear the dispute as a sole arbitrator, as provided for in the arbitration clause in the Contract. On 17 November 2009, the sole arbitrator rendered an award in favor of Maxtel in the amount of US$ 411,905 plus interest. By a second award of 22 December 2009, the arbitrator directed Airmech to pay the costs and fees of the arbitration and Maxtel's costs.

On 17 February 2010, Maxtel filed an application to have the awards enforced. Airmech filed a cross-action in which it sought to have the awards set aside on several grounds.

The Dubai Court of First Instance granted Maxtel's request for enforcement and dismissed Airmech's cross-action, holding that under the 1958 New York Convention and Dubai implementing legislation Dubai courts lack jurisdiction to annul awards rendered abroad. The court held that Maxtel met the formal requirements for seeking enforcement under the Convention and that Airmech failed to meet its burden to supply proof of the existence of any ground for refusing enforcement.

The court noted that its supervisory role when examining a request for recognition and enforcement under the Convention is solely to ensure that recognition and enforcement are not in conflict with the Convention and Dubai implementing legislation and satisfy their procedural and substantive requirements.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152040-n>.

UNITED KINGDOM

Accession: 24 September 1975
1st Reservation

92. Supreme Court, 3 November 2010

Parties:	Appellant: Dallah Real Estate and Tourism Holding Company (Saudi Arabia) Respondent: The Ministry of Religious Affairs, Government of Pakistan
Published in:	Available online at <www.bailii.org> and <www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0165_Judgment.pdf>
Articles:	V; V(1)(*a*)
Subject matters	– non-signatory defendant not bound to arbitration clause – applicable law to existence, validity of arbitration agreement – competence-competence regarding existence, validity of arbitration clause – extent of judicial review of arbitrators' findings as to existence of arbitration agreement – primary v. secondary jurisdiction under 1958 New York Convention – discretion to enforce award where there is ground for refusal under 1958 New York Convention
Topics:	¶ 507 (non-signatory) + ¶ 506; [60]-[62] + [117]-[122] = ¶ 500A; [93]-[95] = ¶ 001

Summary

A court of secondary jurisdiction is not confined to a limited review of the arbitral tribunal's jurisdiction when a (non-signatory) party claims that it was not a party to the arbitration agreement under the applicable law. In such case, the court can carry out its own full examination of the arbitration agreement. An arbitral tribunal's previous finding that it has jurisdiction has no "legal or evidential" value. In the present case, the lower courts correctly held that there was no common intention of the parties that the State be a party to the contract containing the arbitration clause. Further, the lower courts rightly decided not to exercise any residual discretion to enforce that they may have under the New York Convention or the 1996 English Arbitration Act.

The facts of this case are also reported in Yearbook XXXIV (2009) at pp. 887-890 (UK no. 87) and in this Yearbook XXXVI (2011) at pp. 590-593. In December 1994, the Government of Pakistan (GoP) approved a proposal to establish the Awami Hajj Trust (the Trust), which would invest savings of members in order to facilitate and fund their pilgrimage to Mecca (Hajj). In 1995, Mr. Shezi Nackvi, a director of a company owned by the Albaraka Group, proposed to the Ministry of Religious Affairs of Pakistan (the MORA) that another Albaraka company, Dallah Real Estate and Tourism Holding Company (Dallah), provide to the GoP a housing complex in Mecca on a long-term lease for use by Pakistani Hajj pilgrims.

On 16 February 1995, Dallah accordingly sent a letter to the MORA, in which it stated that the King of Saudi Arabia and the Keeper of the Holy Sites entrusted Dallah with the maintenance of those sites and that Dallah was authorized to offer long-term leases of hosting facilities for Hajj pilgrims to Islamic governments. Dallah proposed that the MORA lease several plots of land at Mecca on which Dallah would build a housing complex; Dallah would also provide financing. On 15 July 1995, Dallah submitted the financial conditions for the project to the Pakistani Ministry of Finances.

On 24 July 1995, Dallah and the President of the Islamic Republic of Pakistan, through the MORA, concluded a Memorandum of Understanding (MOU) providing that Dallah would acquire land within Mecca, construct housing facilities for Pakistani pilgrims on that land and lease the houses and the land to the MORA on a ninety-nine-year lease, subject to Dallah arranging the necessary financing. The MOU further provided that it was governed by Saudi Arabian law and for arbitration of disputes in Saudi Arabia.

On 17 August 1995, Mr. Nackvi, on behalf of Dallah, sent to Mr. Lutfallah Mufti (Secretary of the MORA) Dallah's proposals in respect of the lease and financing of the project. The MORA did not approve the proposals within the

contractually agreed period of ninety days. On 18 November 1995, Dallah nevertheless acquired 43,000 square meters of land in Mecca.

On 31 January 1996, the President of Pakistan promulgated Ordinance No. VII of 1996, establishing the Trust as a corporate entity. Mr. Mufti was appointed Secretary of the Board of Trustees. Under the Constitution of Pakistan, an Ordinance is repealed after four months if it is not laid before Parliament, though it can be renewed. Ordinance VII of 1996 was renewed on 2 May 1996 and 12 August 1996; no further renewals were promulgated thereafter. As a consequence, the Ordinance lapsed on 12 December 1996 and the Trust ceased to exist as a legal entity.

In the meantime, on 10 September 1996, Dallah and the Trust entered into an agreement (the Agreement) providing for the construction of housing facilities for 45,000 Pakistani Hajj pilgrims against payment by the Trust to Dallah of a lump sum of US$ 100 million, subject to Dallah arranging a financing facility in the same amount against a guarantee of the GoP. The Trust and the Trustee Bank – a bank that had been appointed by the Trust's Board to collect, maintain and invest the members' deposits – were to provide a counter-guarantee in favor of the GoP. The Agreement did not provide for a governing law; clause 23 was an ICC arbitration clause.

A dispute arose between the parties when Mr. Mufti wrote to Dallah on 19 January 1997, stating that Dallah had failed to submit the project's specifications and drawings within the agreed time limit. This was a breach of a fundamental term of the Agreement and amounted to repudiation, "which repudiation is hereby accepted". The letter, which was written on the MORA's stationery, also stated that Dallah failed to arrange the financing facility, on which the effectiveness of the Agreement depended.

On the following day, 20 January 1997, the Trust commenced proceedings against Dallah in the Court of the Senior Civil Judge in Islamabad, seeking a declaration that the Agreement stood repudiated on account of Dallah's breach. Dallah applied to the court to stay proceedings on the basis of the arbitration clause in the Agreement. On 21 February 1998, the Judge issued an order stating that at the time the proceedings were started, the Trust had ceased to exist and could not bring any proceedings in its own name. On 2 June 1998, the MORA started proceedings in its own name against Dallah before the same Islamabad court.

On 19 May 1998, Dallah in turn commenced ICC arbitration against "the Ministry of Religious Affairs, Government of Pakistan". By a letter of 5 June 1998, the MORA informed the ICC that it had filed court proceedings in Pakistan and that under the Pakistani Arbitration Act 1940 the arbitration

proceedings were invalid unless court proceedings were stayed first. Arbitration nevertheless proceeded. By a letter of 15 August 1998, the MORA informed the ICC that it would not submit to arbitral jurisdiction because there was no contract or arbitration agreement between the MORA and Dallah. On 16 September 1998 , an arbitrator was appointed for the MORA and the seat of the arbitration was fixed in Paris.

The ICC arbitral panel – consisting of Ghaleb Mahmassani, chairman, Michael Mustill and Nassim Hasan Shah – rendered three awards: (1) a First Partial Award on 26 June 2001, holding that "the Ministry of Religious Affairs, Government of Pakistan" was bound by the arbitration agreement in clause 23 of the Agreement and that the dispute fell within the scope of that arbitration agreement; (2) a Second Partial Award on 19 January 2004, determining that Saudi Arabian law applied to the merits of the case and that the MORA's termination letter of 19 January 1997 constituted an unlawful repudiation of the Agreement; and (3) a Final Award on 23 June 2006, ordering the defendant to pay Dallah US$ 18,907,603 by way of damages for breach of the Agreement, as well as the costs of the arbitration and Dallah's costs.

Dallah sought enforcement of the Final Award in England and France, while the MORA sought annulment of all awards in France.

In France, Dallah applied for enforcement of the Final Award on 19 August 2009. On 24 August 2009, the president of the Paris court of first instance granted an ex parte enforcement order.

On 21 December 2009, the MORA in turn filed three applications to set aside the three ICC awards on the ground that the arbitral tribunal erred in finding that the MORA was a party to the Agreement and that consequently the arbitrators had jurisdiction. On 17 February 2011, the Paris Court of Appeal dismissed the application. This decision is reported in this Yearbook XXXVI (2011) pp. 590-593.

In England, Dallah sought leave to enforce the Final Award in the High Court in London on 10 July 2006. On 9 October 2006, Clarke J granted Dallah's application.

On 1 August 2008, the High Court, per Aikens, J, granted the MORA's application to set aside the enforcement order, holding that the arbitration clause in the Agreement did not validly bind the MORA because there was no evidence of a common intention of the parties that the MORA be so bound. The court reached this conclusion under French law, which it found to apply to the issue of the validity of the arbitration agreement, being the law of the country of rendition of the award.

On 20 July 2009, the Court of Appeal, before Ward, Rix and Moore-Bick, LJJ, in an opinion by Moore-Bick, affirmed the lower court's decision and dismissed Dallah's appeal. This decision is reported in Yearbook XXXIV (2009) pp. 887-925 (UK no. 87).

By the present decision, rendered on 3 November 2010, the Supreme Court, before Lord Hope, Lord Saville, Lord Mance, Lord Collins and Lord Clarke, in an opinion by Lord Mance, dismissed Dallah's appeal, holding that the courts below correctly concluded that the MORA was not a party to the Agreement or the arbitration clause therein.

The Supreme Court rejected Dallah's submission that an enforcing court other than the court of the seat of the arbitration – that is, a court of secondary, as opposed to primary, jurisdiction – can conduct only a limited review of the arbitral tribunal's jurisdiction. It reasoned that since the jurisdiction of an arbitral tribunal is founded on the consent of the parties, if there is no consent under the applicable law there can be no jurisdiction. Here, the MORA sought to prove – under the applicable principles of French law – that there was no common intention of the parties that the MORA be a party to the Agreement.

The central issue whether it was allowed to do so had to be decided under the 1996 English Arbitration Act and Art. V(1)(*a*) of the 1958 New York Convention. Neither of these provisions, reasoned the Court, "hints at any restriction on the nature of the exercise open to the person resisting enforcement or to the court asked to enforce an award when the validity (sc. existence) of an arbitration agreement is at issue". Even where an arbitral tribunal has already ruled that it has jurisdiction, the tribunal's own view of its jurisdiction has no "legal or evidential" value when the issue is whether the tribunal has any legitimate authority at all in relation to a party. Hence, a court seised with an action to enforce an award must conduct its own investigation when the party resisting enforcement claims that it was not a party to the agreement under the law applicable to the arbitration agreement.

The Supreme Court further held that once they had found that there was no valid arbitration agreement between Dallah and the MORA the courts below were correct in deciding not to exercise any residual discretion to enforce – notwithstanding the existence of a ground for refusal – that they may have had under Art. V(1) Convention or Sect. 103(2) of the 1996 English Arbitration Act.

In a concurring opinion, also reported, Lord Collins stressed the importance of recognizing that one of the central questions before the UK courts was whether the arbitral tribunal had applied French law principles correctly or at all and of dispelling "the mistaken notion (which appears to have gained currency in the international arbitration world) that this is a case in which the courts below

have recognized that the arbitral tribunal had correctly applied the correct legal test under French law". The concurring opinions of Lord Hope, Lord Saville, and Lord Clarke are reported as well.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152041-n>.

93. High Court of Justice, Queen's Bench Division, Commercial Court, 27 July 2011, Case No: 2010 Folio 1539

Parties:	Claimants: (1) Dowans Holding SA (nationality not indicated); (2) Dowans Tanzania Ltd (nationality not indicated) Defendant: Tanzania Electric Supply Co Ltd (Tanzania)
Published in:	Available online at <www.bailii.org>
Articles:	V(1)(*e*); VI
Subject matters:	– award "not (yet) binding" – double exequatur (no requirement of) – discretion to enforce award where there is ground for refusal under 1958 New York Convention – discretion to enforce award pending setting aside proceedings – adjournment of enforcement decision – stay of enforcement proceedings and posting of security
Topics:	[11]-[26] = ¶ 514; [27]-[28] = ¶ 500A; [29]-[74] = ¶ 601

Summary

The court enforced an ICC award made in Tanzania, holding that a pending annulment action there did not affect the award's binding nature, which is to be ascertained autonomously under the 1958 New York Convention and depends only on the availability of means of ordinary (as opposed to extraordinary) recourse. The court added that even if it had found that the award was not binding, it would have exercised its discretion to enforce despite the existence of a ground for refusal of enforcement under the Convention. The court then granted adjournment, subject to the giving of security, finding that the Tanzanian annulment action had a chance to succeed but faced substantial hurdles.

On 23 June 2006, Tanzania Electric Supply Co Ltd, also known as TANESCO, the Tanzanian State-owned National Electricity Generation and Supply Co of

Tanzania (TANESCO), entered into an Emergency Power Off-Take Agreement (POA) with a company not named in the decision; the POA was subsequently assigned to Dowans Holding SA (Dowans) on 14 October 2006 and to Dowans Tanzania Ltd (Dowans Tanzania) on 20 March 2007. Electricity supply commenced on 26 January 2007, and the POA was continuously performed until 11 August 2008.

By a letter of 30 June 2008, TANESCO informed Dowans Tanzania that the POA was void ab initio because it was concluded in contravention of express prohibitions contained in the Tanzanian Public Procurement Act 2004. It therefore required Dowans Tanzania to decommission the plant set up under the POA by 1 August 2008. Dowans and Dowans Tanzania (collectively, Claimants), commenced ICC arbitration. Proceedings were held in Tanzania.

On 15 November 2010, an ICC arbitral tribunal found in favor of Claimants. The arbitrators held that the POA was valid and ordered TANESCO to pay to Claimants US$ 19.9 million for unpaid supplies and US$ 36.7 million in damages, plus interest and costs. On 10 January 2011, the award was filed with the High Court of Tanzania as provided for by Tanzanian law.

On 9 February 2011, TANESCO filed a petition in the Tanzanian court to have the award set aside or remitted for reconsideration on an issue of quantum; three third-party petitions were also filed, challenging registration of the ICC award. These proceedings were pending at the time of the present decision.

Claimants in turn sought enforcement of the award in the United Kingdom. By an ex parte order of 11 January 2011, the High Court, per Steel J, granted permission to enforce. TANESCO applied to have the order set aside or to adjourn enforcement. Claimants applied for an order that TANESCO give security in case of adjournment (they also applied for partial enforcement of the "debt" part of the award, but this request was not pursued in the proceedings).

The High Court, per Mr. Justice Burton, confirmed the granting of enforcement; it also granted an adjournment pending resolution of the setting aside application in Tanzania, subject to a US$ 5 million security.

The court first considered whether enforcement should be denied because the award was not yet binding due to the setting aside petitions in Tanzania. It noted that the parties undoubtedly agreed that the award would be binding, both in the arbitration clause and in the Terms of Reference; the binding character of ICC awards is also provided for in the applicable ICC Rules. The requirement that the award be "binding" is established by the 1958 New York Convention, which replaced the requirement in the Geneva Convention of 1927 that the award be "final" (the so-called double exequatur). However, no definition of the meaning of "binding" is given in the Convention, or in the Arbitration Act 1996. The

court referred extensively to leading doctrine, and in particular to Albert Jan van den Berg's 1981 treatise, *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation*, for the opinion, now predominant, that the term "binding" should be interpreted autonomously under the Convention. This view is best analyzed, in the court's opinion, by differentiating between ordinary recourse, which is usually subject to a time limit, and extraordinary recourse, that is, a limited challenge to the award, in the courts of its home jurisdiction, by reference to the restrictive terms of the New York Convention. Once ordinary recourse is excluded, the possible availability of extraordinary recourse does not prevent an award from being binding. Thus, a pending action for annulment did not affect the binding effect of the award.

The court added that if it had reached the different conclusion that the award was not yet binding, it would in any event have exercised its discretion to enforce the award despite the existence of a ground for refusal under the Convention.

Having granted enforcement, the court considered whether it should also grant TANESCO's request for an adjournment. The court weighed the prospects of success for the annulment application in Tanzania in accordance with what it understood to be the (case) law that the Tanzanian court will apply, "in the confident expectation that, in applying that law, the Tanzanian court will have full regard to the international approach to the undesirability of interfering with the careful decisions by arbitrators on issues which, by virtue of an arbitration agreement such as in this case, have been referred to those arbitrators in order for them to make a final and binding decision".

The court reached the conclusion that in the present case TANESCO's chances of success of setting aside the award were not fanciful, but that there were substantial hurdles to surmount, in particular, showing that the award did not fall under the so-called *Absalom* Exception, an exception to an award's susceptibility to challenge established by a UK precedent that applies in Tanzania. This made this case a case towards the lower end of the "sliding scale" between manifest validity of the pending application in the home jurisdiction and manifest invalidity, in the words of *Soleh Boneh*. This situation justified an adjournment coupled with an order for security.

The court finally found that the giving of security was appropriate here to safeguard Claimants in relation to any harm due to the adjournment. It therefore ordered security in the sum of US$ 5 million as a condition for adjournment.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152042-n>.

UNITED STATES

Accession: 30 September 1970
1st and 2nd Reservation

713. United States District Court, Southern District of New York, 23 February 2010, 09 Civ. 9531 (SAS)

Parties:	Petitioner: Scandinavian Reinsurance Company Limited (nationality not indicated) Respondents: (1) St. Paul Fire & Marine Insurance Co. (nationality not indicated); (2) St. Paul Reinsurance Co., Ltd. (nationality not indicated); (3) St. Paul Re (Bermuda) Ltd. (nationality not indicated)
Published in:	732 Federal Supplement, Second Series (S.D.N.Y. 2010) p. 293 et seq.; available online at <www.docs.justia.com>; U.S. Dist. LEXIS 15952
Articles:	V(1)(*e*)
Subject matters:	– award set aside – domestic law applies to setting aside (vacatur) of 1958 New York Convention award – bias of arbitrator
Topics:	¶ 516

Summary

The court vacated an award rendered in New York and therefore refused the award's enforcement under Art. V(1)(e) of the New York Convention. The court found that the behavior of two arbitrators met the "evident partiality" standard because they failed to

disclose that they were acting as arbitrators in a contemporaneous arbitration involving similar issues, related parties and a common witness.

On 21 August 1999, Scandinavian Reinsurance Company Limited (Scandinavian Re) and St. Paul Fire & Marine Insurance Co. (St. Paul) entered into a Retrocessional Casualty Stop Loss Agreement (the Scandinavian Re Agreement) under which St. Paul ceded a portion of its casualty reinsurance portfolio to Scandinavian Re. The Scandinavian Re Agreement contained a clause providing for arbitration of disputes by three "disinterested" arbitrators.

A dispute arose between the parties. On 26 September 2007, St. Paul, St. Paul Reinsurance Company, Ltd. and St. Paul Re (Bermuda) Ltd. (collectively, St. Paul) commenced arbitration against Scandinavian Re in New York. As provided in the Scandinavian Re Agreement, each party appointed an arbitrator – Scandinavian Re appointed Jonathan Rosen and St. Paul appointed Peter Gentile – and the two party-appointed arbitrators selected an umpire, Paul Dassenko. Although the Scandinavian Re Agreement did not so require, all three arbitrators were certified by the AIDA Reinsurance and Insurance Arbitration Society (ARIAS). ARIAS-certified arbitrators are required to abide by the ARIAS-US guidelines, which require arbitrators, inter alia, to disclose any interest or relationship likely to affect their judgement and to resolve all doubts in favor of disclosure.

At an organizational meeting on 25 February 2008, the arbitrators made disclosures in respect of their relationships with each other, the parties, their counsel and the dispute. Prior to his appointment as umpire, Dassenko had also filled in a disclosure questionnaire disclosing, inter alia, his relationships with certain listed companies affiliated with both Scandinavian Re and St. Paul. At the organizational meeting, Dassenko and Gentile assured the parties that they acknowledged that disclosure was an ongoing responsibility. Accordingly, additional disclosures were made in the course of the arbitration.

In the meantime, on 2 June 2008, an arbitration was commenced between PMA Capital Insurance Company (PMA) and Platinum Underwriters Bermuda, Ltd. (Platinum Bda), in respect of a 2003 retrocessional agreement. According to Scandinavian Re, the Platinum Arbitration involved similar issues and contract terms as the Scandinavian Re Arbitration; a witness in the Scandinavian Re Arbitration, Bart Hedges, was also a witness in the Platinum Arbitration; and Platinum Bda was St. Paul's successor. This last point was disputed by St. Paul. Neither Platinum Bda nor its parent, Platinum Underwriters Holdings Ltd. (Platinum Holdings), were among the companies listed in the umpire questionnaire completed by Dassenko in the Scandinavian Re Arbitration. In the Platinum Arbitration, Platinum Bda appointed Gentile as its party-arbitrator and

Dassenko was chosen as the umpire. At on organizational meeting on 23 September 2008, both Dassenko and Gentile disclosed that they were serving together as arbitrators in another arbitration, but did not specify that they were referring to the Scandinavian Re Arbitration. On 22 May 2009, the arbitrators issued an award in the Platinum Arbitration, which was vacated on 17 September 2009 by the United States District Court for the Eastern District of Pennsylvania on the grounds that it could not be rationally derived from the parties' submissions and was "completely irrational".

In the Scandinavian Re Arbitration, Dassenko and Gentile did not disclose that they were both chosen to be arbitrators in the Platinum Bda arbitration, or that Hedges was a witness in both arbitrations.

On 19 August 2009, the arbitrators issued a majority award (Dassenko and Gentile, Rosen dissenting) in the Scandinavian Re Arbitration, finding in favor of St. Paul. On 22 October 2009, Scandinavian Re became aware of the majority's involvement in the Platinum Arbitration. It then sought annulment of the award, claiming that Dassenko and Gentile exhibited evident partiality by failing to disclose their simultaneous involvement in the Platinum Arbitration; St. Paul cross-moved to enforce the award.

The United States District Court for the Southern District of New York, per Shira A. Scheindlin, US DJ, granted the petition to vacate and denied the cross-petition to enforce, holding that the behavior of Dassenko and Gentile met the "evident partiality" standard required to vacate an award under the Federal Arbitration Act (FAA) and, as the award was vacated in the country of rendition, the United States, its enforcement should be denied under Art. V(1)(*e*) of the 1958 New York Convention.

The district court first noted that because Art. V(1)(*e*) provides that a court may refuse to confirm an award if the award has been set aside by a competent authority of the country of rendition, the Convention permits a court in the United States to apply domestic arbitration law – the FAA – to a motion to vacate that award. Sect. 10(a)(2) of the FAA allows a court to vacate an award where there was evident partiality in the arbitrators. Evident partiality is found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. Thus, in the present case Scandinavian Re, the party moving to vacate the award, had the burden to show more than a mere appearance of bias but did not need to furnish proof of actual bias.

The court concluded that the "evident partiality" standard was met here. The court found that the Scandinavian Re Arbitration and the Platinum Bda Arbitration were heard by two common arbitrators, overlapped in time, shared similar issues and involved related parties: even if St. Paul had no direct

corporate connection to Platinum Bda, a substantial relationship between St. Paul and Platinum Bda's parent, Platinum Holdings, was clearly revealed during both arbitrations. Further, the two arbitrations included Hedges as a common witness and another witness in the Scandinavian Re Arbitration was employed by Platinum US at the time she appeared. By participating in both arbitrations, reasoned the court, Dassenko and Gentile could receive ex parte information about the kind of reinsurance business at issue in the Scandinavian Re Arbitration, be influenced by Hedges's testimony in the Platinum Bda Arbitration, and influence each other's thinking on issues relevant to the Scandinavian Re Arbitration. By failing to disclose their participation in the Platinum Bda arbitration, Dassenko and Gentile deprived Scandinavian Re of an opportunity to object to their service on both panels and/or adjust their arbitration strategy.

The court added that it was irrelevant that Dassenko and Gentile may have believed in good faith that they would not be influenced in the Scandinavian Re Arbitration by the information they learned in the Platinum Bda Arbitration, nor did St. Paul's argument that the undisclosed relationships were trivial because neither Dassenko nor Gentile had any financial (or other) interest in the outcome of the arbitration and neither Dassenko nor Gentile had any direct relationship with St. Paul change the court's conclusion.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152043-n>.

714. United States Court of Appeals, Fifth Circuit, 18 March 2010, No. 09-30177
United States District Court, Eastern District of Louisiana, 28 March 2011, Civil Action No. 08-1195 SECTION "C" (3)

Parties:	Plaintiff/Appellee: Anthony Todd (US) Defendant/Appellant: Steamship Mutual Underwriting Association (Bermuda) Limited (Bermuda)
Published in:	Both decisions available online at <www.justia.com>; *Court of Appeals*: 2010 U.S. App. LEXIS 5637; *District Court*: 2011 U.S. Dist. LEXIS 38638
Articles:	II(1); II(2); II(3)
Subject matters:	– non-signatory plaintiff compelled to arbitrate – "direct benefits" theory of estoppel – Chapter 2 Federal Arbitration Act (FAA) allows court to compel arbitration abroad – relationship Chapters 1 and 2 (1958 New York Convention) of Federal Arbitration Act (FAA) – Louisiana Direct Action Statute no obstacle to non-signatory being compelled to arbitrate – 1958 New York Convention not reverse-preempted by state law on insurance (Louisiana) – applicable law to whether non-signatory is bound by arbitration clause – applicable law to scope of arbitration agreement – scope of arbitration clause – arbitration agreement "null and void" on public policy grounds (no)
Topics:	¶ 226; [5] + [29] = ¶¶ 214-216; [8]-[22] = ¶ 217; [36]-[46] = ¶ 221; [57]-[62] = ¶ 201; [63]-[64] = ¶ 205; [65]-[66] = ¶ 223; [67]-[69] = ¶ 220

Summary

This case concerned an insurance policy governed by English law and the question whether a non-signatory employee of the insured could be compelled to arbitrate the claims he brought against the insurer under the Louisiana Direct Action Statute – by which an injured plaintiff may sue the insurer directly when the insured is insolvent. Court of Appeals: the Supreme Court reversed earlier Fifth Circuit case law that the Direct Action Statute prevents direct-action plaintiffs being compelled to arbitrate under the arbitration clause in the insurance policy. Thus, the direct-action plaintiff in this case could be compelled to arbitrate if all jurisdictional requirements were met. District Court: arbitration could be compelled under the New York Convention since (i) there was an agreement in writing to arbitrate the dispute; (ii) the agreement provided for arbitration in the territory of a Convention signatory; (iii) the agreement arose out of a commercial legal relationship; and (iv) a party to the agreement was not an American citizen. Under Louisiana law, which applied to this procedural issue by virtue of the English choice-of-law rules, the non-signatory plaintiff could be compelled to arbitrate because he asserted his claims against the insurer on the sole basis of the insurance policy. Also, the claims at issue fell within the scope of the arbitration clause under English law, which applied to this substantive issue.

Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship) insured Delta Queen Steamboat Company (Delta Queen), an operator of steamboats, against liability for injuries to its employees. The insurance policy stated that it was governed by English law. It also provided for arbitration of disputes by two arbitrators in London.

In 2000, Anthony Todd was injured while serving as a chef onboard the *M/V AMERICAN QUEEN*, a replica steamboat owned and operated by Delta Queen. When the injury occurred, the ship was cruising along the Mississippi River in the state of Louisiana. Todd filed Jones Act claims against Delta Queen (which filed for bankruptcy protection in 2001) in Louisiana state court; in 2007, he obtained a decision in his favor, which Delta Queen did not satisfy.

In 2008, Todd filed suit in Louisiana state court against Steamship, attempting to collect on his judgment against Delta Queen pursuant to Louisiana's Direct action Statute, which allows injured individuals to proceed directly against insurers when an insured tortfeasor is insolvent. Steamship removed the action to federal district court and sought referral to arbitration in London under the arbitration clause in the insurance policy with Delta Queen. The United States District Court for the Eastern District of Louisiana denied the motion, on the sole ground that the 1997 decision of the Fifth Circuit in *Zimmerman* foreclosed referring this case to arbitration. Steamship appealed.

By the first decision, rendered on 18 March 2010, the United States Court of Appeals for the Fifth Circuit, before Garwood, Wiener and Benavides, CJS, in

an opinion by Fortunato P. Benavides, reversed the district court's decision, finding that the Supreme Court 2009 decision in *Carlisle*, which was released after the district court rendered its decision, effectively overruled *Zimmerman* as well as the earlier (1989) decision in *Big Foot*. The Court of Appeals then remanded the case to the court below for further proceedings to determine whether Todd could be compelled to arbitrate.

The Court first noted that while under the domestic provisions of the Federal Arbitration Act (FAA) district courts may only refer cases to arbitration within their own district, this limitation does not apply to cases falling under the 1958 New York Convention, which are regulated by the Convention's implementing legislation, Chapter 2 of the FAA. Also, the domestic provisions in the FAA apply to Convention cases, to the extent that they do not conflict with the Convention.

In *Zimmerman* and *Big Foot*, injured seamen filed claims against their employers' foreign insurers under Louisiana's direct action statute. In both cases, the Court of Appeals denied the insurers' motion to stay proceedings pending arbitration between the insurers and the seamen's employers, finding that direct-action plaintiffs cannot be compelled to arbitrate under insurance policies to which they are not a party. Although the facts were different in the present case – Steamship sought to compel arbitration rather than stay court proceedings, and Todd had already won a judgment against Steamship's insured, Delta Queen, and was suing Steamship to collect on it – the Court reasoned that *Zimmerman* and *Big Foot*, if still valid, would rule out arbitration here.

However, the Supreme Court held in its 2009 decision in *Carlisle*, which was released after the district court rendered its decision in this case, that non-signatories to arbitration agreements (such as direct action plaintiffs) may be compelled to arbitrate under the "traditional principles" of state law allowing a contract to be enforced by or against non-parties through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel". *Carlisle* therefore overruled the Fifth Circuit's holdings in *Zimmerman* and *Big Foot* that direct action plaintiffs need never arbitrate under federal law because they are not parties to the insurance policies creating an obligation to arbitrate.

The Court of Appeals added that it was irrelevant that *Zimmerman*, *Big Foot* and *Carlisle* focused on the domestic part of the FAA rather than the New York Convention. Although the Convention and the FAA differ in certain important respects, courts have largely relied on the same common law contract and agency principles to determine whether non-signatories must arbitrate. Consequently, *Carlisle* and other cases discussing whether non-signatories can be compelled to arbitrate under the domestic provisions of the FAA are relevant for a case, such

as the present one, governed by the New York Convention. This is the first decision reported.

By the second decision, rendered on 28 March 2011, the United States District Court for the Eastern District of Louisiana, per Helen G. Berrigan, US DJ, granted Steamship's motion to compel arbitration of Todd's claims.

The court first noted that under the 1958 New York Convention and the FAA, courts must compel arbitration of a Convention case if (i) there is an agreement in writing to arbitrate the dispute; (ii) the agreement provides for arbitration in the territory of a Convention signatory; (iii) the agreement arises out of a commercial legal relationship; and (iv) a party to the agreement is not an American citizen. These requirements were all undisputedly met here in respect of the dispute between the signatories to the insurance policy, Delta Queen and Steamship. However, Steamship sought to bind Todd, a non-signatory, to the arbitration agreement. Following the instructions of the Court of Appeals, the district court examined three issues.

First, the court held that the answer to the question whether a non-signatory could be compelled to arbitrate was not to be found in Steamship's Rules, which contained the arbitration clause, as these Rules were silent on this issue.

Second, the district court examined what law applied to (i) the question whether Todd could be compelled to arbitrate his claims against Steamship and (ii) to the question whether the arbitration agreement covered the claims before the court. The court concluded that under *Carlisle* it was compelled to apply generally applicable Louisiana contract law to issue (i). Because Louisiana contract law includes Louisiana choice-of-law rules, English law – the law chosen by the parties to govern the insurance policy – applied to determine this issue. English law, however, includes English choice-of-law rules, which in turn point to the lex fori, here Louisiana law, for the procedural issue of whether Todd could be deemed bound to arbitrate his claims against Steamship. Also in application of English choice of law rules, English law applied instead to the substantive question of whether Todd's claims fell within the scope of the arbitration agreement between Delta Queen and Steamship.

Third, the district court found that Todd could be compelled to arbitrate his dispute with Steamship. (1) The court held that Todd, as a non-signatory, could be compelled to arbitrate under Louisiana law on the direct-benefits estoppel theory, because he was relying on the terms of the insurance policy containing the arbitration clause as the sole basis for his claims against Steamship. The court dismissed Todd's argument that as Louisiana law prohibits arbitration clauses in insurance policies, Steamship could not assert the arbitration clause as a defense, reasoning that the Fifth Circuit has held that the New York Convention

supersedes the relevant Louisiana statute. (2) The court then held that under English law all of Todd's claims fell within the scope of the broad arbitration agreement between Steamship and Delta Queen. The same result would be reached under Louisiana law.

Finally, the district court dismissed three further arguments raised by Todd. Todd claimed that the Convention requires an arbitration agreement signed by the parties and therefore the Convention did not apply because he never signed any agreement to arbitrate. The court noted that the fact that Todd did not sign a written agreement was immaterial, because it was undisputed that there was a signed written agreement to arbitrate between Delta Queen and Steamship.

Todd also argued that because arbitration agreements in insurance contracts are prohibited in Louisiana, the court should decline to enforce the arbitration clause in the insurance policy at issue by applying by analogy Art. V of the New York Convention, which provides that enforcement of an award may be denied if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought. The district court noted that the Fifth Circuit already rejected the essence of this argument when it found that the relevant Louisiana statute was superseded by the Convention.

Last, Todd claimed that the arbitration agreement – which provided for the application of English law and London arbitration – effected a prospective waiver of Todd's statutory remedies under the Jones Act and the Louisiana Direct Action Statute and was therefore unenforceable as in violation of public policy. The court disagreed, noting that the choice for English law in the insurance policy only applied to disputes related to that policy, not to any of Todd's Jones Act claims. Further, Todd already asserted his Jones Act claims in state court and obtained a judgment against Delta Queen based on those claims. Nor was there a possible waiver of the Louisiana Direct Action Statute remedies, because that statute only provides plaintiffs a procedural right to proceed directly against an insured subject to all lawful terms and limits of the policy, which in the context of a Convention case, includes any arbitration agreements. This is the second decision reported below.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152044-n>.

715. United States District Court, District of Columbia, 7 June 2010, Civil Action No. 09-248 (RBW)
United States Court of Appeals, District of Columbia Circuit, 11 March 2011, No. 10-7093

Parties:	Petitioner/Appellant: The Argentine Republic Respondent/Appellee: National Grid PLC (UK)
Published in:	*District Court*: 2010 U.S. Dist. LEXIS 142052; *Court of Appeals*: available online at <www. justia. com>; 2011 U.S. App. LEXIS 4965
Articles:	V (in general)
Subject matter:	– grounds for refusal of enforcement (in general)
Topics:	¶ 500

Summary

The district court held that Argentina's motion to vacate an award rendered in Washington, DC, under the UNCITRAL Rules was time-barred and granted respondent's cross-motion to confirm, noting that Argentina did not raise any defense under the 1958 New York Convention. The Court of Appeals affirmed, also dismissing Argentina's contention that the court below should have given Argentina the opportunity to raise Convention defenses. The Court held that Argentina had ample opportunity to raise those defenses before the district court. Since it did not, the court below correctly confirmed the award.

On 25 April 2003, National Grid PLC (National Grid), a UK company operating in the electricity transmission sector in the Argentine Republic (Argentina), commenced arbitration against Argentina under the UNCITRAL Arbitration Rules, as provided for in the 1990 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments. National Grid claimed that the emergency measures implemented by Argentina following a national financial crisis destroyed the value of its investment in that country. Arbitration proceedings were held in Washington, DC. On 3

November 2008, the arbitral tribunal found in favor of National Grid in the amount of about US$ 53 million plus costs and interest.

Argentina received a copy of the award on 13 November 2008. Under the Federal Arbitration Act (FAA), it then had three months, until 13 February 2009, in which to serve notice on National Grid of a motion to vacate or modify the award. On 6 February 2009, Argentina filed such motion with the United States District Court for the District of Columbia. On 10 February 2009, it filed a motion to extend time to serve notice, claiming that it would be impossible to complete service of notice within the three-month period because proper service in the United Kingdom requires using a central governmental authority. On 19 February 2009, the parties filed a joint stipulation with the district court, in which National Grid agreed to accept service of process of Argentina's petition, without waiving any defense, including the timeliness defense. National Grid then cross-moved to confirm the award.

By the first reported decision, the district court, per Reggie B. Walton, US DJ, held that Argentina's motion was time-barred. The court reasoned that the FAA compelled it to grant the motion to confirm the arbitral award unless it found the award should be vacated, modified or corrected on the grounds listed in the FAA. For the court to vacate, modify or correct an award, the party seeking such relief must serve notice of the motion to this purpose on the other party within three-months after the award is filed or delivered. The district court added that there is "no statutory or common law exception to this time limitation". Further, in the present case there was nothing in the record showing that Argentina served National Grid with notice of its petition before 13 February 2009. Rather, it appeared that National Grid accepted service on 19 February 2009.

With no basis for vacatur or modification, the district court granted National Grid's cross-motion to confirm the award. In a footnote, the court noted that it need not resolve the question of whether confirmation should be refused on the grounds in Art. V of the 1958 New York Convention, as Argentina did not rely on any of these grounds in opposing National Grid's cross-motion. This is the first decision reported.

By the second reported decision, the United States Court of Appeals for the District of Columbia Circuit, before Tatel and Brown, CJJ, and Silberman, Senior CJ, affirmed the lower court's decision that the motion was time-barred. The Court of Appeals also dismissed Argentina's contention that the district court erred in granting the motion to confirm the award without first giving Argentina the opportunity to raise the defenses available under the Convention. The Court of Appeals held that Argentina had ample opportunity to raise those

defenses before the district court. Confirmation proceedings under the Convention are summary, and the court must grant the confirmation unless it finds that there is one of the grounds for refusal listed in the Convention. Since Argentina made no attempt to rely on those grounds in the district court, the district court was right in confirming the award.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152045-n>.

716. United States District Court, Southern District of New York, 10 September 2010

Parties:	Plaintiff: Bogdan Dumitru (Romania) Defendant: Princess Cruise Lines, Ltd. (nationality not indicated)
Published in:	732 Federal Supplement, Second Series (S.D.N.Y. 2010) p. 328 et seq.
Articles:	II(3)
Subject matter:	– arbitration agreement "null and void" because of unequal bargaining power of parties (no)
Topics:	¶ 220

Summary

The court denied reconsideration of its earlier ruling (US no. 710, Yearbook XXXVI (2010)) – which referred a dispute concerning a seafarer's injury to arbitration, but severed the Bermuda choice-of-law and choice-of-venue provisions, holding that they operated in tandem to deprive the seafarer of his US statutory rights under the Jones Act. The motion was untimely and also failed to meet the standards for reconsideration. The claim that the court did not recognize that an arbitration clause in an employer/employee relationship can be voided because of the "overweening bargaining power" of the employer failed, as some disparity in bargaining power is inherent in such relationships and the court addressed this point by severing the non-enforceable clauses. The claim that contrary to the court's opinion the plaintiff did point to cases remanding a Jones Act claim where there was an arbitration agreement falling under the 1958 New York Convention also failed, because those cases were both distinguishable and not controlling case law in the district.

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 563-567 (US no. 710). On 30 November 2006, Bogdan Dumitru signed an Acceptance of Employment Terms and Conditions (the Acceptance Agreement) with Princess Cruise Lines, Ltd. (PCL). The Acceptance Agreement stated that the parties acknowledged that PCL's Principal Terms and Conditions of Employment (the Terms) were incorporated into the contract by reference and agreed that any

dispute would be resolved by arbitration as provided for in the Terms. The Terms provided for the application of Bermuda law to disputes arising thereunder and for arbitration of disputes in Bermuda; they also stated that void or unenforceable provisions were severable. It was disputed whether Dumitru also signed PCL's Crew Agreement, which provided that employees were considered members of the crew with effect from the date of signing.

Dumitru broke an ankle while working aboard one of PCL's vessels and had surgery at PCL's expenses. On 30 April 2009, he filed suit against PCL in the Supreme Court of the State of New York, New York County, claiming that his ankle required new surgery and prevented him from working. On 17 February 2010, Dumitru filed a second suit in the Supreme Court of the State of New York, New York County. Both suits included Jones Act claims. PCL removed both cases to federal court and sought arbitration. Dumitru moved to remand.

The United States District Court for the Southern District of New York, per Naomi Reice Buchwald, US DJ, granted PCL's motion to compel arbitration, but severed the Bermuda choice-of-law and choice-of-venue part of the arbitration clause. The court found that there was an arbitration agreement in writing under the 1958 New York Convention because Dumitru signed the Acceptance Agreement and thereby acknowledged the applicability of the Terms containing the arbitration clause. Though the Bermuda choice-of-law and choice-of-venue provision in the Terms could result in a prospective waiver of Dumitru's US statutory rights under the Jones Act in violation of public policy, PCL offered to arbitrate in US venues and the Bermuda choice-of-law could be severed as allowed under the Terms. Thus, the core agreement to arbitrate could be enforced. The court referred the dispute to arbitration at the International Centre for Dispute Resolution (ICDR).

By the present decision, the district court, again per Naomi Reice Buchwald, US DJ denied reconsideration of the earlier decision. The court held that the motion was inadmissible as it was filed after the allowed time period had expired. Further, even assuming that it were admissible, it did not meet the standards for reconsideration, which is an extraordinary remedy to be employed sparingly, only when a court overlooks controlling decisions or factual matters that were put before it and which, if examined, might reasonably have led to a different result.

Dumitru mostly raised arguments that were previously made and rejected, and that the court declined to address further. Dumitru further claimed that the court did not recognize in its first decision that a forum selection/arbitration clause may be void because of the "overweening bargaining power" of a party. The court agreed that this was true as a broad proposition of law, but noted that Dumitru

failed to prove that such a finding could be made purely on the basis of an employer/employee relationship, which is inherently subject to some disparity in bargaining power. The court also added that it indirectly addressed the unequal bargaining power by severing the Bermuda choice-of-law and choice-of-venue provisions.

Dumitru also argued for the first time in this proceeding that arbitration would require him to pay an exorbitant filing fee under the ICDR rules. This would deprive him of another statutory protection under the Jones Act, namely, an exemption from the pre-payment of court costs and fees. The court held that this was not a basis for reconsideration, merely an attempt by Dumitru's counsel to remedy their failure to survey all potential arguments available to their client.

Finally, Dumitru claimed that the court erred in holding in its first decision that Dumitru failed to cite any case in which a district court remanded a Jones Act claim notwithstanding the existence of an arbitration agreement falling under the New York Convention. In fact, said Dumitru, he pointed to three such decisions. The court noted that none of these cases were controlling case law in its District and were distinguishable in crucial respects, as they either concerned Jones Act claims that did not fall under the relevant arbitration clause or assumed that foreign law would apply. This was not the case here.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152046-n>.

717. United States Court of Appeals, Ninth Circuit, 28 September 2010, Cases No. 08-15708 and No. 09-15369

Parties:	Plaintiff/Appellants: (1) Polimaster Ltd. (Belarus); (2) Na&Se Trading Co., Limited (Cyprus) Defendant/Appellee: RAE Systems, Inc. (US)
Published in:	623 Federal Reporter, Third Series (Ninth Circuit) p. 832 et seq.; available online at <www.justia.com>; 2010 U.S. App. LEXIS 19990
Articles:	V(1)(*d*)
Subject matters:	– grounds for refusal of enforcement are exhaustive and strict – irregularities in arbitration (counterclaim allowed) – ambiguous wording
Topics:	¶ 513

Summary

The Court denied enforcement, reversing the district court's decision, because the arbitration procedure had not been in accordance with the parties' agreement. The arbitration clause here unambiguously provided for arbitration of claims "at the defendant's site". Hence, the arbitrator erred in allowing a counterclaim to be brought against the Belarus claimant in an arbitration commenced in California, the US defendant's site. The Belarus party was the defendant in the counterclaim and the action against it should have been brought in Belarus. Although this conclusion led to an inefficient result, parties cannot be assumed to choose arbitration for efficiency's sake only. Rather, the pro-arbitration policy of the United States requires the courts to enforce the parties' agreement.

The facts of this case are also reported in Yearbook XXXIV (2009) at pp. 1014-1016 (US no. 660). On 15 January 2003, Polimaster Ltd. (Polimaster) and Na&Se Trading Co., Limited (Na&Se) entered into two agreements with RAE Systems, Inc. (RAE) in respect of the manufacturing and distributing of Polimaster's radiation detection instruments: a Nonexclusive License for Proprietary Information Usage Agreement (the License Agreement) and a

Product and Component Buy/Sell Agreement (the Buy/Sell Agreement). Both the License Agreement and the Buy/Sell Agreement contained a clause (clause 9.1 and clause 7.1, respectively) providing that disputes be settled by arbitration "at the defendant's side" (the parties agreed that this meant the "defendant's *site*", that is, the geographical location of the defendant's principal place of business).

Disputes arose between the parties in respect of the License Agreement. In May 2006, the parties filed a joint request for arbitration at RAE's site in California. A sole arbitrator was appointed. The parties agreed to use JAMS (The Resolution Experts) Comprehensive Arbitration Rules & Procedures. Polimaster made the following reservation:

> "It is Polimaster's position that no counterclaims will be filed in this matter based on the requirement in the agreement that all such claims be filed in the location of the party against whom such claims are brought. Because Polimaster is located in Belarus, Polimaster asserts that all such claims against it shall be brought in that location."

On 7 August 2006, RAE filed an answer which also asserted counterclaims. Polimaster argued that the sole arbitrator did not have jurisdiction over the counterclaims because, under the terms of the License Agreement, claims must be brought at the defendant's location, and thus in Belarus. On 20 September 2007, the arbitrator issued an award in favor of RAE. On 5 October 2007, RAE filed a motion to enforce the award. On 23 January 2009, the United States District Court for the Northern District of California, San Jose Division, granted the motion to enforce. This decision is reported in Yearbook XXXIV (2009) pp. 1014-1022 (US no. 660).

The United States Court of Appeals for the Ninth Circuit, before J. Clifford Wallace, Senior CJ, Procter Hug, Jr. and Richard R. Clifton, CJJ, in an opinion by Wallace, reversed the district court's decision, finding that enforcement should be denied because the arbitral procedure was not in accordance with the agreement of the parties. Since the arbitration clause in the License Agreement provided that all requests for affirmative relief be arbitrated at the defendant's site and Polimaster was the defendant to RAE's counterclaims, the dispute should have been arbitrated at Polimaster's site in Belarus.

The Court reasoned that although in principle counterclaims are resolved in the same proceedings as the claims and the joinder of counterclaims into a pending proceeding is widely contemplated by various rules of arbitral institutions, the parties' clause was adequate to provide for separate arbitrations

at the defendant's site and no rules providing for the joinder of counterclaims were incorporated into the License Agreement.

The Court admitted that its interpretation of the arbitration clause led to an inefficient result, that is, parallel arbitrations on related topics and disputes. However, the United States' policy favoring arbitration – which applies with special force in the field of international commerce – requires courts to enforce the parties' agreement, and although parties often choose arbitration for the sake of efficiency, no such motivation could be imputed to the parties here. Neither the court nor the arbitrator can rewrite a forum selection clause to suit a personal view of the virtue of efficiency.

Clifton CJ filed a dissenting opinion that is also reproduced below.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152047-n>.

718. United States District Court, Southern District of Florida, Miami Division, 7 October 2010, Case No: 10-23276-CIV-KING

Parties:	Plaintiff: Karla Monica Orozco (Mexico) Defendant: Princess Cruise Line, Ltd. d/b/a Princess Cruises (Bermuda)
Published in:	Available online at <www.justia.com>; 2010 U.S. Dist. LEXIS 111631
Articles:	II(3)
Subject matters:	– requirements for referral to arbitration (in general) – arbitration agreement "null and void" on public policy grounds (no) – arbitration agreement "null and void" because unconscionable (no)
Topics:	[6] = ¶¶ 214-216; [7]-[13] = ¶ 220

Summary

The court granted the defendant's motion to compel arbitration but severed the Bermudian choice-of-law provision in the arbitration agreement, accepting the defendant's stipulation to this purpose. This stipulation addressed the concern that a foreign arbitration provision and foreign law provision could operate in tandem to deprive the plaintiff, a seafarer, of her statutory Jones Act rights. The jurisdictional prerequisites for compelling arbitration under the 1958 New York Convention were all satisfied.

On 4 April 2007, Karla Monica Orozco signed an Acceptance of Terms and Conditions, a standard agreement that set forth some basic terms of employment, prior to being employed as a buffet stewardess by Princess Cruise Line, Ltd. d/b/a Princess Cruises (Princess Cruises) aboard Princess Cruises' ship *M/S ROYAL PRINCESS*. The Acceptance set out Orozco's position, her monthly hours and compensation, and her acceptance of the more detailed terms contained in a separate document, the Principal Terms and Conditions of Employment (the Terms). The Acceptance also contained an "Arbitration Notice & Agreement", wherein the employee acknowledged the existence of an

arbitration agreement in the Terms and further agreed "that any and all disputes shall be referred to and resolved by arbitration as provided for" in the Terms. In turn, Art. 14 of the Terms stated that any disputes arising out of the employment agreement, including personal injury, were governed by Bermuda law and to be arbitrated in Bermuda or California. Art. 15 of the terms provided that "the conditions of these Terms is severable. If any clause of these Terms is determined to be void or otherwise unenforceable by any court or tribunal of competent jurisdiction, then the remainder of the Terms shall stand in full force and effect."

Orozco alleged that she was sexually harassed, while working on the *M/S ROYAL PRINCESS*, by Luigi Pascale, her supervisor, who subsequently punished Orozco for rebuffing his advances by assigning her an excessive work schedule that caused her injuries, so that she ultimately took medical leave, underwent surgery and was diagnosed with a herniated disc.

On 3 June 2010, Orozco commenced an action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, seeking damages for her injuries and asserting, inter alia, Jones Act negligence claims. On 10 September 2010, Princess Cruises removed the case to federal court and filed a motion to compel arbitration.

The United States District Court for the Southern District of Florida, Miami Division, per James Lawrence King, US DJ, granted Princess Cruises' motion to compel arbitration but accepted Princess Cruises' stipulation to sever the Bermudian choice-of-law provision.

The district court noted that two cases decided by the Eleventh Circuit were relevant here: *Bautista*, decided in 2005, and *Thomas*, decided in 2009.

In *Bautista*, the Court of Appeals found that the arbitration clause in a seafarer's agreement was enforceable because it met the four jurisdictional requirements for compelling arbitration under the 1958 New York Convention: there was an arbitration agreement in writing; the agreement provided for arbitration in a Convention state and arose out of a commercial relationship; at least one party to the agreement was not an American citizen, or there was some reasonable relationship to one or more foreign states.

In the present case, all four *Bautista* jurisdictional prerequisites were undisputedly satisfied.

In *Thomas*, the Court of Appeals held that an arbitration clause requiring a seaman to arbitrate a Wage Act claim in a foreign country while applying foreign law would deprive the seaman of his statutory rights under the Wage Act and was therefore unenforceable on the basis of the affirmative defense of public policy in Art. V(2)(*b*) of the Convention.

In the present case, Orozco similarly argued that the choice-of-law and choice-of-forum provisions rendered the arbitration clause unenforceable because they operated in tandem to deprive Orozco of her statutory remedy under the Jones Act. The district court noted, however, that the Eleventh Circuit held in *Thomas* that arbitration clauses should be upheld "if it is evident that either US law definitely will be applied or if there is a possibility that it might apply and there will be later review". Here, Princess Cruises stipulated before the court that it waived the choice-of-law provision, allowing the arbitrator to apply US law if Orozco so chose. This stipulation directly addressed the public policy concern in *Thomas*.

The district court added that because of the strong federal interest in arbitration, courts will enforce arbitration agreements according to their terms, where possible. However, where, as here, an arbitration agreement contains a severability provision, a court may choose to excise any invalid provision. The court concluded that severing the choice-of-law provisions in the Acceptance and the Terms, as stipulated by Princess Cruises, was the appropriate remedy.

The court then dismissed Orozco's remaining arguments, holding in particular that the arbitration clause was not unconscionable because the seafarer was not in a position to negotiate it – a contention squarely rejected by the Eleventh Circuit in *Bautista* – and because arbitration and travel to Bermuda would be costly. The court noted in the latter respect that Orozco did not explain how arbitration will be more expensive than litigation, or how travel from Mexico to Bermuda will be costlier than travel from Mexico to Miami. Further, added the court, the "prohibitive costs" defense under the Convention had been already rejected by other judges in the district.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152048-n>.

719. United States District Court, Southern District of New York, 12 October 2010, 10 Civ. 3823 (RMB) (JCF)

Parties:	Petitioner: NTT DoCoMo, Inc. (Japan) Respondent: Ultra d.o.o. (Slovenia)
Published in:	2010 U.S. Dist. LEXIS 109377
Articles:	I(1); V; V(2)(*b*)
Subject matters:	– public policy and award ordering specific performance – narrow concept of public policy – burden of proof on respondent
Topics:	[4]-[8] = ¶ 110 + ¶ 518 + ¶ 524 (award ordering specific performance); [8] = ¶ 503

Summary

The court granted enforcement of an ICC award ordering specific performance, holding that such award does not per se violate public policy. Here, the respondent failed to prove that confirmation would violate the public policy of the United States, which in the context of the 1958 New York Convention only concerns the most basic notions of morality and justice and covers cases where the award violates some well-defined, dominant and explicit public policy.

On 1 February 2008, NTT DoCoMo, Inc. (DoCoMo) entered into a Stock Purchase Agreement with Ultra d.o.o. (Ultra), pursuant to which DoCoMo would sell and Ultra would purchase DoCoMo's shares of common stock in Telargo, Inc. (Telargo), a Delaware corporation owned jointly by DoCoMo and Ultra. The Stock Purchase Agreement provided that Ultra would pay a total of US$ 3,086,900 in three installments between 31 March 2008 and 31 December 2009. The Stock Purchase Agreement provided for International Chamber of Commerce (ICC) arbitration of disputes.

A dispute arose between the parties when Ultra allegedly failed to make the first installment payment and repudiated its obligation to make the remaining two payments. Ultra argued that it did not pay because of alleged breaches by DoCoMo. On 2 July 2008, DoCoMo commenced ICC arbitration in New York

City pursuant to the Stock Purchase Agreement. On 26 January 2010, an ICC arbitral tribunal found that DoCoMo was entitled to an order of specific performance against Ultra to pay US$ 3,086,900 in exchange for the Telargo shares. The arbitrators also ordered Ultra to pay interest on that sum, to reimburse DoCoMo one-half of the amount paid as advance on costs of the arbitration (US$ 125,000) and to pay an additional sum of US$ 300,000 in partial reimbursement of DoCoMo's costs and attorneys' fees incurred during the arbitration (reduced by the tribunal from an initial request of US$ 700,000). On 10 May 2010, DoCoMo filed a motion to confirm the ICC award.

The United States District Court for the Southern District of New York, per Richard M. Berman, US DJ, granted confirmation, dismissing Ultra's argument that confirmation of an award for specific performance would violate the public policy of the United States because monetary damages would clearly be adequate and appropriate.

The court reasoned that the public policy exception under the 1958 New York Convention is a narrow one that concerns the most basic notions of morality and justice and covers cases where the award violates some well-defined, dominant and explicit public policy. Here, Ultra failed to meet its burden of identifying and proving such public policy, merely invoking "due process concerns".

The district court then granted DoCoMo reasonable attorney's fees in respect of the confirmation proceedings.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152049-n>.

720. United States District Court, Southern District of New York, 19 October 2010, Case no. 10 Civ. 04541 (CM)
United States Court of Appeals, Second Circuit, 6 January 2011, Case no. 10-4331-cv
United States District Court, Southern District of New York, 8 February 2011, Case no. 10 Civ. 04541 (CM)

Parties:	Plaintiffs/Appellees: (1) Dedon GmbH (Germany); (2) Dedon Inc. (US) Defendant/Appellant: Janus et Cie (US)
Published in:	*District Court, 19 October 2010:* 2010 U.S. Dist. LEXIS 112131; *Court of Appeals, 6 January 2011:* available online at <http://scholar.google.co.uk/scholar_case?case=3384521707507939709&q=Dedon+GmbH+v.+Janus+et+Cie&hl=en&as_sdt=2,5>; 2011 U.S. App. LEXIS 262; *District Court, 8 February 2011:* available online at <http://blogatory.s3.amazonaws.com/wp-content/uploads/2011/02/dedon.pdf>; 2011 U.S. Dist. LEXIS 14112
Articles:	II(2); II(3)
Subject matters:	– existence of contract containing arbitration clause – jurisdiction of court to determine existence of arbitration agreement – competence-competence regarding existence of arbitration agreement (no) – stay of court proceedings (no)
Topics:	¶ 217

Summary

First decision: Arbitration can be compelled under the 1958 New York Convention only when the parties have agreed to arbitrate. When a party contests the existence or enforceability of an arbitration agreement, Supreme Court precedent mandates that the court first resolve the disagreement. A stay of proceedings pending arbitration was also denied because the court needed to decide the issue of whether the parties had entered into an arbitration agreement in order to decide the motion before it – the plaintiff's request for an injunction to desist from tortious interference – which would have to be referred to arbitration if the parties were found to have concluded an arbitration agreement. The court ordered a trial of the issue of whether the parties did conclude such an agreement, which was as yet unripe for decision in view of the contrasting evidence submitted. Second decision: The Court of Appeals affirmed the decision below in its entirety. Third decision: The Second Circuit's decision in Khan *– which held that both arbitration clauses and agreements must be either signed or contained in an exchange of communications in order to be enforceable under the Convention – would prevent referral to arbitration in this case, where the alleged contract and arbitration clause were unsigned. However, the issue that the district court needed to decide before it could address the tortious interference claim was whether an arbitration agreement had come into being absent a signature. Thus,* Khan *did not obviate the need for a trial on this issue.*

In 2002, Dedon GmbH, a designer and manufacturer of outdoor furniture, and its subsidiary Dedon Inc. (collectively, Dedon) entered into an agreement with Janus et Cie (Janus) to distribute Dedon products in the United States. The commercial relationship between the parties was governed by Dedon's General Terms and Conditions of Sale that were printed on the invoices that Dedon sent to Janus with each shipment. The Terms did not indicate that the distributorship was exclusive and specified that the confirmation of an order and the Terms constituted the entire agreement between Dedon and Janus. The Terms further contained a clause for arbitration in Hamburg, Germany, of disputes relating to each invoiced transaction. This clause was not at issue in the present case.

From August 2004 until April 2006, the parties negotiated the terms of an agreement that would give Janus exclusive distribution rights for Dedon products in the United States until 31 December 2011 (the Distribution Agreement). No contract was ever signed, though several draft proposals were exchanged. Janus claimed that the agreement came into being nevertheless because, after April 2006, the parties performed in accordance with its terms. The version of the Distribution Agreement that according to Janus governed the parties' relations since April 2006 provided for arbitration of disputes by three arbitrators in London under the Rules of Arbitration of the International Chamber of Commerce (ICC). This version also provided that the Distribution Agreement was governed by English law.

A dispute arose between the parties when, on 28 April 2010, Dedon sent a letter to Janus announcing that it planned to begin direct sales in the United States and that it considered the parties' business relationship to be over as of 15 July 2010. On 18 May 2010, Janus commenced ICC arbitration in London, claiming breach of contract by Dedon and seeking a declaration that the Distribution Agreement remained in force until 31 December 2011, payment of a termination fee and damages resulting from any direct sales that Dedon might make in the United States prior to 31 December 2011.

On 9 June 2010, in turn, Dedon filed a complaint before the United States District Court for the Southern District of New York, seeking a declaration that no Distribution Agreement existed and alleging tortious interference by Janus because of letters that Janus sent to individuals (one of them in New York) who were negotiating with Dedon to become Dedon's US sales representatives. The letters asserted that Janus was the exclusive distributor of Dedon products in the United States and that any attempt to act as a Dedon sales representative in the United States would constitute intentional interference with Janus's purported exclusive distribution agreement with Dedon.

On 23 June 2010, Dedon asked the ICC to examine whether it was prima facie satisfied that an arbitration agreement existed between the parties, as provided for in Art. 6(2) of the ICC Rules. Dedon also asked for an extension of its time to answer Janus's petition in the arbitration until after the ICC made the Art. 6(2) ruling. On 25 June 2010, the ICC denied Dedon's request for an extension. On 28 June 2010, so as not to put itself in danger of default, Dedon filed its answer to Janus's request for arbitration. In all its communications with the ICC, Dedon reiterated its contention that the Distribution Agreement was never executed by the parties. On 30 July 2010, the ICC concluded that it was prima facie satisfied that an arbitration agreement existed between the parties and began constituting the arbitral tribunal.

In the meantime, in the US proceedings, both Dedon and Janus filed motions before the district court on 16 July 2010. Dedon moved for a preliminary injunction to prohibit Janus from continuing to interfere with Dedon's ability to contract with potential US sales representatives. Janus moved for an order compelling arbitration and dismissing Dedon's complaint, or in the alternative staying the action pending a determination of arbitrability by the ICC arbitral tribunal that was being constituted.

By the first reported decision, rendered on 19 October 2010, the district court, per Colleen McMahon, US DJ, denied Janus's motion to compel arbitration without prejudice and deferred its decision on Dedon's motion until

a trial was held on the issue of whether the parties concluded an arbitration agreement.

The court reasoned at the outset that it was asked to determine whether it could or should decide the issue of whether the dispute should be referred to arbitration, which implied deciding whether the parties entered into the Distribution Agreement. Such decision should be made against the backdrop of the strong pro-arbitration policy of the Federal Arbitration Act and the case law of the Supreme Court of the United States, which requires courts to determine whether the parties have agreed to arbitrate in cases where the very existence of the arbitration agreement is disputed.

The district court first examined Janus's request to compel arbitration – which, it noted, was "strange" because Dedon was already arbitrating, albeit contesting arbitral jurisdiction. Janus relied on Art. II(3) of the 1958 New York Convention to argue that the court lacked jurisdiction because the dispute had already been submitted to ICC arbitration. The court found this argument "completely circular and utterly illogical". The text itself of Art. II(3) provides that a court is required to refer the parties to arbitration under the New York Convention only in a matter in respect to which the parties have made an agreement to arbitrate. Here, Dedon denied that there was an agreement to arbitrate disputes with Janus in London. Hence, the court could not compel Dedon to arbitrate without first finding that it entered into a valid and binding arbitration agreement with Janus, and that such agreement was not null and void, inoperative or capable of being performed. It was irrelevant that Janus had already commenced arbitration.

The court noted that the Supreme Court "has made it crystal clear that whenever a party contests the existence or the enforceability of an arbitration agreement, the court must resolve the disagreement". If Dedon were arguing that the arbitration agreement was void, voidable or illegal, then the matter would be for the arbitrators to determine. However, in the present case Dedon undisputedly did not sign the Distribution Agreement and did not agree with Janus's contention that the Agreement otherwise came into being.

Janus further claimed that Dedon waived its right to object to having the arbitrability issue decided in arbitration by submitting its request for a prima facie determination of arbitrability to the ICC. The court held that this argument was meritless as a matter of fact, since it appeared from the record that Dedon repeatedly objected to the submission of the dispute to ICC arbitration. Since there was no clear and unmistakable evidence of an agreement to arbitrate, as required by the Supreme Court's decision in *Kaplan* (see below), the district court should decide the question of whether the parties entered into a valid

arbitration agreement. Janus's motion to compel arbitration was therefore denied. However, the denial was without prejudice, so that Janus could renew the motion in the event the court determined that the parties did conclude an agreement to arbitrate.

The court also denied Janus's request to stay proceedings in favor of arbitration. Though concerned about the possibility of inconsistent rulings over whether an agreement to arbitrate existed – particularly because its own connection to the dispute was "the slender thread of a single allegedly tortious letter's being sent to a single New York recipient" – the court reasoned that it was even more concerned about abdicating its undoubted responsibility to decide the question of arbitrability, in light of the Supreme Court's repeated rulings that where some evidence supports the proposition that no agreement to arbitrate exists, this question is not to be submitted to arbitrators. Furthermore, noted the court, it could not decide Dedon's motion for a preliminary injunction against further interference by Janus without first addressing the issue of arbitrability. If the parties concluded a valid arbitration agreement in respect of all disputes "arising out of or in conjunction with" Janus's exclusive distributorship – as stated in the (draft) Distribution Agreement – then the claim for tortious interference would fall within the scope of the arbitration clause and the court would lack jurisdiction to decide it.

The court concluded, on balance, that it would deny the motion for a stay "pending arbitration of what is ultimately a non-arbitrable issue: the existence of an agreement to arbitrate".

The district court then held that at this point it should logically proceed to determine whether Dedon and Janus did in fact enter into the Distribution Agreement containing the arbitration clause. However, a decision on this issue would be premature. Rather, a trial was necessary in view of the competing evidence, both in favor and against conclusion of the Distribution Agreement. This is the first decision reported.

By the second reported decision, rendered on 6 January 2011, the United States Court of Appeals for the Second Circuit, before Amalya L. Kearse, Ralph K. Winter and Peter W. Hall, CJJ, affirmed the district court's decision in its entirety.

Janus raised a new argument in the appellate proceedings, namely, that aan alternative basis for arbitrating the exclusive distribution dispute could be found in the terms and conditions that accompanied each purchase order between Dedon and Janus. The Court of Appeals did not find this argument persuasive, reasoning that it clearly appeared from the terms that they only governed the particular exchange of goods occurring with that purchase order; they did not

create or refer to any exclusive distribution relationship between the parties, "which is the sole focus of the present suit".

Dedon claimed before the Court of Appeals that the district court should have denied Janus's motion to compel arbitration with prejudice. It argued that the Second Circuit's holding in *Kahn* precluded the district court from finding that an enforceable agreement to arbitrate existed. This made a trial on the existence of the agreement unnecessary. In dismissing the appeal, the Court of Appeals did not express an opinion on this argument as it had not been raised before the district court, but stated that the parties would have the opportunity to argue this point at the trial on the existence of the contract before the district court. This is the second decision reported.

By the third reported decision, rendered on 8 February 2011, the district court, again per Judge McMahon, held that *Kahn* did not obviate the need for the Court to hold a trial on the issue of whether the parties concluded an agreement to arbitrate. The Second Circuit held in *Kahn* that, in order to be enforceable under the New York Convention, both an arbitral clause in a contract and an arbitration agreement must be signed by the parties or contained in an exchange of letters or telegrams. *Kahn* thus precludes enforcement of an unsigned arbitration agreement pursuant to the New York Convention.

Here, however, there was no motion to compel arbitration under the New York Convention pending before the district court. If there were, the court would indeed deny the motion with prejudice as required under *Kahn*, because there was undisputedly no signed arbitration agreement between the parties. However, the issue that the district court needed to decide before it could address Dedon's tortious interference claim and its preliminary injunction motion was whether an arbitration agreement can come into being absent a signature. Since it was possible that the parties concluded a valid and binding agreement to arbitrate under the (yet to be determined) applicable contract law – though not an agreement that the court could enforce under the Convention – the court needed to solve that issue in order to decide whether to proceed with the tortious interference claim. The court therefore set a later date for expedited trial on this issue. This is the third decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152050-n>.

721. United States Court of Appeals, Third Circuit, 25 October 2010, No. 09-2514tg

Parties:	Plaintiffs/Respondents: (1) Invista S.à.r.l. (nationality not indicated); (2) Invista Technologies, S.à.r.l. (nationality not indicated); (3) Invista North America S.à.r.l. (nationality not indicated) Defendant/Appellant: Rhodia, SA (France)
Published in:	625 Federal Reporter,Third Series (3rd Circuit) p. 75 et seq.; available online at <www.justia.com>; 2010 U.S. App. LEXIS 21950
Articles:	II(3)
Subject matters:	– non-signatory defendant may (not) rely on arbitration agreement/clause – effect of arbitral finding of no jurisdiction over non-signatory party
Topics:	¶ 226

Summary

The district court had dismissed the defendant's motion to compel the plaintiff to participate in an arbitration and stay court proceedings, finding that the plaintiff, a non-signatory of the original joint venture agreement, was not bound by the arbitration clause therein. The Court of Appeals dismissed the appeal against that decision as moot, because in the meantime the arbitral tribunal had held that it had no jurisdiction over the defendant in court, which therefore could not seek any relief on the basis of the arbitration clause.

The facts of this case are also reported in Yearbook XXXIV (2009) at pp. 1098-1099 (US no. 669). In the 1960s, E.I. DuPont de Nemours (DuPont) developed a technology for manufacturing adiponitrile (ADN), a chemical used in the production of nylon. In 1974, DuPont de Nemours France S.A.S. (DuPont France) entered into a joint venture (Butachimie) with Société des Usines

Chimiques Rhône-Poulenc (SUCRP) to manufacture and sell ADN. The joint venture was governed, inter alia, by a joint venture agreement (JVA), which contained a clause providing for ICC arbitration of disputes.

The ownership of Butachimie was transferred several times; at the relevant time, the shares originally owned by SUCRP were held by Rhodianyl, a subsidiary of Rhodia, SA (Rhodia). DuPont's shares were purchased by an affiliate of Invista S.à.r.l. (Invista).

A dispute arose between the parties when, on 19 September 2006, Invista announced plans to build an ADN manufacturing facility in Asia and, shortly thereafter, Rhodia also revealed plans to build an ADN plant in Asia. Invista accused Rhodia of misappropriating trade secrets it learned through the joint venture. On 3 October 2007, Rhodianyl and Rhodia (collectively, Rhodia) initiated International Chamber of Commerce (ICC) arbitration against Invista and other Invista entities (collectively, Invista), seeking a declaratory ruling that they had a right to use the confidential information that was disclosed to Butachimie more than fifteen years before.

In turn, on 12 November 2008, Invista filed suit against Rhodia in state court in Delaware, bringing claims of misappropriation of trade secrets. On 12 December 2008, Rhodia removed the action to the United States District Court for the District of Delaware under the 1958 New York Convention and moved to dismiss or stay proceedings pending arbitration. On 20 May 2009, the district court denied Rhodia's motion, holding that Invista was not bound by the arbitration provision in the JVA. This decision is reported in Yearbook XXXIV (2009) at pp. 1098-1102 (US no. 669).

By the present decision, the United States Court of Appeals for the Third Circuit, before McKee, Chief Judge, Hardiman, Circuit Judge, and Cynthia M. Rufe, US DJ for the Eastern District of Pennsylvania, sitting by designation, in an opinion by McKee, dismissed Rhodia's appeal from the order of the district court, finding that the appeal had become moot because on 13 January 2010 the ICC arbitral tribunal issued a Partial Award holding that it lacked jurisdiction over Rhodia. The arbitrators found that although Rhodia had a direct interest in the Butachimie joint venture – which substantially supplied it with ADN – that interest was not sufficient to infer that Rhodia consented to the arbitration clause in the JVA establishing Butachimie.

The Court of Appeals noted at the outset that non-signatories may be bound to arbitration agreements under certain very limited circumstances; relevantly, Rhodia claimed that Invista was bound to the arbitration clause under the theory of estoppel and assumption. Rhodia overlooked, however, "the rather crucial fact" that Rhodia did not sign the arbitration clause either, and could not offer –

nor did the Court find – any authority for its contention that a non-signatory to an arbitration agreement can compel another non-signatory to arbitrate.

The Court concluded that this argument was ultimately irrelevant because the Partial Award rendered Rhodia's appeal moot: the arbitral tribunal's finding that it had no jurisdiction over Rhodia meant that Rhodia was "a stranger to the ICC Arbitration" and could not seek to compel arbitration or stay court proceedings on the basis of the arbitration clause in the JVA.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152051-n>.

722. United States District Court, Southern District of New York, 1 November 2010, Case no. 10 Civ. 5251 (SAS)

Parties:	Plaintiff: Glencore AG (Switzerland) Defendant: Bharat Aluminum Company Limited (India)
Published in:	Available online at <www.justia.com> and <www.nylj.com>, 1202474413491, at *1 (subscription required)
Articles:	I(1); III
Subject matters:	– personal jurisdiction over foreign defendant – piercing the corporate veil – alter ego doctrine
Topics:	¶ 106 + ¶ 301

Summary

An enforcement action is a summary proceeding. It is not the proper occasion to assert an alter ego theory for liability.

By a contract of 11 September 2008, Glencore AG (Glencore) sold 25,000 metric tons of alumina to Bharat Aluminum Company Limited (Balco), a company owned for 49 percent by the Government of India and 51 percent by Sterlite Industries (India) Limited (Sterlite India), an Indian company. In turn, Sterlite India was owned for 54 percent by Vedanta Resources PLC (Vedanta), an English company. The sale and purchase contract contained a clause for arbitration of disputes in England.

A dispute arose between the parties when Balco did not accept the vessel nominated by Glencore for the delivery and asked instead for a reduced price due to the falling price of aluminum. When negotiations between Glencore and Balco, Sterlite India and Vedanta to resolve the dispute failed, Glencore commenced arbitration against Balco in England as provided for in the contract. On 17 June 2010, a sole arbitrator found in favor of Glencore and against Balco in the amount of US$ 5,731,793, together with interest, arbitration costs and

legal costs. Glencore then sought enforcement of the English award in the United States against Balco; it also petitioned the court to hold Vedanta and Sterlite India liable as Balco's alter egos. Vedanta and Sterlite India moved to dismiss on the ground that the court lacked jurisdiction over them.

The United States District Court for the District of New York, per Shira A. Scheindlin, US DJ, dismissed Glencore's petition. The court noted at the outset that an action to enforce a foreign arbitral award is not the proper occasion to assert an alter ego theory for liability. An enforcement action is a summary proceeding where the court's powers are narrowly circumscribed to determining whether the award falls within the dispute as submitted to the arbitrator.

In the present case, Vedanta and Sterlite India were not parties to the arbitration and the award was issued only against Balco. Glencore named them as defendants alleging that they were alter egos of Balco. The court held that adjudicating whether Vedanta and Sterlite India were indeed alter egos of Balco for the purpose of holding them liable for the award would require new fact-finding not contemplated in enforcement proceedings. Hence, the court granted the motion of Vedanta and Sterlite India to dismiss the action against them.

The district court then examined whether it had jurisdiction over Balco and concluded that it had not, either directly or as an alter ego of Vedanta and Sterlite, as alleged by Glencore. First, Balco was not "doing business" in New York as is required for a finding of personal jurisdiction over a foreign defendant. Second, a finding that Balco was subject to the jurisdiction of the court as an alter ego of its parents would require the court to find both that the court had personal jurisdiction over Sterlite India and Vedanta and that Balco was their alter ego. Although a less stringent standard applies to a determination of alter ego status for the purpose of establishing jurisdiction than that necessary for purposes of liability, the court found that it lacked personal jurisdiction over Vedanta and Sterlite, which were not "doing business" in New York. Further, even if Glencore did provide sufficient evidence to make out a prima facie case that Balco was an alter ego of Vedanta and Sterlite India, Balco's evidence pointed in the opposite direction and discovery served no purpose as in any event the court lacked personal jurisdiction over Vedanta or Sterlite India.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152052-n>.

723. United States District Court, District of Hawaii, 2 November 2010, Civil No. 10-00622 JMS/KSC

Parties:	Plaintiff: Access Information Management of Hawaii, LLC (nationality not indicated) Defendants: (1) Shred-It America, Inc. (US); (2) Shred-It USA, Inc. (nationality not indicated); (3) Vincent Depalma (nationality not indicated); (4) Jeff Reis (nationality not indicated); (5) Janine Lozano (nationality not indicated); (6) David Epstein (nationality not indicated); (7) Phil Rico (nationality not indicated); (8) Doe Defendants 1-40 (nationality not indicated)
Published in:	Available online at <www.justia.com>; 2010 U.S. Dist. LEXIS 116862
Articles:	II(3)
Subject matters:	– removal from state court to federal court – requirements for referral to arbitration (in general) – arbitration agreement falling under 1958 New York Convention (no) – (lack of) reasonable relationship to foreign state
Topics:	¶¶ 214-216 + ¶ 217

Summary

The court remanded the action to state court, finding that the arbitration agreement did not fall under the 1958 New York Convention because the underlying relationship had no reasonable relation to a foreign state. The connections alleged by the removing party were superficial and mostly depended on its internal structure – a US company with corporate offices in Canada. They did not establish that the relationship had an "important foreign element", as is required under the Federal Arbitration Act for an arbitration agreement between US parties to fall under the Convention.

Shred-It Canada Corporation (Shred-It Canada), a Canadian company, developed a proprietary system regarding the establishment, development and operation of a shredding and recycling business; Shred-It Franchise, Inc. (Shred-It Franchise) owned the proprietary marks related to this business. Shred-It Franchise then granted Shred-It America, Inc. (Shred-It America) a license to use its proprietary marks for franchising in the United States.

By a Franchise Agreement concluded in 1998, Shred-It America granted Edward MacNaughton, in trust for what later became Shred-It Hawaii, the right to operate a Shred-It franchise business in Honolulu. Under the Franchise Agreement, relevantly, Shred-It America agreed to provide Shred-It Hawaii with training, marketing support and general assistance in arranging for working capital loans, leasing and/or purchasing of trucks and related financing assistance, while Shred-It Hawaii agreed to conduct its franchise in compliance with the Shred-It system, subject its General Manager to Shred-It America's management training program and cause its employees to complete additional training. The Franchise Agreement was governed by California Law; any action was to be brought in Orange County, California. The Franchise Agreement further provided for arbitration of disputes under the rules of the American Arbitration Association (AAA).

On 21 September 2010, Access Information Management of Hawaii, LLC (Access) purchased certain assets from Shred-It Hawaii. A dispute arose when Access claimed that since this purchase, Shred-It America and its agents Vincent Depalma, Jeff Reis, Janine Lozano, David Epstein and Phil Rico (collectively, Defendants) engaged in unfair methods of competition and misconduct. Several court proceedings followed. The present decision concerns an action filed by Access in the First Circuit Court of the State of Hawaii alleging various state law claims against Defendants stemming from their alleged misconduct. Shred-It America removed the action to the United States District Court for the District of Hawaii, asserting that the federal court had jurisdiction because the action related to the Franchise Agreement, which included an arbitration provision governed by the 1958 New York Convention.

The district court, per J. Michael Seabright, US DJ, granted Access's motion and remanded this action to the circuit court, finding that Shred-It America failed to carry its burden of establishing that the arbitration agreement in the Franchise Agreement fell under the New York Convention.

Pursuant to the Federal Arbitration Act (FAA), an arbitration agreement falls under the Convention if (1) there is a written agreement to arbitrate; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship that is considered

commercial; and (4) one party is not a US citizen, or the commercial relationship at issue involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

In the present case, the first three requirements were met, both Shred-It America and Shred-It Hawaii were US companies and the Franchise Agreement did not involve property located abroad or envisage performance and/or enforcement abroad. It remained thus to be seen whether, as alleged by Shred-It America, its relationship with Shred-It Hawaii in the Franchise Agreement had "some other reasonable relation" to a foreign state, namely, Canada.

Shred-It America asserted several connections with Canada – including the fact that the Franchise Agreement was executed in Canada and signed by a Canadian citizen on behalf of Shred-It America and that Shred-It America's corporate office and management were in Canada. The court held, however, that these connections were superficial at best, resulted simply from the manner in which Shred-It America structured its corporate offices and did not establish an "important foreign element" as required under the FAA.

The court added that requiring that the relationship have an important foreign element for an arbitration agreement to fall under the New York Convention comports with the very purpose of the Convention, that is, to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152053-n>.

724. United States District Court, Southern District of New York, 14 December 2010, Case No. 10 Civ. 1862 (RJH)

Parties:	Plaintiff: FR8 Singapore Pte. Ltd. (Singapore) Defendants: (1) Albacore Maritime Inc. (Marshall Islands); (2) Prime Marine Corp. (Marshall Islands); (3) Prime Marine Management Inc. (Liberia); (4) PMC Holding Inc. d/b/a Prime Marine Holdings Inc. (Marshall Islands)
Published in:	Available online at <www.justia.com>; 2010 U.S. Dist. LEXIS 132212
Articles:	II(3)
Subject matters:	– piercing the corporate veil – applicable law to whether non-signatory is bound by arbitration clause – relationship Chapters 1 and 2 (1958 New York Convention) of Federal Arbitration Act (FAA)
Topics:	¶ 226

Summary

The provisions in Chapter 1 of the Federal Arbitration Act (FAA) apply in 1958 New York Convention cases if they are not in conflict with the relevant provisions in Chapter 2 FAA, which implements the Convention in the United States. Sect. 4 FAA thus applied to allow a party to seek an order compelling arbitration in London. The issue of piercing the corporate veil to order non-signatory companies in the line of ownership of the company that was a party to the arbitration agreement was to be decided under the law chosen as the law governing the underlying contract. Though Second Circuit precedent is unclear on this question, the court chose to resolve any disharmony in case law in a way that allows the application of the choice-of-law clause.

In early 2008, Prime Marine Management Inc. (Prime Management), a Liberian company managing the companies of the Prime group, negotiated the purchase

of a vessel, the *OVERSEAS REGINAMAR*, from FR8 Singapore Pte. Ltd. (FR8 Singapore). On 1 April 2008, FR8 Singapore requested Prime Management to advise the name of the company of the Prime group that would execute the contract. On 2 April 2008, Prime Management indicated that the buyer would be Albacore Maritime Inc. (Albacore), which had been incorporated that day. Albacore was owned by AMC Holding Inc., which was owned by CLRT Holding, which was owned by Prime Marine Corporation (Prime), which in turn was wholly owned by PMC Holding Inc. (collectively, the Prime companies), all Marshall Islands companies with corporate books and/or offices in Greece.

On 14 April 2008, Albacore entered into a Memorandum of Agreement (MOA) to purchase the vessel from FR8 Singapore. The MOA set the purchase price of the vessel at US$ 58,500,000 and required a 10 percent security deposit, which Prime paid on 16 April 2008. Albacore signed the MOA in Greece; FR8 Singapore signed it in Singapore. The MOA provided that it "shall be governed by and construed in accordance with English law and any dispute arising out of this Agreement shall be referred to arbitration in London …".

The MOA provided that the vessel was to be delivered between 1 May and 30 June 2009. On 30 April 2009, FR8 Singapore sent Prime Management a notice that the vessel would be delivered on 11 May 2009. The next day, however, Prime Management informed FR8 Singapore that because of the "global financial meltdown", Albacore was unable to arrange financing for the transaction and that the financial crisis could serve as a basis to invoke the MOA's force majeure clause and terminate the contract.

FR8 Singapore continued to proceed as though the transaction would occur regularly and set the closing meeting for 11 May 2009 at the Marshall Islands registry in New York. On the day of the meeting, counsel for the Prime companies e-ailed counsel for FR8 Singapore that because FR8 Singapore had not yet provided a Notice of Readiness for delivery pursuant to the MOA, he did not have to attend the closing. FR8 Singapore sent a Notice of Readiness that same day, but counsel for the Prime companies did not attend the closing meeting. On 12 May 2009, Prime Management invoked the force majeure clause of the MOA to terminate the agreement, citing the global financial crisis. FR8 Singapore in turn accused the Prime companies of breaching the contract by failing to attend the closing meeting.

On 25 June 2009, FR8 Singapore commenced arbitration proceedings in London against Albacore, pursuant to the arbitration clause in the MOA.

On 9 March 2010, FR8 Singapore also commenced proceedings in the United States District Court for the Southern District of New York, seeking a declaration that Prime, Prime Management and PMC Holding Inc. (collectively,

the Prime Defendants) were bound to Albacore's arbitration agreement as alter egos of Albacore, and an order consequently compelling the Prime Defendants to join Albacore in defending FR8 Singapore's claims in the London arbitration. The Prime Defendants moved to dismiss the action.

On 7 July 2010, while the district court proceeding was pending, FR8 Singapore requested through counsel that the Prime Defendants participate in the London arbitration as if they were signatories and "agree to be joint and severally liable with Albacore". The Prime Defendants refused on the grounds that they disputed alter ego liability.

By the present decision, the district court, per Richard J. Holwell, US DJ, denied the Prime Defendants' motion to dismiss without prejudice to renewing it. The court dismissed the Prime Defendants' argument that the court had no jurisdiction under the 1958 New York Convention because FR8 Singapore was not a "party aggrieved" within the meaning of Sect. 4 of the Federal Arbitration Act (FAA), which provides that only a party aggrieved by the alleged failure, neglect or refusal of another party to arbitrate in accordance with a written arbitration agreement may petition the competent court for an order compelling arbitration.

The district court noted at the outset that Sect. 4 FAA applied to the present case, which fell under the 1958 New York Convention, because the provisions in Chapter 1 of the FAA, which governs domestic arbitration, apply to Convention cases, which fall under Chapter 2 FAA, to the extent that those domestic provisions do not conflict with Chapter 2. Second Circuit case law holds that Sect. 4 does not conflict with Chapter 2.

The court then held that FR8 Singapore's 7 July 2010 request to the Prime Defendants to participate in the London arbitration, and the Prime Defendants' refusal, made FR8 an aggrieved party as required under Sect. 4 FAA. The court rejected the Prime Defendants' argument that the July exchange either failed to meet the MOA's contractual notice requirements or did not comprise a demand and refusal to arbitrate under the MOA. The court found that on the contrary FR8 Singapore complied with the notice requirement of the MOA and unambiguously demanded the Prime Defendants to arbitrate, and that the Prime Defendants could not defeat subject matter jurisdiction simply because FR8 Singapore issued its demand to arbitrate to the Prime Defendants' counsel rather than directly to the address specified in the MOA.

The Prime Defendants also moved to dismiss FR8 Singapore's claim for failure to state a claim. The district court reasoned that the issue of the applicable law was relevant in this respect, as it affected the elements that FR8 Singapore must plead in order to support a veil-piercing or alter-ego claim. The Prime

Defendants argued that either the law of the Marshall Islands applied, being the law of the place of incorporation of the Prime companies, or English law applied because of the MOA's choice-of-law clause. In contrast, FR8 Singapore argued that the federal common law of the United States governs the question of veil-piercing in the context of an action to compel arbitration under the New York Convention.

The Prime Defendants based their claim that Marshall Islands law applied on a 1993 decision of the Second Circuit, where the Court relied on the choice-of-law principles of the forum state, New York, to hold that the law of the state of incorporation determined "when the corporate form will be disregarded and liability will be imposed on shareholders". Here, all the companies in Albacore's line of ownership were Marshall Islands corporations. However, in the decision referred to by the Prime Defendants the Second Circuit applied New York's choice-of-law doctrine to a *state law* veil-piercing claim; also, it disavowed this approach in Convention cases in the *Smith/Enron* case of 1999. The district court therefore concluded that it was inappropriate in this case to apply New York choice-of-law principles to hold that Marshall Islands law governed the question of alter ego or veil-piercing.

The court then considered that where the choice of law in a Convention case is between the law specified by the choice-of-law clause and federal common law, Second Circuit precedent "has been less than crystal clear". The court referred in particular to two cases, *Sarhank* and *Motorola*, noting that *Sarhank* counsels against honoring the choice-of-law clause in Convention cases when deciding the question of arbitrability, while *Motorola* counsels for honoring the clause. The district court chose to follow *Motorola*, finding that first, it was unclear that the two cases really conflict, as *Sarhank* may be distinguishable from the present case and, second, any disharmony should be resolved in a way that allows the application of the choice-of-law clause.

Since the parties did not brief the issue of piercing the corporate veil under English law, the court denied the Prime Defendants' motion to dismiss for failure to state a claim without prejudice to renewing the motion and briefing the issue of English law.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152054-n>.

725. United States Court of Appeals, Fourth Circuit, 15 December 2010, No. 09-2064

Parties:	Plaintiff/Appellee: AO Techsnabexport (Russian Federation) Defendant/Appellant: Globe Nuclear Services and Supply GNSS, Limited, d/b/a Global Nuclear Services and Supply, Limited (US)
Published in:	Available online at <http://pacer.ca4. uscourts.gov/opinion.pdf/092064.U.pdf>; 2010 U.S. App. LEXIS 25640
Articles:	III; V; V(1)(*b*); V(1)(*c*); V(1)(*d*); V(2)(*b*)
Subject matters:	– no cross-examination of witnesses not in accordance with parties' agreement – due process and no cross-examination of witnesses – estoppel from raising 1958 New York Convention defense not raised in the arbitration – public policy and criminal findings – excess of authority of arbitrators by considering criminal matters (no) – partial and final award in conflict (no)
Topics:	[2] = ¶ 502; [3] = ¶ 301; [4] = ¶ 501; [5]-[7] = ¶ 513 + ¶ 511 (no cross-examination of witnesses); [6]-[7] = ¶ 303; [8]-[21] = ¶ 512; [9]-[14] = ¶ 524 (criminal law findings)

Summary

Enforcement of an SCC award was confirmed. By failing to raise this argument before the arbitrators, the defendant waived its right to object to the arbitrators' admission as evidence of transcripts of interviews in a related criminal investigation on the ground that those interviews amounted to witness statements without cross-examination, in violation of the procedure agreed on by the parties. The arbitrators did not exceed their authority by considering matters related to Russian criminal law, as the broad scope of the arbitration

clause allowed them to do so and their findings did not constitute an "assessment" of Russian criminal law. Further, the arbitrators held in a partial award that the plaintiff breached the contract between the parties but concluded in their final award that the contract was inequitable and thus unenforceable. By so doing, they did not violate the principle of functus officio and exceed their authority: the partial award did not definitively dispose of any claim or constitute a final determination of any issue and was rendered moot by the final award.

The facts of this case are also reported in Yearbook XXXIV (2009) at pp. 1174-1176 (US no. 678). On 31 January 2000, AO Techsnabexport (Tenex), a joint stock company fully owned by the Ministry of Property Relations of the Russian Federation, executed a Contract for the supply of natural uranium hexaflouride to Globe Nuclear Services and Supply GNSS, Limited, d/b/a Globe Nuclear Services and Supply, Limited (Globe), a company incorporated in the United States whose principal officers and executives were at the relevant time Russian nationals and which was owned in part by Tenex and, for 62 percent, by TKST, Inc. (TKST). The Contract was governed by Swedish law. It also contained a clause for arbitration of disputes at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

A dispute arose between the parties when, on 3 November 2003, Tenex informed Globe that it would no longer deliver uranium to Globe as of 1 January 2004, because such deliveries were "inimical to the interests of the Russian Federation". On 20 November 2003, Globe filed a request for SCC arbitration, asserting that Tenex breached the contract and seeking damages in excess of US$ 944 million.

A panel of three arbitrators was appointed. A pre-hearing conference was held in Arlanda, Sweden, and a set of procedural rules to govern the arbitration proceedings was agreed upon (the Arlanda Rules). The Arlanda Rules provided, inter alia, that each witness must be available for cross-examination.

Before the arbitration hearings began, Tenex informed the arbitral tribunal that indictments had been filed in the United States charging, among others, Dr. Dmitrievich Pismenny, a Globe executive, with using international assistance funds stolen from the United States government to purchase shares of Globe for TKST. The General Prosecutor's Office of the Russian Federation also began a criminal investigation of individuals allegedly involved in the same scheme. Tenex informed the arbitral tribunal that the Russian criminal investigation might affect Tenex's defense in the arbitration proceedings and requested that the record remain open to receive new evidence that may result therefrom.

In October 2005, the SCC arbitral tribunal conducted a hearing to determine to what extent the Russian criminal investigation could affect the arbitration proceeding. At that hearing, Tenex asserted that the Russian criminal

investigation confirmed that before Tenex and Globe entered into the Contract, a group of individuals, including Pismenny, engaged in a fraudulent scheme to obtain a controlling interest in Globe in the corporate name of TKST, purchasing Globe's shares with stolen funds and on behalf of an organized criminal group. Tenex asserted that these individuals (the alleged TKST conspirators) misrepresented to Tenex, at the time of concluding the Contract, that TKST was acting in the interests of Tenex and the Russian Federation, when TKST actually served to benefit the alleged TKST conspirators. Tenex asserted that these facts rendered the Contract inequitable and therefore invalid under Sect. 33 of the Swedish Contracts Act, which provides that an otherwise valid contract will not be enforced when one party has knowledge that the circumstances leading to the contract's formation are inequitable.

On 11 November 2005, the SCC arbitrators issued a procedural Order dividing the arbitration in two phases: the tribunal would first issue a partial award on liability and then a final award on damages. The Order also stated that the arbitrators would decide at a later stage whether to allow evidence resulting from the ongoing criminal investigations in the Russian Federation and the United States. Such evidence, if admitted, would be heard at a hearing in December 2006 and the tribunal would then conduct a third phase of hearings to consider the validity of the Contract in light of that evidence.

On 31 August 2006, the SCC arbitral tribunal issued a Partial Award holding Tenex liable for breach of the Contract. The tribunal then proceeded to conduct the second phase of hearings to determine damages, but deferred its ruling when, in December 2006, Tenex submitted 460 new exhibits and a brief addressing the validity of the Contract. The exhibits included transcripts documenting interviews between the Russian Prosecutor General and several individuals regarding, relevantly, TKST's purchase of Globe's share. Globe objected that the arbitrators did not have authority to review matters involving Russian criminal law but did not object to the transcripts from the Russian Prosecutor General being accepted as evidence. The tribunal accepted the new evidence and proceeded to conduct a third phase of hearings on the validity of the Contract.

On 11 June 2007, the SCC arbitral tribunal issued a Final Award in favor of Tenex, awarding Tenex damages and compensation for its legal expenses. The tribunal found, inter alia, that Globe fraudulently induced Tenex to enter into the Contract by representing that TKST was ultimately owned by the Russian State and was acting in the interest of Tenex, whereas there was a secret arrangement that TKST would act in the interest of the alleged TKST conspirators. The Contract was therefore inequitable and invalid under Sect. 33 of the Swedish Contracts Act.

The arbitrators specifically addressed Globe's objection to their consideration of the evidence obtained from the Russian criminal investigation, stating that they were allowed to "take into account such facts that also may constitute a criminal offence or, as an incidental question, decide whether a certain act or omission constitutes an offence, and consider the civil aspects thereof".

Tenex sought enforcement of the Final Award in the United States; Globe moved to confirm the Partial Award holding that Tenex was liable for breach of contract.

On 28 August 2009, the United States District Court for the District of Maryland granted enforcement of the Final Award and denied enforcement of the Partial Award. This decision is reported in Yearbook XXXIV (2009) pp. 1174-1185 (US no. 678).

By the present decision, the United States Court of Appeals for the Fourth Circuit, before Traxler, Chief Judge, and Davis and Keenan, CJJ, in an opinion by Keenan, affirmed the district court's decision.

Globe first argued that the district court should have denied enforcement of the Final Award under Art. V(1)(*d*) and Art. V(1)(*b*) of the 1958 New York Convention, because the transcripts of interviews conducted by the Russian Prosecutor General, which the arbitrators allowed as evidence, were in fact "witness statements" of individuals who were not available for cross-examination, in violation of the Arlanda Rules and of Globe's right to present its case by cross-examining the witnesses. The Court of Appeals dismissed this argument, finding that Globe waived these defenses by failing to raise them during the arbitration proceedings.

Globe then contended that the district court should have refused enforcement under Art. V(1)(*c*) of the 1958 New York Convention because the arbitrators exceeded the scope of their authority by considering matters related to Russian criminal law and "the rights and interests" of individuals other than the parties to the Contract, namely, the alleged TKST conspirators. Also, because the Final Award contained "criminal findings", the tribunal "mimicked" a Russian criminal court in violation of the public policy interest in protecting the integrity of international arbitration. Hence, enforcement should have been denied also under Art. V(2)(*b*) of the Convention.

The Court of Appeals rejected both objections. It held that under the plain language of the arbitration clause ("any … dispute, controversy or claim arising out of or relating to [the Contract] or the breach, termination or invalidity thereof"), the arbitrators had authority to consider the alleged criminal acts to the extent that those acts related to the Contract's validity under Sect. 33 of the Swedish Contracts Act. Further, the arbitrators' conclusion that the alleged

TKST conspirators knowingly concealed from Tenex the true nature of TKST's ownership and interests served as the basis for the finding that the Contract was inequitable and thus invalid; it was not an assessment of Russian criminal law.

Finally, Globe argued that enforcement should be denied under Art. V(1)(*c*) of the New York Convention because the arbitral tribunal violated the principle of functus officio by issuing the Final Award in reconsideration of its findings in the Partial Award. The Court disagreed, finding that the Partial Award did not definitively dispose of any severable claim or constitute a final determination of the issues presented by the parties. Rather, it was rendered moot by the arbitral tribunal's conclusion in the Final Award that the Contract was not enforceable.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152055-n>.

726. United States District Court, Southern District of Texas, Houston Division, 4 January 2011, Civil Action No. H-09-3904

Parties:	Plaintiff: QPro Inc. (US) Defendant: RTD Quality Services USA, Inc. (US)
Published in:	761 Federal Supplement, Second Series (S.D. Texas 2011), p. 492 et seq.; available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 438
Articles:	II(3)
Subject matters:	– arbitrability to be decided by court – incorporation of arbitration rules evidence that arbitrability is to be decided by arbitrator – non-signatory defendant may not rely on arbitration clause – estoppel (equitable) – remand from federal court to state court
Topics:	¶ 217 + ¶ 226

Summary

A non-signatory defendant sought to compel arbitration of a claim of tortious interference brought by a signatory to a contract containing an arbitration clause. The court denied the motion. First, the issue of arbitrability was for the court to decide. The reference to ICC arbitration in the arbitration clause evidenced an intent to arbitrate the issue of arbitrability only in respect of the signatories; case law extends this reasoning to allow a non-signatory to compel a signatory to arbitrate issues of arbitrability only where the non-signatory defendant essentially stands in the shoes of the signatory. This was not the case here. Further, the plaintiff was not estopped from seeking to avoid the arbitration clause on grounds of equitable estoppel, as it did not rely on the terms of the contract containing the arbitration clause and did not allege concerted misconduct of the non-signatory defendant and its signatory parent (not a party to the court proceedings). Since the claim was not arbitrable and thus not removable under the New York Convention, and was based on state law, there was no other basis for federal jurisdiction and the case was remanded to state court.

QPro Inc. (QPro) and Applus RTD (Applus), a Dutch company, entered into a Lease Agreement under which Applus leased to QPro the INCOTEST technology, which QPro used for providing non-destructive testing and inspection services to detect corrosion in insulated and coated piping. The Lease Agreement, which was non-exclusive and was to expire in 2011, provided that it was governed by Dutch law. It also provided for arbitration of disputes in the Netherlands under the rules of the International Chamber of Commerce.

In 2006, QPro began a three-year service agreement with Dow Chemical to inspect and test its piping systems using the INCOTEST technology. QPro alleged that it had an understanding with Applus to lease a second INCOTEST system as the work from Dow Chemical increased but that when it was ready to enter into that second lease Applus failed to provide it. QPro alleged that this refusal was due to its non-acceptance of Applus's offer to acquire QPro in February 2007, after which Applus tried "to put QPro out of business by any means". RTD Quality Services USA, Inc. (RTD USA), Applus's US subsidiary, allegedly colluded to this aim with Team Industrial Services, Inc. (Team Industrial) to interfere with QPro's contract with Dow Chemical, by offering to lease the INCOTEST technology to Team Industrial, inducing a senior QPro INCOTEST technician to go to work for RTD (USA) and misrepresenting to Dow Chemical that QPro would soon no longer have the INCOTEST technology. As a result, Dow Chemical called for an early rebid of the inspection contract and awarded the majority of the work to Team Industrial.

On 5 October 2009, QPro commenced an action in Texas state court against RTD (USA), alleging tortious interference with QPro's Dow Chemical contract. On 4 December 2009, RTD (USA) removed the action to federal court under the 1958 New York Convention and moved to compel arbitration.

The United States District Court for the Southern District of Texas, Houston Division, per Lee H. Rosenthal, US DJ, denied the motion, finding that the requirements for allowing RTD (USA), a non-signatory of the Lease Agreement, to compel arbitration with QPro, a signatory, were not satisfied. The court then granted QPro's motion to remand to state court.

The court first held that the issue whether a non-signatory to an arbitration clause may enforce it against a signatory is for the court to decide. RTD (USA) relied on case law to argue that, on the contrary, this issue was for the arbitrator because the Lease Agreement referred disputes to ICC arbitration, evidencing a clear intent to arbitrate the issue of arbitrability. The court agreed that under the case law cited by RTD (USA) an ICC arbitrator has jurisdiction to decide issues of arbitrability; however, this only applies to the parties to the arbitration agreement, here, QPro and Applus. The cases extending this reasoning and

allowing a non-signatory to compel a signatory to arbitrate issues of arbitrability all involve a non-signatory defendant that "essentially stood in the shoes of a signatory to the arbitration agreement when defending the suit". This was not the case here.

The district court then dismissed RTD (USA)'s argument that QPro was estopped from avoiding the arbitration clause under the theory of equitable estoppel. Under the governing Fifth Circuit case in *Grigson*, there is equitable estoppel when the signatory to an agreement containing an arbitration clause relies on the terms of that agreement in asserting its claims against a non-signatory, as it would be unfair to allow a party to rely on a contract for its claim and repudiate it to avoid the arbitration clause therein. Also, there is equitable estoppel when a signatory to the arbitration clause alleges interdependent conduct by both a signatory and a non-signatory and the non-signatory defendant seeks to compel the signatory plaintiff to arbitrate all claims.

The court held that in the present case the two prongs of the *Grigson* test for a finding of equitable estoppel were not met: first, QPro's tortious interference claim against RTD (USA) presumed the existence of the Lease Agreement between QPro and Applus but did not rely on its terms, as it alleged a conduct separate from the specific rights and obligations under the Agreement. Second, the misconduct allegations made by QPro (a signatory) did not involve both Applus, the signatory parent, and RTD (USA), the non-signatory subsidiary which was trying to compel QPro to arbitrate. In fact, no allegation of misconduct or tortious interference at all was made against Applus.

The district court finally granted QPro's motion to remand, finding that there could be no removal under Sect. 205 of the Federal Arbitration Act – which provides for removal to federal court of actions whose subject matter relates to an arbitration agreement or award falling under the Convention – because QPro's claim was found to be non-arbitrable. As the claim was based on state law, there was no other basis for federal jurisdiction.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152056-n>.

727. United States District Court, District of Columbia, 21 January 2011, Civil Action No. 09-791 (RBW)

Parties:	Petitioner: International Trading and Industrial Investment Company (f/k/a International Trading and Investment Company) (Qatar) Respondent: DynCorp Aerospace Technology (US) et al.
Published in:	Available online at <https://ecf.dcd.uscourts.gov/ cgi-bin/show_public_doc?2009cv0791-51>; 2011 U.S. Dist. LEXIS 5954
Articles:	V; V(1)(*e*)
Subject matters:	– award set aside by non-competent authority – grounds for refusal of enforcement are exhaustive – manifest disregard of the law not a ground for refusing enforcement under 1958 New York Convention
Topics:	[2]-[6] + [25]-[44] = ¶ 501; [5]-[6] = ¶ 502; [8]-[24] = ¶ 516

Summary

Enforcement of an ICC award rendered in France was granted. The setting aside of the award by a Qatari court was no ground for refusing enforcement, because that court was not a "competent authority" under the New York Convention as the award was rendered in France. The argument that the plaintiff agreed to judicial review in Qatar by omitting the adverb "finally" before "settled" when drafting the controlling Arabic text of the arbitration clause was unavailing, since by agreeing to be governed by the ICC rules the parties intended the award to be final and binding. Nor was the plaintiff's participation in the Qatari proceedings a ground for finding that the Qatari courts became a "competent authority": the inquiry whether a court is "competent" under Art. V(1)(e) goes to subject-matter jurisdiction, and parties cannot confer this jurisdiction on a court by way of consent. Nor was there estoppel, since the question whether the Qatari courts were a competent authority was a question of law that was for the court to decide irrespective of consent or stipulations by the parties. The allegation that the sole arbitrator acted in manifest disregard of (Qatari) law

also failed, because neither the Convention nor case law supports the position that manifest disregard of the law – a judicially determined ground that may be considered in addition to statutory grounds for vacating *an award – is a valid basis for* denying enforcement *of a Convention award. In any event, there was no evidence that the arbitrator acted in manifest disregard of Qatari law or that the Qatari courts did in fact find that the arbitrator refused to apply or ignored the law, thus meeting the manifest disregard of the law standard.*

On 17 July 1998, DynCorp Aerospace Technology (DynCorp) entered into an agreement with International Trading and Industrial Investment Company (International Trading). Under the 1998 Agreement, International Trading was appointed as a service agent for the purpose of establishing and operating a licensed branch office for DynCorp in Qatar and for advising DynCorp regarding importing and exporting equipment and in dealings with the Qatar government and agencies in order for DynCorp to obtain contracts to provide security services in Qatar. The 1998 Agreement was written in both Arabic and English, with the Arabic version controlling in the event of a conflict between the two versions. The duration of the contract was governed by Sect. 9.1, which read:

> "[T]his Agreement shall be for a period of [s]ixty months from the date of signature and shall continue thereafter unless and until terminated by either party giving to the other not less than 90 … days prior notice expiring on or any time after the first anniversary of the date hereof."

Sect. 13.1 of the 1998 Agreement was a clause providing for arbitration of disputes at the International Chamber of Commerce (ICC). The English translation of Sect. 13.1 read:

> "In case of any dispute arising in connection with this agreement, it shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules."

The Arabic version of the arbitration clause did not contain the word "finally".

On 24 September 2001, DynCorp sent a letter to International Trading evincing its intent to terminate the agreement on 23 December 2001. International Trading disputed DynCorp's ability to terminate the agreement because it believed that the Agreement could not be terminated until after the expiration of the initial period of sixty months, that is, until after 20 July 2003. DynCorp argued in response that either party could terminate the Agreement upon ninety days' notice one year after the Agreement's execution. International

Trading then commenced ICC arbitration as provided for in the 1998 Agreement. The arbitration was held in Paris before a sole arbitrator; the parties agreed on the application of Qatari substantive law to the merits of the case and that the ICC Rules would apply to procedural issues.

On 29 May 2006, the sole arbitrator rendered an award holding that DynCorp breached the 1998 Agreement by seeking to terminate it prematurely. The arbitrator found that Sect. 9.1 required the Agreement to remain in effect for a period of sixty months from the date of signature. As a result of the breach, International Trading was entitled to US$ 1,107,764.95 for damages, US$ 40,000 for costs and interest at 5 percent per annum.

On 23 July 2006, DynCorp sought a stay of the award before the Qatari Court of First Instance, arguing that the arbitration suffered from procedural defects; the court denied relief. DynCorp then appealed to the Qatari Court of Appeal, which concluded that the dispute "was resolved on correct, suitable, and accepted … law"; the Court of Appeal upheld the arbitrator's award of damages and costs but vacated the award of 5 percent interest. DynCorp then appealed to the Qatari Court of Cassation, which concluded "that the arbitrator failed to follow Qatari law by improperly interpreting the 1998 Agreement in light of the parties' intentions". The Qatari Court of Cassation found that the arbitrator's interpretation of the Agreement "goes against the apparent meaning of the contract conditions" and that the arbitrator's reading of the Agreement was a "misinterpretation of facts", as well as an "error [regarding] the implementation of the law".

On 30 April 2009, International Trading sought enforcement of the ICC award in the United States District Court for the District of Columbia. DynCorp cross-moved to deny enforcement on the grounds that the award had been validly set aside by the Qatari courts and that it had been rendered in manifest disregard of the law. DynCorp also sought a stay of the enforcement proceedings because of the annulment action it filed in the French courts on the same day it filed its cross-motion in the district court.

On 28 July 2010, the district court denied DynCorp's cross-motion for a stay without prejudice, "in light of the parties' agreement that the motion should be held in abeyance pending resolution of" the matter before the French courts. On 4 November 2010, the Paris Court of Appeal rejected DynCorp's action to set aside the Award. The district court then heard the parties' arguments as to whether the award should be confirmed at a hearing on 1 December 2010.

By the present decision, the district court, per Reggie B. Walton, US DJ, dismissed DynCorp's cross-motion to deny enforcement and granted International Trading's motion to enforce the ICC award.

The court first set out some basic principles: the (narrow) grounds for refusing enforcement of an award under the 1958 New York Convention are limitatively listed in Art. V Convention; enforcement proceedings are generally summary in nature; the burden of establishing such grounds is on the party resisting enforcement; and judicial review does not concern the merits of the award, as "careful scrutiny of an arbitrator's decision would frustrate" the pro-arbitration policy of the arbitration law of the United States, the Federal Arbitration Act (FAA).

The district court then dismissed DynCorp's argument that the ICC award should not be enforced under Art. V(1)(*e*) Convention because it had been set aside by the Qatari Court of Cassation. DynCorp recognized that in general a "competent authority" within the meaning of Art. V(1)(*e*) is a court in the country where the award was rendered. DynCorp argued that this case was different because International Trading (1) assented to review by the Qatari courts by omitting the word "finally" when drafting the Arabic version of the arbitration clause and (2) was estopped by raising this argument as it consented to the jurisdiction of the Qatari courts by participating in the proceedings there.

The court found these arguments unavailing. First, by agreeing to be governed by the ICC rules the parties intended the award to be final and binding. Second, DynCorp's contention that International Trading consented that the Qatari courts serve as competent authorities within the meaning of Art. V(1)(*e*) Convention did not influence the court's construction of that provision: the inquiry whether a court is "competent" under Art. V(1)(*e*) goes to subject-matter jurisdiction to hear a case, and it is axiomatic that parties cannot confer subject-matter jurisdiction on a court by way of consent. Thus, on the plain language of Art. V(1)(*e*), only the courts of France had the authority to set aside the award.

The district court also rejected DynCorp's estoppel argument, which was based on the 2004 decision of the Fifth Circuit in *Karaha Bodas*, finding that *Karaha Bodas* was inapposite. In that case, the issue was whether a Swiss or an Indonesian court had jurisdiction to vacate an award, depending on which law (Swiss or Indonesian) the parties chose as the law applicable to the arbitration. This was a factual determination to be made through contract interpretation. Here, on the contrary, the parties were in agreement that the seat of the arbitration was Paris and that the arbitration was governed by the ICC rules. Thus, the question whether the Qatari courts were a competent authority within the meaning of Art. V(1)(*e*) raised a question of law that was for the district court to decide, "without fidelity to any consent or stipulations by the parties".

The district court finally dismissed DynCorp's contention that the Qatari Court of Cassation had already determined that the sole arbitrator acted in

manifest disregard of Qatari law, so that the district court should deny enforcement on that ground. The court reasoned that the manifest disregard of the law standard is recognized in many Circuits as being a ground for *vacatur* of awards that is to be considered in addition to the statutory grounds provided for in the FAA. However, there is no support in the New York Convention or in case law for the position that an arbitrator's manifest disregard of the law is a valid basis upon which courts can deny *enforcement* of Convention awards.

The court added that, in any event, there was no evidence that the sole arbitrator acted in manifest disregard of Qatari law, nor did the Qatari Court of Cassation in fact conclude that the arbitrator "refused to apply" or "ignored" Qatari law, as is required to meet the manifest disregard of the law standard.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-KLI-KA-1152057-n>.

728. United States District Court, District of Columbia, 21 January 2011, Civil Action No. 08-485 (RBW)

Parties:	Plaintiff: Republic of Argentina Defendant: BG Group Plc (UK)
Published in:	Available online at <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv0485-57>; 2011 U.S. Dist. LEXIS 5975
Articles:	V; V(1)(*c*); V(2)(*b*)
Subject matters:	– grounds for refusal of enforcement are exhaustive – (limited) review of award to ascertain grounds for refusal – excess of authority of arbitrators (no) – narrow concept of public policy – public policy and failure to comply with precondition to arbitration – review of Treaty interpretation by arbitrators (no) – public policy and "derivative" claim – public policy and assessment of damages
Topics:	[13]-[14] = ¶ 501; [15]-[16] = ¶ 502; [18]-[21] = ¶ 512; [22]-[24] + [45] = ¶ 518; [25]-[31] = ¶ 524 (pre-condition to arbitration); [32]-[34] = ¶ 524 (derivative claim); [35]-[44] = ¶ 524 (assessment of damages)

Summary

The court granted confirmation of an award rendered in favor of an investor for the negative impact on its investment of Argentina's 2002 emergency measures. The court dismissed Argentina's claims that the arbitrators exceeded their powers and that confirmation would violate public policy. First, the court need not decide whether Art. V(1)(c) of the New York Convention, which applies in the context of motions for enforcement, has the broader scope of the equivalent provision in the Federal Arbitration Act, which applies in motions for vacatur, because of its findings at an earlier stage in the proceedings that the arbitral

tribunal did not in fact exceed its powers. Second, none of Argentina's public policy claims succeeded: (i) the court could not review the arbitrators' holding that under the applicable Investment Treaty BG Group could resort to arbitration without first submitting the dispute to an Argentine court; (ii) the arbitrators' decision to allow a "derivative" claim was in accordance with US public policy: where, as here, there is a direct contractual duty, an exception is made to the general rule that shareholders do not have an individual cause of action against third parties for wrongs or injuries to the corporation in which they hold stock, when the only injury is the loss in value of their shares; and, (iii) the arbitrators did not hold Argentina liable to pay compensation for the consequences of its economic crisis: rather, they assessed the fair market value of BG Group's investment by taking as a starting point a date just before the enactment of the emergency measures, when the economic crisis had already started. Argentina's public policy arguments all fell short of the required standard of a violation of fundamental notions "of what is decent and just".

The facts of this case are also reported in Yearbook XXXV (2010) at pp. 545-548 (US no. 704). BG Group Plc (BG Group) acquired a majority interest in Gas Argentino, S.A., a consortium of investors that owned a majority interest in MetroGAS, one of eight distribution companies into which the Republic of Argentina had divided its gas distribution industry in the late 1980s and early 1990s.

In 2001, Argentina began to experience an economic crisis. On 6 January 2002, it enacted an emergency law implementing measures that had a negative impact on BG Group's investment in MetroGAS. On 25 April 2003, BG Group commenced ad hoc arbitration against Argentina under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as provided for in the Agreement for the Promotion and Protection of Investments (the Investment Treaty) concluded between Argentina and the United Kingdom on 11 December 1990.

By an award issued in Washington, DC, on 24 December 2007, an arbitral tribunal unanimously ruled in favor of BG Group. The arbitrators held that although Argentina did not breach the Investment Treaty by expropriating BG Group's investment – since the impact of Argentina's measures was not permanent – Argentina did breach its obligation under the Treaty not to fundamentally modify the investment regulatory framework. The arbitrators therefore awarded damages to BG Group in the amount of US$ 185,285,485.85, based on the fair market value of its investment in MetroGAS. They also awarded costs, attorneys' fees and interest. On 21 March 2008, Argentina filed a petition in federal court to vacate or modify the award. BG Group cross-moved to have the award confirmed.

On 7 June 2010, the United States District Court for the District of Columbia, per Reggie B. Walton, US DJ, denied Argentina's petition to vacate the award.

Though "highly skeptical" that the award violated the public policy of the United States, as alleged by Argentina, the court held that Argentina should be given the opportunity to submit a supplemental memorandum on BG Group's cross-motion to confirm. This decision is reported in Yearbook XXXV (2010) at pp. 545-548 (US no. 704).

By the present decision, the district court, again per Reggie B. Walton, memorialized the oral ruling issued at a hearing on 28 September 2010, by which the court granted BG Group's cross-motion to confirm the award.

The court first set out the governing principles of its inquiry: under the 1958 New York Convention, a court is required to confirm an award unless it finds one of the grounds for refusal limitatively specified in the New York Convention; confirmation proceedings are generally summary in nature; and judicial review is limited to ascertaining the existence of such grounds for refusal, since an in-depth scrutiny of the arbitrators' decision would frustrate the emphatic federal policy in favor of arbitral dispute resolution in the Federal Arbitration Act (FAA), a policy that applies with special force in the field of international commerce.

Argentina argued that confirmation should be denied because (1) the arbitral panel disregarded the terms of the parties' agreement to submit to arbitration; (2) the arbitral panel improperly allowed BG Group to present a "derivative" claim in contravention of United States and international law; and (3) the arbitral panel improperly held Argentina liable to pay compensation for the consequences of an economic crisis. Argentina framed its first and third argument under Art. V(1)(*c*) of the New York Convention, claiming that the arbitral tribunal exceeded its powers; it further argued that recognition of the award, given all of these errors, would be contrary to US public policy and thus confirmation should be denied pursuant to Art. V(2)(*b*) of the Convention.

The court first dismissed Argentina's contentions under Art. V(1)(*c*) of the Convention. It reasoned that this Article has a narrower scope than Sect. 10(a)(4) of the FAA, which provides that an award may be vacated "where the arbitrators exceeded their powers". Art. V(1)(*c*) only authorizes the court to refuse enforcement if the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration". Arguably, opined the court, the New York Convention covers only that specific scenario, not the broader category of acts covered by Sect. 10(a)(4) of the FAA. The court mentioned in this respect the conclusion reached by the Sixth Circuit in *M & C Corp.*, that the grounds for refusal under the Convention do not include manifest disregard of the law. However, the court need not conclusively decide this issue

because of its finding in the earlier phase of the proceeding that the arbitral tribunal did not in fact exceed its powers. Although this conclusion was reached in the context of a motion of vacatur, it equally applied in the present confirmation proceedings.

The district court then denied Argentina's argument that enforcement should be denied on grounds of public policy. The court noted at the outset that the public policy defense under the New York Convention is to be construed narrowly and applied only where enforcement would violate the forum state's – here, the United States' – most basic notions of morality and justice.

Argentina claimed first that under the Investment Treaty the dispute had to be submitted for eighteen months to an Argentine court before the parties could commence arbitration. As this precondition had not been complied with, Argentina did not consent to arbitrate its dispute with BG Group and confirmation would violate the public policy principle that a party has to agree to arbitration. The court found Argentina's analytical approach to be flawed. In the present case, in particular because Argentina conceded that the arbitral tribunal had "the principal power to rule upon its jurisdiction", the court had to abide by the arbitrators' construction of the Investment Treaty. In other words, where the parties have conferred upon the arbitrators the authority to determine whether the dispute is arbitrable, the court may not hear claims of factual or legal error by the arbitrators. Hence, the conclusion of the arbitral tribunal that the Investment Treaty allowed BG Group to submit its claim to arbitration without first seeking recourse before the Argentine courts was binding on the district court.

Also unsuccessful was Argentina's argument that the arbitral tribunal's decision to allow BG Group to directly proceed against Argentina on a "derivative" claim was contrary to US public policy. The court reasoned that while it is true that shareholders do not have an individual cause of action against third parties for wrongs or injuries to the corporation in which they hold stock, when the only injury to the shareholders is the indirect harm which consists of the diminution in the value of their shares, there are exceptions to this rule. One such exception is the existence of a contractual duty. In the present case, Argentina had a direct contractual duty to BG Group, as an investor within the meaning of the Investment Treaty, to refrain from enacting unreasonable or discriminatory measures that would impair the investment.

Finally, Argentina asserted that the arbitral tribunal's assessment of damages was contrary to the public policy of the United States because the arbitrators held Argentina liable to pay compensation for the consequences of its economic crisis, by assessing the fair market value of BG Group's shares in MetroGAS on the basis

of a transaction concluded in 1998, when the Argentine economy was at its peak, rather than at the time of the crisis. The court found this argument meritless, as it appeared from the award that the arbitrators took 1 January 2002, a few days before the enactment of the emergency measures, as the starting point for measuring the loss in BG Group's investment.

The district court concluded that Argentina's public policy arguments fell "exceedingly short of the standard" that an award may be refused enforcement as against public policy because it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought".

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-KLI-KA-1152058-n>.

729. United States District Court, Eastern District of North Carolina, Northern Division, 21 January 2011, No. 2:06-CV-49-F

Parties:	Petitioners: (1) Blackwater Security Consulting, LLC (nationality not indicated); (2) Blackwater Lodge and Training Center, Inc. (nationality not indicated) Respondent: Richard P. Nordan, as Ancillary Administrator for the Separate Estates of Stephen S. Helveston, Mike R. Teague, Jerko Gerald Zovko, and Wesley J.K. Batalona (nationality not indicated)
Published in:	Available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 6185
Articles:	I(1); V
Subject matters:	– non-domestic award – contract "envisages performance abroad" – relationship Chapters 1 and 2 (1958 New York Convention) of Federal Arbitration Act (FAA) – grounds for refusal of enforcement are exhaustive and strict – burden of proof on respondent
Topics:	¶ 102 + ¶ 501 + ¶ 503

Summary

An order terminating arbitration proceedings for failure to make the necessary payments is a final award that can be confirmed by the district court. The petitioners relied on both Chapter 1 (on domestic arbitration) and Chapter 2 (codifying the 1958 New York Convention) of the Federal Arbitration Act, arguing that Chapter 2 applied because the termination order was non-domestic in that it concerned a relationship envisaging performance abroad. Chapter 1 can be applied in the context of Chapter 2 proceedings if, as here, there is no conflict. There was no ground to deny confirmation of the termination order.

Blackwater Security Consulting, LLC and Blackwater Lodge and Training Center, Inc. (collectively, Blackwater) concluded four separate Independent Contractor Service Agreements with Stephen S. Helveston, Mike R. Teague, Jerko Gerald Zovko and Wesley J.K. Batalona (the Blackwater professionals). The Service Agreements contained a clause referring disputes to arbitration according to the rules of the American Arbitration Association (AAA).

The four Blackwater professionals were killed by insurgents in Fallujah, Iraq. In January 2005, Richard P. Nordan, Ancillary Administrator for the individual estates of the decedents, filed suit against Blackwater in Wake County, North Carolina, Superior Court asserting claims for wrongful death and fraudulent inducement. On 20 December 2006, Blackwater sought an order to compel arbitration as provided for in the Service Agreements. On 20 April 2007 and 11 May 2007, the United States District Court for the Eastern District of North Carolina, Northern Division, allowed the petition and stayed court proceedings pending completion of the arbitration (the 2007 Orders). On 17 October 2008, the United States Court of Appeals for the Fourth Circuit dismissed Nordan's appeal against the 2007 Orders as interlocutory, holding that the district court had not yet issued a final judgment but merely directed that arbitration proceed and stayed proceedings pending arbitration.

The parties commenced arbitration. The AAA assigned the matter to the International Centre for Dispute Resolution (ICDR) and consolidated Nordan's claim for damages, in the amount of US$ 20 million, and the arbitration initiated by Blackwater against Nordan for breach of contract, release and covenant not to sue, as well as breach of the confidentiality and non-publicity provisions of the Service Agreements.

Nordan failed to make the necessary payments in the arbitration, claiming lack of financial means. Blackwater initially paid Nordan's share, but after November 2008 neither party made any payment. On 9 June 2010, the ICDR arbitral tribunal issued Order 17 terminating the arbitration.

By the present action, Nordan sought to have the 2007 Orders vacated; Blackwater sought to confirm Order 17.

The United States District Court for the Eastern District of North Carolina, Northern Division, per James C. Fox, Senior US DJ, first dismissed Nordan's motion, holding that his claim that the estates were unable to afford arbitration fees was unsupported by evidence.

The district court then granted Blackwater's motion to confirm the termination decision. Blackwater based its motion on both Chapter 1 (on domestic arbitration) and Chapter 2 (codifying the 1958 New York Convention) of the Federal Arbitration Act (FAA), arguing that Chapter 2 applied because

Order 17 was a non-domestic award in that it was based on a relationship envisaging performance or enforcement abroad.

The district court pointed out that the grounds for refusing enforcement under the New York Convention are exhaustively listed in the Convention and must be interpreted strictly, in the light of the policy favoring enforcement of foreign arbitral awards, while under Chapter 1 confirmation can be denied only if it is shown that the award has been corrected, vacated or modified in accordance with the FAA. Under either Chapter 1 or Chapter 2 FAA, the burden of proof is on the party opposing confirmation or enforcement. Also, Chapter 1 of the FAA applies to actions and proceedings brought under Chapter 2 only to the extent that it is not in conflict with Chapter 2. Nordan did not argue that Chapters 1 and 2 conflict.

The court concluded that Nordan's argument that enforcement should be denied because Blackwater failed to cite any authority supporting its position that Order 17 – a termination order for failure to pay fees that did not decide on the merits of the dispute – was a final award subject to confirmation by the district court was without merit. Order 17 was clearly a final award; also, Nordan was bound by the arbitration clause in the Service Agreements, as shown by the court's refusal to grant him relief from the 2007 Orders compelling arbitration.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152059-n>.

730. United States District Court, District of Oregon, Portland Division, 31 January 2011, Civ. No.10-788-AC

Parties:	Plaintiff: ESCO Corporation (US) Defendant: Bradken Resources Pty Ltd. (Australia)
Published in:	2011 U.S. Dist. LEXIS 46460
Articles:	I(1); III; V(2)(*b*)
Subject matters:	– non-domestic award – domestic law applies to setting aside (vacatur) of 1958 New York Convention award – public policy and counsel fees in antitrust action – manifest disregard of the law – estoppel from raising defense not raised in the arbitration – post-award, pre-judgment interest – post-judgment interest
Topics:	[5]-[6] = ¶ 102; [7]-[18] = ¶ 501; [19] = ¶ 518; [19]-[34] = ¶ 524 (counsel fees in antitrust action); [35]-[44] = ¶ 524 (manifest disregard of the law); [45]-[61] = ¶ 303; [62] = ¶ 500; [63]-[87] = ¶ 307

Summary

A non-domestic ICC award was granted enforcement. The defendant could rely, along with the grounds in the 1958 New York Convention, on the grounds for vacatur available under Chapter I of the Federal Arbitration Act, which governs domestic arbitration. Its argument that the part of the award ordering reimbursement of attorney fees violated public policy was unsuccessful: the parties had agreed to the ICC rules, which provide that arbitrators may award legal costs, and the defendant failed to prove that there is a clear dominant policy in the United States prohibiting arbitrators to award attorney fees to successful defendants (rather than plaintiffs) in antitrust actions, which can override the policy in favor of arbitration. Nor was it proved that the award was rendered in manifest disregard of the law. In any event, the defendant waived its right to object to the award by failing to raise these

claims before the arbitrator. The court granted post-judgment interest but denied post-award, pre-judgment interest and sanctions for frivolous challenge of the award.

In 1999, ESCO Corporation (ESCO) entered into an agreement with an Australian company in respect of an exclusive license to use ESCO patents, trademarks and know-how in the manufacture and sale of ESCO products – heavy equipment and cast components for use in the mining, mineral processing, and construction industries – within an assigned territory (the 1999 Agreement). Following two subsequent novation agreements in 2001 and 2004, Bradken Resources Pty Ltd. (Bradken) assumed the rights and obligations of the 1999 Agreement. The 1999 Agreement, as amended in 2004, provided for the application of the law of Oregon, United States. It also provided that all disputes "arising in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) by one or more arbitrators appointed in accordance with the rules. The place of arbitration shall be Portland, Oregon, United States of America."

On 6 March 2008, ESCO filed a request for arbitration with the ICC, asking for an interpretation of the 1999 Agreement regarding certain Bradken obligations and for a declaration that Bradken was obliged to comply with the 1999 Agreement as interpreted by the arbitrator. Bradken filed a counterclaim asserting that the 1999 Agreement was invalid, based on various United States antitrust and patent misuse grounds, and seeking over US$ 600 million in damages; it further asked to be awarded attorney fees and other costs of arbitration pursuant to the ICC Rules. In its 5 August 2008 response, ESCO sought early termination of the 1999 Agreement and also requested an award of costs and fees. Both requests were included in the Terms of Reference, which also stated that Oregon law was to govern interpretation of the 1999 Agreement and US antitrust law was to govern the counterclaim.

Arbitration proceedings followed before a sole arbitrator. On 29 April 2010, the arbitrator asked the parties to submit documents detailing their requests for legal fees and costs. Both parties did so and both stated that they did not wish to comment on the other party's statement of costs.

On 11 June 2010, the sole arbitrator rendered an award denying Bradken's counterclaim, largely accepting ESCO's contractual interpretations and rejecting ESCO's request for early termination of the 1999 Agreement. With regard to costs, the arbitrator declared ESCO to be the "substantially successful" party in the proceeding and required Bradken to pay 90 percent of the arbitration costs. In respect of legal costs, the arbitrator observed that a "very complex" case arose out of a "relatively benign" complaint when Bradken filed its counterclaim; he ordered Bradken to pay ESCO's legal costs in the amount of US$ 7,747,087.88.

By two letters of 25 June and 2 July 2010, Bradken expressed to ESCO its intent to pay under the ICC award by 31 July 2010. On 7 July 2010, ESCO replied acknowledging Bradken's letters and indicating that the amount of the award became due as of 17 June 2010, the date Bradken received the award, and that interest had been accruing since that date at a rate of nine percent in accordance with Oregon law.

On 8 July 2010, ESCO filed a petition in the United States District Court for the District of Oregon, Portland Division, seeking confirmation of the award. On 10 September 2010, Bradken filed a motion to vacate the award in respect of the award of attorney fees.

The district court, per John V. Acosta, US Magistrate Judge, confirmed the ICC award and denied Bradken's motion to vacate, holding that Bradken did not meet its burden to prove its alleged grounds for vacatur.

The court noted at the outset that the 1958 New York Convention undisputedly applied here because the award, though rendered in the United States, related to a commercial relationship that was not entirely domestic as Bradken was an Australian company and the 1999 Agreement contemplated the distribution of products in Australia and other foreign countries.

ESCO argued that because the award fell under the Convention, the court was required to confirm the award unless Bradken proved one of the seven defenses exhaustively listed in the Convention; Bradken was not allowed to rely on the defenses available under Chapter 1 of the Federal Arbitration Act (FAA), which regulates domestic arbitration. The court noted that the question whether a party may assert the grounds for vacating an arbitral award set out in Chapter 1, in addition to the those under the Convention, has not been determined by the Ninth Circuit. However, many other courts have found that the Convention and the FAA provide overlapping coverage and that a party may also assert the defenses available under Chapter 1. In any event, added the court, it was irrelevant in the present case whether Bradken could rely on the defenses in Chapter1 FAA, because – as held later in the decision – Bradken's arguments failed on their merits, and alternatively, had been waived by Bradken's failure to timely present its arguments to the arbitrator.

Bradken first sought vacatur of the ICC award on grounds of public policy. The court noted that this defense could be based on both Chapter 1 FAA and Art. V(2)(*b*) Convention. The public policy defense under the Convention must be narrowly construed and applies only to those circumstances where enforcement of the award would violate basic notions of morality and justice. The court concluded that Bradken failed to meet its burden to prove a violation of public policy under either the domestic provisions of Chapter1 or the Convention.

Bradken argued in particular that the award of over US$ 6 million in attorney fees to ESCO for successfully defeating Bradken's antitrust counterclaims ran contrary to an explicit, well-defined and dominant public policy embodied in US legislation that provides that treble damages and attorney fees are available only to a successful *plaintiff* pursuing enforcement of antitrust laws. The court disagreed, holding that the relevant statute invoked by Bradken in fact did not prohibit the awarding of fees to a prevailing *defendant* in an antitrust action. Further, the case law cited by Bradken in support of its dominant public policy contention arose from antitrust lawsuits in court, rather than arbitration. Courts – noted the court – have recognized that parties may agree in an arbitration to something that a statute would otherwise prohibit. Here, Bradken did not dispute that the ICC Rules provide that arbitrators have the authority to award attorney fees and costs; rather, it argued that the public policy preventing an award of attorney fees to successful antitrust defendants is so integral to the antitrust enforcement scheme that such an award is prohibited despite an agreement on rules that allow it; in other words, the antitrust public policy is so strong that parties may not contract around this provision. The court concluded that, on the contrary, the public policy favoring enforcement of arbitration awards must prevail in this case. This pro-arbitration policy is clearly established, while Bradken failed to prove an identifiable, explicit public policy that would prohibit an award of attorney fees to ESCO in this case.

Bradken's contention that the ICC award was rendered in manifest disregard of the law also failed. Bradken argued that the arbitrator was aware that ESCO was not entitled to attorney fees for successfully defending the antitrust claims but granted those fees nevertheless, and that Bradken could not present its challenge to the attorney fee award during the arbitration. The court dismissed both arguments. First, the arbitrator could not be aware of – and have disregarded – a binding precedent prohibiting an award of attorney fees to a successful antitrust defendant in the context of an international commercial arbitration agreement which specifically empowers an arbitrator to award such fees, as no such precedent existed. Second, Bradken did not provide persuasive evidence that the arbitrator was aware of and intentionally disregarded the law, since it could not prove that the specific issue of ESCO's entitlement to fees was properly put before the arbitrator. Third, Bradken's contention that it could not have raised its argument concerning ESCO's request for attorney fees prior to issuance of the award was disproved by the record, nor did Bradken identify any legal authority for its proposition, or indicate how the arbitrator manifestly disregarded the law.

The district court then held that in any event Bradken waived its right to object to the award by failing to raise the public policy and manifest disregard claims before the arbitrator.

Having found no grounds for vacatur, the district court confirmed the award.

The court then

(1) rejected ESCO's request for sanctions against Bradken for frivolous challenge to the arbitrator's award, finding that the motion to vacate had not been factually or legally baseless as Bradken had an objectively reasonable basis for asserting its claims;
(2) rejected ESCO's request for post-award pre-judgment interest, holding that in this case, "the equities do not weigh in favor of awarding pre-judgment interest", since to award interest here would discourage parties from asserting objectively reasonable grounds for vacatur and would punish Bradken for its use of the legal system;
(3) granted ESCO post-judgment interest at the federal rate.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152060-n>.

731. United States District Court, Southern District of New York, 16 February 2011, Case no. 10 Civ. 3240 (TPG)

Parties:	Plaintiff: Ameropa AG (Switzerland) Defendant: Havi Ocean Co. LLC (UAE)
Published in:	Available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 15803
Articles:	V(2)(*b*)
Subject matters:	– US embargo on Iran – narrow concept of public policy
Topics:	¶ 518 + ¶ 524 (embargo on Iran)

Summary

Enforcement of a German award was granted. Even if the US subsidiary of buyer had been involved in a sale of sulphuric acid from Iran, there would be no violation of public policy. The public policy exception under the 1958 New York Convention can be successful only where enforcement would violate the forum state's most basic notions of morality and justice. Here, the defendant relied on the US national policy to discourage trade with Iran. However, national policy is not synonymous with public policy.

On 2 August 2007, Ameropa AG (Ameropa) and Havi Ocean Co. LLC (Havi), a Dubai company, entered into a contract under which Ameropa agreed to buy and Havi agreed to sell 18,000 metric tons of sulfuric acid, in two lots of 9,000 metric tons each. The source of the sulfuric acid was Iran and the ultimate destination of the sulfuric acid was Venezuela. The contract contained a clause for arbitration of disputes at the Court of Arbitration of the Hamburg Chamber of Commerce, Germany.

A dispute arose between the parties when Havi failed to make the second delivery of 9,000 metric tons. Ameropa commenced arbitration in Hamburg as provided for under the contract. On 25 May 2009, an arbitral tribunal issued an award in favor of Ameropa in the amount of € 720,216.03 and interest. Havi unsuccessfully appealed the award before the courts; as a result, it was ordered to reimburse € 7,166.17 in attorney's fees to Ameropa.

Ameropa sought enforcement of the award and the money judgment in the United States under the 1958 New York Convention and the Uniform Foreign Money Judgment Recognition Act (UFMJRA), respectively.

The United States District Court for the Southern District of New York, per Thomas P. Griesa, US DJ, granted enforcement, rejecting Havi's objection that enforcement would violate public policy.

Havi argued that employees of Ameropa's US subsidary, Ameropa North America, Inc., may have been involved in the sulphuric acid sale, in violation of the US sanction regime against Iran. It therefore sought an order compelling Ameropa North America, Inc., a non-party to the proceeding, to submit to discovery so that Havi may determine if its accusations had any foundation.

The court reasoned in respect of the award that enforcement may indeed be refused under the New York Convention on grounds of public policy. However, "there is a wealth of case law" that holds that the public policy exception is to be granted only where enforcement would violate the forum state's most basic notions of morality and justice. Here, Havi sought to oppose enforcement by invoking US foreign policy concerns. The court noted that, while there is clearly a national policy in the United States to discourage trade with Iran, public policy and national policy are not synonymous. Enforcement would therefore be granted even if some involvement of Ameropa's US subsidiary could be demonstrated. Under these circumstances, the court did not deem it appropriate to order discovery.

The court also granted enforcement of the money judgment under the UFMJRA, which has a public policy exception similar to that of the FAA.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152061-n>.

732. United States District Court, Southern District of Florida, 25 February 2011, Case No. 10-CV-24229-Ungaro

Parties:	Plaintiff: Camilo Costa (India) et al. Defendant: Celebrity Cruises, Inc.
Published in:	2011 U.S. Dist. LEXIS 23491
Articles:	I(1); V(2)(*b*)
Subject matters:	– 1958 New York Convention applied to setting aside of award – 1958 New York Convention applies exclusively to nondomestic arbitration – narrow concept of public policy – public policy and requirement to exhaust grievance procedure (no)
Topics:	¶ 102 + ¶ 518 + ¶ 524 (requirement to exhaust grievance procedure; seafarers exempt from exhausting grievance procedure)

Summary

The motion for vacatur was examined solely under the 1958 New York Convention and Chapter 2 of the Federal Arbitration Act (FAA), which implements the Convention in the United States, because these statutes apply exclusively to arbitrations involving non-US citizens. The grounds raised under Chapter 1 FAA (on domestic arbitration) and the Florida International Arbitration Act were dismissed. The public policy grounds raised by the plaintiffs failed. It was not an issue of public policy that the award granted the defendant's objection that the plaintiffs should have exhausted the grievance procedure under their employment contracts, while the defendant did not raise this objection in an earlier, similar case with a different plaintiff. Also, the plaintiffs' reliance on the Supreme Court decision in Arguelles *was misplaced as* Arguelles *does not say, as alleged, that seafarers are exempt from the requirement of the exhaustion of grievance procedures. Nor could the plaintiffs invoke the Eleventh Circuit's holding in* Thomas *that arbitration agreements that operate in tandem with choice-of-law clauses to deprive seafarers of US statutory remedies are prohibited, as the arbitrator applied US law.*

Camilo Costa, Bernard Fernandes and Menino D'Acosta, all citizens of India (collectively, Plaintiffs) entered into separate employment contracts with Celebrity Cruise, Inc. (Celebrity) to work as stateroom attendants on Celebrity's vessels. The terms of Plaintiffs' employment incorporated the terms of a Collective Bargaining Agreement (the CBA) between Celebrity and Plaintiffs' labor union (the Union). The CBA provided for a grievance procedure in case of claims; it also contained an arbitration clause.

A dispute arose when Celebrity allegedly breached the terms of Plaintiffs' employment and the CBA by requiring Plaintiffs, between 31 August 2001 and 1 January 2005, to share their earned gratuities with assistant cabin stewards and the chief housekeeper at the rates of US$ 1.20 and US$ 0.50 per day, respectively. On 21 October 2009, Costa and Fernandes submitted a request for arbitration to Celebrity and the Union pursuant to the terms of the CBA; D'Acosta did the same on 9 December 2009. On 29 December 2009, the Union formally demanded arbitration on behalf of all three Plaintiffs.

Celebrity and the Union appointed a sole arbitrator. Arbitration proceedings were held in Miami, Florida. On 28 May 2010, Celebrity moved to dismiss the request for arbitration, arguing that Plaintiffs' claims were non-arbitrable because Plaintiffs failed to exhaust the grievance procedure provided for under the CBA. On 28 August 2010, the sole arbitrator granted Celebrity's motion.

On 28 November 2010, Plaintiffs filed an action before the United States District Court for the Southern District of Florida, seeking annulment of the Miami award. In their Amended Complaint, Plaintiffs sought vacatur under Chapter 1 of the Federal Arbitration Act (the FAA), Chapter 2 of the FAA, which implements the 1958 New York Convention, and the Florida International Arbitration Act (the FIAA).

The district court, per Ursula Ungaro, US DJ, denied Plaintiffs' motion. It first noted that the New York Convention and Chapter 2 of the FAA exclusively govern an arbitration between a citizen of the United States and a citizen of a foreign country, such as the one at issue here. Accordingly, the court dismissed all grounds for vacatur based on Chapter 1 of the FAA and the FIAA and examined the motion to vacate solely under the seven grounds exhaustively listed in the Convention.

Plaintiffs relied on public policy grounds for vacatur. The court found them all unconvincing. Noting that the public policy defense under the Convention must be construed narrowly to include only the forum state's most basic notions of morality and justice, the court first held that it was not an issue of public policy that the award granted Celebrity's argument that Plaintiffs failed to

exhaust the grievance procedure, while Celebrity failed to raise this objection in an earlier, similar litigation involving a different plaintiff.

Second, Plaintiffs contended that the sole arbitrator erred in not accepting evidence that Plaintiffs were seafarers and, therefore, exempt from the grievance procedure under the Supreme Court decision in *Arguelles*. The court reasoned that *Arguelles* does not in fact support this contention.

Finally, Plaintiffs could not invoke the public policy argument discussed in *Thomas*, where the Eleventh Circuit held that arbitration agreements which, through foreign choice-of-law provisions, operate to deprive seafarers of US statutory remedies, are prohibited. In the present case, there was no indication that any law other than US law was applied by the arbitrator.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152062-n>.

733. United States District Court , Southern District of California, 28 February 2011, Case No. 10-CV-1001 W (BLM)

Parties:	Plaintiff: MediVas, LLC (US) et al. Defendants: (1) Marubeni Corp. (Japan); (2) Does 1 through 100 (nationality not indicated)
Published in:	Available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 19160
Articles:	II(1); II(3)
Subject matters:	– arbitration agreement "null and void" because of renewal of contract (*novatio*) (no) – scope of arbitration clause and tort claim – non-signatory plaintiff not compelled to arbitrate – "direct benefits" theory of equitable estoppel
Topics:	[1]-[10] = ¶ 220; [11]-[15] = ¶¶ 214-216; [15] + [17]-[19] = ¶ 201; [20]-[21] = ¶ 226

Summary

The court granted the defendant's motion to compel arbitration in respect of the first plaintiff, finding that the arbitration clause in the contract between the parties had not been superseded by later contracts. Further, all the jurisdictional requirements for compelling arbitration under the 1958 New York Convention were met and the first plaintiff recognized that all of its claims, also those in tort, were related to the contract containing the arbitration clause. The court then denied the motion to compel arbitration of the claims brought by other plaintiffs, holding that they had not been parties to the contract containing the arbitration clause and could not be compelled to arbitrate under the doctrine of equitable estoppel on the ground that they received a direct benefit from the contract. The court found that the contract was not for their direct benefit and their claims arose under another contract which provided for the exclusive jurisdiction of the California courts.

On 13 April 2004, MediVas, LLC (MediVas), a biomedical manufacturer, and Marubeni Corp. (Marubeni) entered into a Note Purchase Agreement under which Marubeni would lend MediVas a maximum of US$ 5 million and MediVas

would make quarterly interest payments and pay the principal amount on the note's maturity date. The parties also entered into an Agency Agreement, whereby MediVas appointed Marubeni as its exclusive agent in Japan. Both the Note Purchase Agreement and the Agency Agreement (collectively, the 2004 agreements) provided for arbitration of disputes under the rules of the International Chamber of Commerce.

MediVas made all quarterly interest payments to Marubeni until June 2007, when it began experiencing financial problems and could not pay the principal obligation on the Note Purchase Agreement when it became due in July 2007.

As a way to deal with its financial hardship, MediVas began merger discussions with Nastech Pharmaceutical Company, Inc. (Nastech). Nastech requested that Marubeni consent to the merger, but Marubeni refused. In order to obtain Marubeni's consent, MediVas agreed to enter into three additional contracts with Marubeni in late 2007 (the 2007 agreements): (1) the Forbearance Agreement, whereby Marubeni agreed not to exercise any remedies available under the Note Purchase Agreement and, in exchange, MediVas agreed to limit its ability to issue equity and to grant Marubeni a first priority security interest in all of MediVas' assets; (2) the Security Agreement, which granted Marubeni a continuing security interest in MediVas' collateral; and (3) the Intellectual Property Security Agreement, which granted Marubeni a security interest in all of its intellectual property. The Security Agreement provided for the exclusive jurisdiction of the state and federal courts of San Diego, California.

Despite executing these contracts, the merger failed. In March 2008, MediVas began discussions with DSM Biomedical Materials BV (DSM). DSM first offered to acquire MediVas for a price of between US$ 100 and 130 million. Allegedly, the Forbearance Agreement, Security Agreement and Intellectual Property Security Agreement caused the negotiations to degrade into discussions about a license agreement and the price for the license to go from US$ 16 million to US$ 8 million. MediVas offered to pay part of that price, US$ 1 million, to Marubeni. Marubeni refused and insisted that DSM completely repay Marubeni's loan and accrued interest. DSM refused. On 11 February 2009, MediVas and DSM executed a technology license agreement for the price of US$ 7 million.

In the meantime, Marubeni foreclosed on the Incentive Notes – promissory notes for the purchase of "stock" units – of managers, employees and investors of MediVas (collectively, the Individual Plaintiffs), claiming that they were "collateral" within the meaning of the Security Agreement.

On 28 April 2010, MediVas and the Individual Plaintiffs commenced an action in the San Diego County Superior Court against Marubeni. On 10 May 2010, Marubeni removed the action to federal court, relying on the arbitration clause

in the Note Purchase Agreement, and sought to compel arbitration. MediVas moved to remand the case to state court, arguing that there was no arbitration clause because the parties amended and rescinded the 2004 agreements when they entered into the 2007 agreements.

The United States District Court for the Southern District of California, per Thomas J. Whelan, US DJ, dismissed MediVas' motion to remand and granted Marubeni's motion to compel arbitration of MediVas' claims, but not of the claims of the Individual Plaintiffs.

The court first held that removal was proper because the 2007 agreements did not supersede the Note Purchase Agreement or the arbitration clause therein. The court noted that there was no language in the 2007 agreements stating that the Note Purchase Agreement or the arbitration clause were superseded. Rather, the Forbearance Agreement expressly amended only one provision of the Note Purchase Agreement, which concerned the issuance of equity, and therefore confirmed that the parties did not intend to amend the remaining provisions of the Note Purchase Agreement.

The court then considered that arbitration must be compelled under the 1958 New York Convention when the arbitration agreement falls under the Convention, that is: (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or the commercial relationship has some reasonable relation with one or more foreign states. All these requirements were met here in respect of MediVas' claims against Marubeni.

The district court added that under the Federal Arbitration Act, which implements the New York Convention in the United States, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, and enforcement of an arbitration agreement should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Here, MediVas recognized that all of its claims, also those in tort, were related to the 2004 Note Purchase Agreement. Hence, they must be arbitrated.

Differently, the claims brought by the Individual Plaintiffs should be heard in court. The Individual Plaintiffs were not parties to the Note Purchase Agreement and could not be compelled to arbitrate under the doctrine of equitable estoppel, as argued by Marubeni, on the ground that they received a direct benefit from the Note Purchase Agreement containing the arbitration clause. The court reasoned that the purpose of the Note Purchase Agreement was for Marubeni to lend

money to MediVas, not to provide services or any other direct benefit to the Individual Plaintiffs. Also, the Individual Plaintiffs' claims arose from a dispute about the impact of the 2007 Security Agreement on the Individual Plaintiffs' Incentive Notes. The Security Agreement provided for the exclusive jurisdiction of the courts of San Diego, California.

The district court added that it was irrelevant, in light of Supreme Court jurisprudence, that there would be a "piecemeal resolution" of the dispute.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152063-n>.

734. United States District Court, Southern District of New York, 3 March 2011, 08 Civ. 5951 (SHS)

Parties:	Plaintiff: The Republic of Iraq, including as Parens Patriae on Behalf of the Citizens of the Republic of Iraq Defendant: ABB AG (nationality not indicated) et al.
Published in:	769 Federal Supplement, Second Series (S.D.N.Y. 2011) p. 605 et seq.; available online at <www.justia.com>; 2010 U.S. Dist. LEXIS 141766
Articles:	II(3)
Subject matters:	– non-signatory plaintiff may not rely on arbitration clause – third-party beneficiary
Topics:	¶ 226

Summary

The court dismissed a motion to compel arbitration, finding that the non-signatory plaintiff could not invoke the arbitration clause in the contract. The court first held that issues of arbitrability are presumptively for the court rather than the arbitrator to decide, unless there is clear and unmistakable evidence to the contrary; no such evidence existed here. The court then determined on the merits that the claims at issue were not arbitrable because the contract limited arbitration to disputes between the signatory parties to the contract.

In 1995, the United Nations Security Council established the Oil-for-Food Programme to alleviate the human suffering resulting from international economic sanctions against Iraq. The Programme permitted the sale of Iraqi oil as a means of raising funds for the purchase of humanitarian goods for the Iraqi people. Security Council Resolution 986 directed the UN Secretary-General to establish an escrow account for Programme funds. By a 1996 contract (the Banking Agreement), Banque Nationale de Paris S.A., a French bank which later became BNP Paribas (BNP), agreed to open the escrow account. The Banking Agreement contained an arbitration clause providing that:

> "Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, unless settled amicably under Article 1.23.1 within sixty (60) days after receipt by one Party of the other Party's request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining and the directions contained in this Article 1.23.2."

The Banking Agreement stated that a reference to a "Party" was a reference to either the United Nations or BNP.

The Oil-for-Food Programme ceased in 2003 and did not perform as intended. In 2008, the Republic of Iraq commenced an action in the United States District Court for the Southern District of New York against more than ninety defendants, including BNP, to recover damages stemming from the alleged corruption of the Programme. On 30 April 2010, the Republic of Iraq also sought to commence arbitration against BNP, relying on the arbitration provision in the Banking Agreement as a third-party beneficiary and claiming that BNP breached the Banking Agreement by, inter alia, assisting others in violating the Programme's rules and concealing information about this malfeasance. At the same time, the Republic of Iraq moved in the district court proceeding to compel arbitration. BNP cross-moved to enjoin arbitration.

The district court, per Sidney H. Stein, US DJ, dismissed the Republic of Iraq's motion to compel arbitration and granted BNP's cross-motion to enjoin arbitration, finding that the Republic could not invoke the arbitration provision in the Banking Agreement.

The court first reasoned that although the Republic of Iraq was not a party to the Banking Agreement, in principle it could still invoke its arbitration provision under such principles of New York state law such as, relevantly, the third-party beneficiary theory.

Before addressing the merits of this argument, the court held that the issue of arbitrability was for the court, rather than the arbitrator, to decide. Although the federal policy favoring arbitration requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration, arbitrability questions are presumptively to be decided by the courts. This presumption – which also applies in cases falling under the 1958 New York Convention, such as the present one – is overcome only by clear and unmistakable evidence from the arbitration agreement, as construed by the applicable state law, that the parties intended that the question of arbitrability be decided by the arbitrator. This was not the case here: first, there could be no evidence that the Republic of Iraq and BNP agreed

to arbitrate arbitrability issues between them because there was no contract between them. Second, the Banking Agreement between BNP and the United Nations did not clearly and unmistakably provide for arbitral resolution of arbitrability disputes with third parties. Hence, the court should decide the issue of arbitrability.

The district court then found on the merits that the Republic of Iraq's claims were not arbitrable as a matter of New York contract law. Whether third-party beneficiaries may rely on the clauses in a contract, including the arbitration clause, depends on the contracting parties' intent. No such intent existed here, as the arbitration clause in the Banking Agreement referred to arbitration only between the United Nations and BNP. Accordingly, even if the Republic of Iraq were a third-party beneficiary and thus entitled to sue for breach of contract, the Banking Agreement did not grant it a right to compel arbitration. It was therefore unnecessary to decide whether the Republic of Iraq was indeed a third-party beneficiary of the Banking Agreement.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152064-n>.

735. United States District Court, Southern District of Florida, 8 March 2011, Case No. 10-20685-CIV-LENARD/TURNOFF

Parties:	Plaintiff: Adolfo Arzu Martinez (Honduras) Defendant: Carnival Corporation, d/b/a Carnival Cruise Lines, Inc. (nationality not indicated)
Published in:	Available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 22904
Articles:	II(3)
Subject matters:	– requirements for referral to arbitration (in general) – seamen's employment contracts are commercial contracts subject to the 1958 New York Convention – arbitration agreement "null and void" on public policy grounds (no)
Topics:	¶¶ 214-216 + ¶ 220

Summary

The court compelled arbitration of a seafarer's claim, finding that all requirements for compelling arbitration were met and that there was no public policy affirmative defense under the 1958 New York Convention. The Eleventh Circuit found in Thomas *that a similar arbitration agreement – providing for arbitration in Panama and the application of substantive Panamanian law – was unenforceable because the arbitration and choice of law provisions acted in tandem to strip the plaintiff of his statutory rights under the Seaman's Wage Act. However, it did so in circumstances distinguishable from the present case. Here, other than in* Thomas*, all of the plaintiff's claims were covered by an arbitration agreement; it was not proved that Panamanian law would fail to provide the plaintiff with a reasonable equivalent to his Jones Act claims; the defendant stipulated to the application of US law; and there was a greater chance of review of the public policy defense at the enforcement stage, since all of the plaintiff's claims would be submitted to arbitration and US law would be applied. Since the present case was distinguishable from* Thomas*, the parties should be referred to arbitration.*

On 8 June 2007, Adolfo Arzu Martinez entered into an employment contract with Carnival Corporation, d/b/a Carnival Cruise Lines, Inc. (Carnival), to

work as a cabin steward aboard Carnival's vessels, performing duties such as transporting luggage for passengers. On 11 January 2009, the parties concluded a second employment contract. Both the June 2007 and the January 2009 contracts provided that they were governed by the law of the flag of the vessel on which the seafarer was assigned at the relevant time. They also provided for arbitration of disputes under the International Rules of the American Arbitration Association/International Centre for Dispute Resolution, in London, Monaco, Panama City or Manila, whichever was closest to the seafarer's home country.

Martinez alleged that he started suffering from back pain in July 2007 and again in May 2009 while he was working on a Panamanian-flagged vessel operated by Carnival. He reported these concerns to Carnival's medical staff but was advised to continue working and given inappropriate medical treatment. He only received surgical treatment for his injuries at the end of October 2009.

Martinez then commenced an action against Carnival in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, alleging (1) negligence under the Jones Act; (2) unseaworthiness; (3) failure to treat or provide adequate medical care and (4) failure to provide maintenance and cure. On 8 March 2010, Carnival removed the action to the United States District Court for the Southern District of Florida under Chapter 2 of the Federal Arbitration Act (FAA), which implements the 1958 New York Convention in the United States, and moved to compel arbitration. Martinez moved to remand the case to state court.

On 18 June 2010, the district court referred the matter to the Magistrate Judge for an evidentiary hearing in respect of several material facts. As a result of the hearing, the parties submitted a Joint Stipulation in which they agreed that Martinez's initial injury occurred in July 2007 and that the June 2007 Agreement and the January 2009 Agreement were the two relevant employment agreements in force at the relevant time. Also, Carnival stated that it was willing to stipulate to the application of US law to Martinez's Jones Act claim. On 26 August 2010, the Magistrate Judge issued a Report and Recommendation, recommending that the district court adopt the stipulated facts.

By the present decision, the district court, per Joan A. Lenard, US DJ, granted Carnival's motion to compel arbitration, denied Martinez's motion to remand the case to state court and adopted the Report and Recommendation of the Magistrate Judge.

The court first noted that pursuant to the arbitration agreement in the employment contracts, any arbitration would take place in Panama City – the closest seat to Honduras, Martinez's home country – and Panamanian law, the law of the flag of the vessel, would apply. Martinez argued that the arbitration agreement was unenforceable on grounds of public policy under Art. V(2)(*b*) of

the New York Convention, because the requirement that he arbitrate his Jones Act claim in Panama pursuant to Panamanian law would strip him of his statutory rights under the Jones Act.

The district court found that the requirements for compelling arbitration under the Convention were all met in the present case: (1) there was an arbitration agreement in writing; (2) the agreement provided for arbitration in the territory of a signatory of the Convention (Panama); (3) the agreement arose out of a legal relationship that is considered commercial, since seamen's employment contracts were held to be commercial by the Eleventh Circuit's 2005 decision in *Bautista*; and (4) neither party was a citizen of the United States. As a consequence, the court should compel arbitration unless an affirmative defense under the Convention was proved.

No such affirmative defense existed here. Although the Eleventh Circuit held in its 2009 decision in *Thomas* that a similar arbitration provision in a seafarer's employment contract was void and unenforceable as a matter of public policy under Art. V(2)(*b*) Convention, *Thomas* was distinguishable as it dealt with different circumstances. In particular, the seafarer in *Thomas* brought claims based on both the Jones Act and the Seaman's Wage Act and, because most of his injuries occurred while he was employed under an employment agreement that did not contain any arbitration provision, only a portion of his Seaman's Wage Act claim was covered by an arbitration clause. The Eleventh Circuit found that Panamanian law did not provide a reasonable equivalent to the plaintiff's rights under the Seaman's Wage Act and that there was no assurance of an opportunity for re-examining the public policy defense at the enforcement stage. Thus, the Court held that the arbitration and choice of law provisions acted in tandem to strip the plaintiff of his statutorily created rights.

In the present case, no Seaman's Wage Act claim was brought and Martinez failed to explain how Panamanian law would fail to provide him with a reasonable equivalent to his statutory Jones Act claim. Also, Carnival stipulated to the application of US law with respect to the Jones Act claim and, unlike in *Thomas*, there was a greater chance of review at the enforcement stage, given the fact that all of Martinez's claims would be submitted to arbitration and US law would be applied to his Jones Act claim. The dispute should therefore be referred to arbitration.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152065-n>.

736. Supreme Court of New York, Appellate Division, First Department, 10 March 2011, 602511/09, 3841

Parties:	Petitioner/Respondent: Sojitz Corporation (Japan) Respondent/Appellant: Prithvi Information Solutions Ltd (India)
Published in:	2011 NY Slip Op 1741; 82 A.D.3d 89; 921 N.Y.S.2d 14; available online at <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=tirVQewp3Wtz3B6nW1R5iQ==&system=prod>; 2011 N.Y. App. Div. LEXIS 1709
Articles:	II(3)
Subject matter:	– pre-award attachment
Topics:	¶ 228

Summary

Pre-award attachment is available in aid of an arbitration conducted outside New York and/or falling under the 1958 New York Convention. Such attachment may be ordered, strictly for security purposes, also against a party who has no contacts with New York.

In November 2007, Sojitz Corporation (Sojitz) and Prithvi Information Solutions (Prithvi) entered into a contract under which Sojitz agreed to provide telecommunications equipment to Prithvi against payments into an escrow account at an Indian bank. The contract was governed by English law. It also provided for arbitration of disputes in Singapore.

A dispute arose between the parties when Sojitz claimed that it only received part of the sum owed under the contract, that Prithvi diverted payments intended for the escrow account because of its cash flow problems and that Prithvi also owed interest under the contract. Sojitz claimed that Prithvi owed a total of US$ 48.4 million.

In August 2009, Sojitz moved ex parte for an order of attachment against Prithvi for US$ 40 million, claiming that it intended to commence arbitration in Singapore within 30 days of the order of attachment, but that it would take time

to constitute the arbitral tribunal and Prithvi might dissipate assets in the meantime. On 13 August 2009, the Supreme Court of New York County granted an order of attachment to secure the amount of US$ 40 million; it also ordered Sojitz to post a US$ 2 million bond. Prithvi filed evidence that it had no regular contacts in New York, and none at all in connection with the contract at issue; it also showed that as of September 2009, one of its three or four New York customers owed US$ 18,480. Sojitz attached that US$18,480, which was located in New York. On 5 October 2009, the Supreme Court vacated the US$ 40 million attachment against Prithvi but confirmed the US$ 18,480 attachment, reduced Sojitz's US$ 2 million bond to US$ 900, or 5 percent of any amount attached, whichever was greater, and permitted Sojitz to move to attach additional specific assets if it found any in New York. The court rejected Prithvi's argument that the court had to have personal jurisdiction over it to issue such an attachment. Prithvi appealed.

The Supreme Court of New York, Appellate Division, before Angela M. Mazzarelli, JP, David Friedman, James M. McGuire, Dianne T. Renwick and Rosalyn H. Richter, JJ, in an opinion by Renwick, affirmed the lower court's decision, answering in the affirmative the issue of first impression whether a creditor can attach assets in New York in anticipation of an award that will be rendered in foreign arbitration, "strictly for security purposes", where there is no connection to New York by way of subject matter or personal jurisdiction.

The Court noted that the authority of New York courts to issue the provisional remedy of attachment in aid of arbitration is a relatively recent phenomenon, despite "New York's status as a global commercial and financial center". As late as 1982, when the New York Court of Appeals rendered its decision in *Cooper*, this authority was held not to exist. The *Cooper* court reasoned that the provisional remedy of attachment "is, in part, a device to secure payment of a money judgment" and is therefore available only in an action for damages, not in proceedings to compel arbitration. This situation changed in 1985, when the Civil Practice Law and Rules (CPLR) were amended specifically to provide that courts could entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, provided that the award would otherwise be rendered ineffectual without such provisional relief. The doubt whether this rule applied to cases where the seat of the arbitration was outside New York or in actions governed by the 1958 New York Convention was solved in October 2005, when the CPLR were again amended to explicitly grant the courts of New York authority to issue preliminary injunctions and attachments in aid of all arbitrations, including those involving

foreign parties – that is, falling under the New York Convention – or in which the arbitration is conducted outside of New York.

The Supreme Court of New York found that in the present case attachment was therefore allowed and also proper.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152066-n>.

737. United States Court of Appeals, Second Circuit, 17 March 2011, Docket Nos. 10-1020-cv (L) 10-1026 (Con)

Parties:	Petitioner/Appellant: Republic of Ecuador Plaintiffs/Appellants: Daniel Carlos Lusitand Yaiguaje (Ecuador) et al. Defendants/Appellees: (1) Chevron Corporation (US); (2) Texaco Petroleum Company (US)
Published in:	Available online at <www.ca2.uscourts.gov/decisions/isysquery/f880d544-852e-4c8b-a1d7-0a4322bcbd5e/4/doc/10-1020_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/f880d544-852e-4c8b-a1d7-0a4322bcbd5e/4/hilite/>; 2011 U.S. App. LEXIS 5351
Articles:	II(1); II(3) (both by implication)
Subject matters:	– arbitration agreement "in writing" under Bilateral Investment Treaty – estoppel from demanding arbitration – waiver of (right to) arbitration – arbitrability (estoppel, waiver issues) to be decided by arbitrator – reliance on UNCITRAL arbitration rules evidence that arbitrability is to be decided by arbitrator – estoppel (judicial) – estoppel (equitable) – estoppel (collateral)
Topics:	¶ 217 + ¶ 222 + ¶ 226

Summary

Chevron's initiation of arbitration against Ecuador under the Ecuador-US BIT while court proceedings commenced against Chevron were pending in Ecuador did not violate Chevron's promise to submit to the jurisdiction of the Ecuadorian courts, laid down in a 2001 district court decision as a condition for a forum non conveniens dismissal of an action brought in the

United States on related grounds. The Court held: (1) There was a valid arbitration agreement under the 1958 New York Convention because the BIT provides that such an agreement is made when a foreign company gives notice in writing to a BIT signatory and submits an investment dispute to arbitration in accordance with the BIT. This was the case here. (2) The issue whether Chevron was estopped from seeking arbitration or had waived its right thereto was for the arbitrators to decide; estoppel and waiver issues are presumptively for the arbitrators, but in the present case the matter was settled beyond any doubt by the parties' agreement to apply the UNCITRAL Rules, which so provide. (3) Ecuador's request for a stay of arbitration on grounds of judicial, equitable and collateral estoppel in order to hold Chevron accountable to its 2001 promise was denied. The two proceedings – one in which Chevron asserted wrongdoing on the part of Ecuador and another in which different plaintiffs asserted wrongdoing on the part of Chevron – could coexist. Also, Chevron's claim in the arbitration that Ecuador interfered with the Ecuadorian court proceedings was not in conflict with the 2001 promise, which was conditioned on a reservation of any rights under a New York statute that allows a party to resist enforcement of foreign money judgments on due process grounds.

The facts of this case are also reported in Yearbook XXXI (2006) at pp. 1162-1194 (US no. 544). In 1993, a group of residents of the Oriente region of Ecuador (Plaintiffs) brought an action in the United States District Court for the Southern District of New York against Texaco Petroleum Company (TexPet), seeking relief for the devastation to that region caused by the oil exploration and extraction activities under a concession granted to TexPet by Ecuador in 1964. Plaintiffs alleged that TexPet improperly dumped toxic by-products of the drilling process into the local rivers and constructed a pipeline that leaked large quantities of petroleum into the environment, causing both personal injuries and catastrophic environmental damage.

In 1996, the district court dismissed the case, at TexPet's request, on grounds of forum non conveniens, international comity and failure to join indispensable parties, specifically Ecuador and Petroecuador, Ecuador's state oil company, which had become a partner in the concession in 1974 (*Aguinda v. Texaco, Inc.*, 945 F.Supp. 625 (S.D.N.Y. 1996)). Plaintiffs moved for reconsideration; Ecuador sought to intervene in the lawsuit on Plaintiffs' behalf. The district court denied both motions. In 1998, the United States Court of Appeals for the Second Circuit reversed this decision and remanded the case for further proceedings, holding that the district court erred by dismissing Plaintiffs' complaint without first securing a commitment by TexPet to submit to the jurisdiction of the Ecuadoran courts (*Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998)).

In 2001, on remand, the district court again dismissed the case on grounds of forum non conveniens when TexPet agreed to be sued in Ecuador, to accept service of process in Ecuador and to waive any statute of limitations-based

defenses that may have matured since the filing of the complaint. TexPet also promised that it would "satisfy judgments that might be entered in plaintiffs' favor [by the Ecuadorian courts], subject to [its] rights under New York's Recognition of Foreign Country Money Judgments Act". TexPet's promises were laid down in the district court's decision (the 2001 dismissal). (*Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534 (S.D.N.Y. 2001)). On 16 August 2002, the Second Circuit affirmed this decision (*Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002)).

During the pendency of the *Aguinda* litigation, TexPet, Ecuador and Petroecuador entered into several agreements regarding measures to remedy environmental damage. By a May 1995 Contract For Implementing of Environmental Remedial Work and Release From Obligations, Liability and Claims (the 1995 Settlement), TexPet agreed to perform certain environmental remedial work in exchange for a release of environmental claims by Ecuador and Petroecuador. By a Final Document of 30 September 1998, the 1995 Settlement was declared to be fully performed and concluded and Ecuador and Petroecuador released TexPet from any liability and claims thereunder (the 1998 Final Release).

In May 2003, a group of individuals filed claims in the courts of Lago Agrio, Ecuador, against ChevronTexaco Corporation (ChevronTexaco), of which TexPet had become a wholly owned subsidiary in 2001 when Chevron Corporation merged with TexPet's parent company, Texaco, to form ChevronTexaco (the Lago Agrio litigation).

On 11 June 2004, ChevronTexaco and TexPet commenced AAA arbitration proceeding against Petroecuador, seeking indemnification for costs and liabilities in the Lago Agrio litigation pursuant to the clause in the 1965 Joint Operating Agreement (JOA), by which the concession had been granted, providing that TexPet would be indemnified for any claims made by third parties in connection with its performance under the JOA.

On 15 October 2004, Ecuador and Petroecuador commenced an action in New York State Supreme Court, New York County, against ChevronTexaco and TexPet and the AAA, seeking an order to stay the arbitration. On 22 October 2004, the defendants removed the action to the United States District Court for the Southern District of New York. On 27 June 2005, the district court denied the motion to stay arbitration (*Republic of Ecuador v. ChevronTexaco Corp.*, 376 F.Supp. 2d 334 (S.D.N.Y. 2005)). This decision is reported in Yearbook XXXI (2006) at pp. 1162-1194 (US no. 544).

In September 2009, Chevron (which had changed its name back from ChevronTexaco in 2005) and TexPet commenced arbitration against Ecuador as

provided under the 1993 Bilateral Investment Treaty between Ecuador and the United States. Chevron asserted two claims related to the Lago Agrio litigation: it argued (1) that any judgment issued against it would violate the terms of the 1995 Settlement and (2) that the Ecuadorian government improperly interfered with the Lago Agrio proceedings, publicly announcing its support for the plaintiffs and seeking to interfere with Chevron's defense, and that Ecuador's judiciary was conducting the Lago Agrio litigation "in total disregard of Ecuadorian law, international standards of fairness, and Chevron's basic due process and natural justice rights".

In the BIT arbitration, Chevron and TexPet sought (1) a declaration that they were not liable or responsible for environmental impact or for performing further environmental remediation; (2) a declaration that Ecuador breached both the BIT and the terms of the 1998 Final Release; (3) an order requiring Ecuador to inform the Lago Agrio court that Chevron was released from all environmental impact and that Ecuador and Petroecuador were responsible for any remaining and future remediation work; (4) a declaration that Ecuador or Petroecuador was exclusively liable for any judgment that may be issued in the Lago Agrio litigation; (5) an order requiring Ecuador to indemnify, protect and defend Chevron in connection with the Lago Agrio litigation, including payment of all damages that may be awarded against Chevron; and (6) attorneys' fees, litigation costs, arbitration costs, moral damages and interest.

In December 2009, Ecuador petitioned the Southern District of New York to stay the BIT arbitration "to the extent it would seek dismissal, nullification or avoidance of any judgment" in the Lago Agrio litigation. Ecuador argued that the commencement of arbitration and the pursuit of such broad relief violated the promises that TexPet made in the *Aguinda* litigation in order to secure a forum non conveniens dismissal of that action (the 2001 dismissal). The district court denied the motion. Ecuador and Plaintiffs appealed to the Second Circuit.

While the appeal was pending, the arbitral tribunal in the BIT arbitration issued an interim order directing Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement … of any judgment against [Chevron] in the Lago Agrio Case" (*Chevron Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23 (9 Feb. 2011)). A few days later, the Lago Agrio court entered an US$ 8.6 billion judgment against Chevron.[1]

1. The Court of Appeals noted that, while it recognized the potential importance of the latest developments in this case, "they do not alter the basic question on appeal: whether the district court erred by refusing to stay the BIT arbitration based on the record before it".

By the present decision, the United States Court of Appeals for the Second Circuit, before Jacobs, Chief Judge, Poolerk and Lynch, CJJ, in an opinion by Gerard E. Lynch, affirmed the district court's decision, concluding that the initiation of BIT arbitration did not breach the promises made to the district court in the *Aguinda* litigation and that the BIT arbitration and the Lago Agrio litigation could coexist without undermining the 2001 dismissal.

The Court of Appeals noted at the outset that BIT arbitration falls under the 1958 New York Convention, which governs agreements that are commercial and not entirely between citizens of the United States.

Chevron argued that because of the strong pro-arbitration policy in the Convention and the Federal Arbitration Act (FAA), which implements the Convention in the United States, and because of the lack of express authorization to stay arbitrations in the Convention, the FAA or the BIT, courts lack the power to stay BIT arbitration. The Court reasoned that this was an open question in its Circuit which, however, it need not answer because it concluded that a stay was unnecessary.

Ecuador argued that Chevron was estopped from relying on its right to demand arbitration – or had waived such right – by agreeing to litigate in Lago Agrio. Before dealing with this argument, the Court reasoned that under federal law, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Here, such an agreement to arbitrate existed, though Chevron was not a party to the BIT and the arbitration clause therein. The Ecuador-US BIT provides that an agreement in writing for purposes of Art. II of the New York Convention is made when a foreign company gives notice in writing to a BIT signatory and submits an investment dispute to arbitration in accordance with the BIT. Thus, a valid agreement to arbitrate existed here because Ecuador signed the BIT and Chevron submitted a dispute to arbitration.

Having establish that a valid arbitration agreement existed, the Court turned to the question whether Ecuador's waiver and estoppel claims were for the court or the arbitrators to decide. Because of the strong federal pro-arbitration policy, the Court noted that any doubts concerning the scope of arbitrable issues should be solved in favor of arbitration.

It then reasoned that, under Supreme Court precedents, there are two categories of gateway matters: "questions of arbitrability" – disputes as to whether the dispute should be arbitrated, such as whether the parties are bound by an arbitration clause or whether an arbitration clause applies to a certain controversy – and procedural questions which grow out of the dispute and bear on its final disposition. Matters in the former category 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. Matters in the latter category are presumptively for an arbitrator to decide, as parties likely expect that an arbitrator would decide them. Waiver and estoppel generally fall into the group of issues that are presumptively for the arbitrator.

In this case, however, Ecuador characterized its waiver and estoppel arguments as undermining the agreement itself, not merely as preventing Chevron from taking advantage of a binding arbitration clause. Ecuador claims that, under such circumstances, waiver and estoppel are presumptively for the courts.

The Court of Appeals held that it need not reach that issue. Even assuming Ecuador's waiver and estoppel claims concerned Chevron's ability to initiate arbitration and were thus questions of arbitrability, there was unmistakable evidence here that the parties intended these issues to be decided by the arbitral tribunal in the first instance. By signing the BIT, Ecuador agreed to resolve investment disputes through arbitration under the UNCITRAL Arbitration Rules. Art. 21 of the UNCITRAL Rules states that the arbitrators shall have the power to rule on objections that they have no jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Chevron also agreed to the application of the UNCITRAL Rules by relying thereon in its notice of arbitration.

Finally, the Court of Appeals examined Ecuador's claim that Chevron was using the BIT arbitration to undermine the Lago Agrio litigation and, by so doing, was breaching the promises that TexPet made in the 2001 dismissal. In Ecuador's opinion, a stay of the arbitral proceedings should be granted, on the basis of judicial estoppel, equitable estoppel and collateral estoppel grounds, in order to hold Chevron accountable to those promises.

The Court noted that all these doctrines basically require that the party who is to be estopped must have asserted a fact or claim, or made a promise, that another party relied on, that a court relied on or that a court adjudicated. The party must then later attempt to take a contradictory stance in that or another proceeding. Generally speaking, estoppel is employed to ensure the integrity of the judicial process and to hold litigants accountable for statements upon which courts and other parties reasonably rely.

The Court noted first that there was no inherent conflict between the BIT arbitration and the Lago Agrio litigation and that the two proceedings – one in which Chevron asserted wrongdoing on the part of Ecuador and another in which Plaintiffs asserted wrongdoing on the part of Chevron – could coexist.

Nor was there a conflict between TexPet's promises to the district court in the 2011 dismissal decision and Chevron's initiation of a challenge to Ecuador's conduct with respect to the Lago Agrio litigation in the arbitration. TexPet expressly conditioned its promises on a reservation of its rights under New York's Recognition of Foreign Country Money Judgments Act. By so doing, it reserved its right to challenge any judgment issued in Lago Agrio on the grounds that the Ecuadorian judicial system did not provide impartial tribunals or procedures compatible with the requirements of due process of law, that the judgment itself was obtained by fraud, or that the proceeding in Lago Agrio was contrary to an agreement between the parties. Chevron, in TexPet's stead, could rely on the same rights.

Against this backdrop, the Court concluded that neither of the alleged grounds justified a stay.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152067-n>.

738. United States District Court, Southern District of Texas, Houston Division, 24 March 2011 and 12 May 2011, Civil Action No. H-11-0585

Parties:	Petitioner: Tamimi Global Company Limited (nationality not indicated) Respondent: Kellogg Brown & Root LLC (nationality not indicated) et al.
Published in:	*Decision of 24 March 2011*: available online at <http://scholar.google.co.uk/scholar_case?case=13999147740897613 54&q=Tamimi+Global+Company+Limited+v.+Kellogg+Brown+%26+Root&hl=en&as_sdt=2,5&as_vis=1>; 2011 U.S. Dist. LEXIS 30822; *Decision of 12 May 2011*: available online at <http://scholar.google.co.uk/scholar_case?case=14498548474214716621&q=Tamimi+Global+Company+Limited+v.+Kellogg+Brown+%26+Root&hl=en&as_sdt=2,5&as_vis=1>; 2011 U.S. Dist. LEXIS 50873
Articles:	V; V(2)(*b*)
Subject matters:	– narrow concept of public policy – corruption/bribery – fraud as ground for violation of public policy – burden of proof on respondent
Topics:	¶ 503 + ¶ 518 + ¶ 524 (fraud and corruption)

Summary

An LCIA award in favor of a party which had obtained a dining facilities contract for the US military in Iraq was granted enforcement. The court dismissed the argument – based on the allegations of fraud made by the United States in a related action – that the award was based on a contract obtained by fraud and corruption. Even if proven, these allegations would not amount to a violation of the United States' most basic notions of morality and justice and would not lead to refusal of enforcement, because "to the extent Tamimi was paying kickbacks

to obtain dining services subcontracts, KBR was accepting those kickbacks". By the second decision, the court dismissed a request for reconsideration.

In 2001, the United States awarded Kellogg Brown & Root LLC (KBR) a contract in connection with the Government's Logistics Civil Augmentation Program to provide dining facility services during military operations. In 2003, KBR was assigned to provide dining facilities and food services for military personnel in Iraq. In June 2003, KBR awarded Master Agreement 3 to Tamimi Global Company Limited (Tamimi), setting forth the basic terms and conditions governing the contractual relationship between KBR and Tamimi; in August 2003, KBR issued Work Release 3 under Master Agreement 3 for Tamimi to provide food services to American troops at Camp Anaconda in Iraq. Master Agreement 3 contained a clause providing for arbitration of disputes in London under the rules of the London Court of International Arbitration (LCIA).

When a dispute arose between the United States and KBR, the United States withheld funds from KBR and KBR commenced an action in the United States Court of Claims.

In turn, KBR withheld funds it owed to Tamimi, admitting that it owed US$ 34,675,583.00 but arguing that it was not required to pay Tamimi unless and until the United States paid KBR. The parties submitted the dispute to arbitration in London as required by Master Agreement 3. In December 2010, an LCIA arbitral tribunal issued an award in favor of Tamimi in the amount of US$ 34,675,583.00, plus interest and costs. Tamimi sought enforcement of the LCIA award in the United States.

KBR opposed enforcement on grounds of public policy, based on allegations of fraud that the United States filed as a counterclaim in the Court of Claims proceedings. The United States alleged in that proceeding that Mr. Terry Hall, KBR's head of food services for Kuwait and Iraq, and Mr. Luther Holmes, his deputy, received kickbacks from Tamimi to influence them to recommend awarding the dining facilities sub-contracts to Tamimi. The United States also alleged that in February 2004 a former KBR employee reported to KBR that there were irregularities surrounding the Master Agreement 3 Work Release 3 sub-contract with Tamimi but KBR allegedly took no action.

By the first reported decision, rendered on 24 March 2011, the United States District Court for the Southern District of Texas, Houston Division, per Nancy F. Atlas, US DJ, granted enforcement, finding that even if proven the allegations of fraud would not amount to a violation of public policy within the meaning of the 1958 New York Convention.

The court first reasoned that under the New York Convention, awards must be enforced unless the court finds one of seven grounds exhaustively specified in

the Convention. These defenses must be construed narrowly; in particular, the public policy defense is to be granted only where enforcement would violate the forum state's most basic notions of morality and justice.

Here, KBR contended that enforcement of the LCIA award would violate public policy because the award concerned a contract procured through fraud and corruption. The court denied this argument, finding that the allegations made by the United States in the Court of Claims, on which KBR exclusively relied, even if proven, would not lead to a refusal of confirmation on public policy grounds because "to the extent Tamimi was paying kickbacks to obtain dining services subcontracts, KBR was accepting those kickbacks" and therefore did not have "clean hands". The court held that enforcement of an award in favor of a party alleged to have committed fraud against the other party allegedly engaged in the same fraudulent misconduct "does not violate the most basic notions of morality and justice".

The district court also denied KBR's claim that the part of the LCIA award ordering KBR to pay interest on the sum owed to Tamimi should not be enforced because it was in violation of Texas public policy, which does not provide for an award of interest in arbitration. The court noted that it is "well-established" that courts should enforce awards "as written". This is the first decision reported.

By the second reported decision, rendered on 12 May 2011, the district court, again per Judge Atlas, denied KBR's motion for reconsideration of the 24 March 2011 decision. The court noted, inter alia, that there were competing public policies in this case: a strong public policy against paying bribes to obtain contracts, particularly government contracts; an equally strong public policy against accepting bribes to award contracts, particularly government contracts; and the overriding strong federal policy favoring arbitration and enforcement of arbitral awards. The court added that the pro-arbitration policy is so strong that a district court is required to confirm the award unless the party opposing confirmation establishes one of only seven specific defenses listed in the New York Convention. KBR failed to show that enforcement of the LCIA award would violate the most basic notions of morality and justice of the United States, even if the United States' allegations in the Court of Claims were proven. This is the second decision reported.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152068-n>.

739. United States District Court, District of Columbia, 28 March 2011, Civil Action No. 10-0003 (PLF)

Parties:	Petitioner: DRC, Inc. (US) Respondent: Republic of Honduras
Published in:	Available online at <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv0003-68>; 2011 U.S. Dist. LEXIS 32056
Articles:	VI
Subject matters:	– 1975 Panama Convention applies – 1975 Panama Convention and 1958 New York Convention are intended to achieve same results – discretion to stay enforcement proceedings pending annulment proceedings – stay of enforcement proceedings and posting of security
Topics:	¶ 601 + ¶ 704(A)

Summary

The court exercised its discretion to adjourn enforcement pending a confirmation action in the country of rendition of the award, Honduras, on a balance of the factors developed by the Second Circuit in respect of adjournment under the 1958 New York Convention. This framework applied here because the 1975 Panama Convention and the 1958 New York Convention are intended to achieve the same results. The defendant – a presumably solvent state that will comply with legitimate orders – was not required to post security.

Following Hurricane Mitch's devastation of Central America in 1998, the United States Agency for International Development (USAID) funded reconstruction projects in various Central American countries, including Honduras. One such project, involving the construction of water and wastewater sub-projects in Honduras, was undertaken in collaboration with the Honduran Social Investment Fund (*Fondo Hondureño de Inversión Social* – FHIS), an instrumentality of the

Republic of Honduras. FHIS solicited bids for the project and DRC, Inc. (DRC) was eventually selected as the contractor.

On 21 June 2000, FHIS and DRC entered into a Construction Contract. The Construction Contract provided that the work would be paid for by USAID, which issued a Letter of Commitment to DRC. The Construction Contract provided that all disputes be governed by the Construction Contract Liability Clauses, which provided for arbitration.

On 1 June and 7 July 2004, DRC brought two suits against the United States government in the United States Court of Federal Claims, claiming that (1) USAID breached the contract created by the Letter of Commitment by failing to pay certain invoices and (2) a different contract between DRC and FHIS should be assigned to USAID (the Claims Court Actions). In September 2004, the United States in turn brought suit against DRC in the United States District Court for the District of Columbia, seeking to recover payments made to DRC for the work in Honduras on the ground that DRC committed fraud by misrepresenting itself in order to obtain the contract and subcontracting out most of the work without USAID's approval. These claims were brought under the False Claims Act (the FCA Action). The Claims Court Actions were then stayed at the United States' request pending resolution of the FCA Action.

In early 2009, DRC commenced arbitration against FHIS, seeking damages totaling over US$ 86 million arising out of alleged breaches of the Construction Contract. The arbitration was held in Honduras; the Honduran arbitrators applied Honduran law. On 8 September 2009, the arbitral tribunal rendered an award in DRC's favor.

On 11 November 2009, DRC filed an action before the Honduran Supreme Court for recognition and execution of the award. On 24 February 2010, DRC requested a temporary suspension of the proceedings in light of the parties' negotiations to reach an amicable settlement. FHIS agreed to a suspension of sixty days but asserted that thereafter DRC must either file the proceedings or finally withdraw the petition. On 30 April 2010, the Honduran Supreme Court granted DRC's request and ordered a temporary suspension on FHIS's conditions. On 2 July 2010, upon expiry of the sixty-day period, FHIS requested the Honduran Supreme Court to proceed to adjudicate the matter. This action was pending at the time of the present decision.

In the meantime, on 5 January 2010, DRC filed a petition for enforcement of the Honduran award in the same US district court. Honduras filed a motion to stay or dismiss the action.

The district court, per Paul L. Friedman, US DJ, granted the motion to stay; it refused to order Honduras to post security.

The court applied the 1975 Panama Convention, noting that this Convention is intended to achieve the same results as the 1958 New York Convention, whose standards it adopts. Both Art. 6 Panama Convention and Art. VI New York Convention give the court discretion to postpone a decision on enforcement "if there is a pending action in the State in which, or according to the law of which, the arbitral award was made". Both Articles also allow the court to order the posting of security.

The court set forth the framework for determining whether to adjourn a decision to enforce an award in a March 2010 case, *Continental Transfert*, decided under Art. VI of the New York Convention. That framework was equally applicable in the case at issue, since the text of Art. 6 of the Panama Convention and Art. VI of the New York Convention is substantively identical and, as noted earlier in the decision, the two Conventions are intended to achieve the same results.

In *Continental Transfert*, the district court relied on Second Circuit precedent in *Europcar Italia*, also a case decided under the New York Convention. Finding that the District of Columbia Circuit has not yet had occasion to offer guidance as to suspension of enforcement in cases brought under the Panama Convention, the court again relied on *Europcar Italia*. In that 1998 decision, the Second Circuit listed several factors which a district court must take into account in order to balance the inherent tension between competing concerns: pro-arbitration federal policy and the fact that the adjournment of enforcement proceedings impedes the goals of arbitration, that is, the expeditious resolution of disputes and the avoidance of protracted and expensive litigation. The Second Circuit also held that where parallel proceedings are pending in the country where the award was rendered and may lead to the award being set aside, "a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings".

The district court found that in the present case the *Europcar Italia* factors weighed in favor of a stay and found that as a consequence it would be acting improvidently if it enforced the award prior to the completion of the proceedings in Honduras.

The court did not require Honduras ("a sovereign state that presumably is solvent and will comply with legitimate orders issued by courts in this country or in Honduras") to post security.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152069-n>.

740. United States District Court, Southern District of New York, 29 March 2011, No. 09 Civ. 8856 (RJS)

Parties:	Petitioner: Zeevi Holdings Ltd. (Israel) Respondent: The Republic of Bulgaria
Published in:	Available online at <http://lettersblogatory.files.wordpress.com/2011/04/zeevi.pdf>; 2011 U.S. Dist. LEXIS 38556
Articles:	III
Subject matters:	– forum non conveniens – grounds are exhaustive
Topics:	¶ 301; [2]-[8] = ¶ 501

Summary

The court granted a defense of forum non conveniens, based on the provision in the contract that "execution" of any award against Bulgaria could only be conducted in Bulgaria. Forum selection clauses can be relied on in cases falling under the 1958 New York Convention, in addition to the seven grounds for denial limitatively listed therein. Here, all conditions for a forum non conveniens defense were satisfied: the forum selection clause was reasonably communicated to the party resisting enforcement; it was mandatory; and it applied to the present action (as "execution" included enforcement actions). Further, the petitioner did not show that enforcement of the clause would be unreasonable or unjust. Its allegation of corruption of the Bulgarian judiciary did not support a finding that Bulgaria was a fundamentally unfair forum.

The facts of this case are also reported in Yearbook XXXIV (2009) at pp. 632-634 (Israel no. 3). In 1999, Zeevi Holdings Ltd. (Zeevi) and the Privatization Agency for the Republic of Bulgaria (the Agency) entered into an Agreement under which Zeevi agreed to purchase 75 percent of the shares of the Bulgarian national airline, Balkan Bulgarian Airline (BBA). The Agency provided extensive warranties and assurances as to the financial health of Balkan Airlines and represented that BBA enjoyed all of the rights and privileges as the exclusive national carrier, and that it would maintain that status for at least twelve years.

The Agreement was in both Bulgarian and English, with the English-language version controlling. It provided that it was to be "governed by and construed in accordance with the laws of Bulgaria" and contained two forum-selection clauses. Sect. 15.1 provided for arbitration of disputes in Paris "in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law". Sect. 15.3 provided:

> "The decision and award of the arbitrators will be final and binding. Such decision or award will not be subject to appeal. The execution of an award against the seller may be conducted only in Bulgaria in accordance with the provisions of Bulgarian Law."

A dispute arose between the parties regarding performance of the Agreement. On 1 February 2001, Zeevi commenced arbitration in Paris against the Agency and the Republic of Bulgaria, alleging that the Agreement contained misrepresentations concerning the financial health of BBA and that Bulgaria had breached its undertaking to maintain the airline's status as the Bulgarian national carrier. On 25 October 2006, the arbitral tribunal rendered a final award holding that Bulgaria shall pay Zeevi the sum of US$ 10,360,143 plus interest (the Agency was dismissed from the arbitration).

Zeevi sought enforcement of the award in the District Court of Jerusalem. On 13 January 2009, the Israeli court granted enforcement, dismissing Bulgaria's claim that under Sect. 15.3 of the Agreement Bulgarian courts had exclusive jurisdiction to enforce the award. This decision is reported in Yearbook XXXIV (2009) at pp. 632-636 (Israel no. 3).

By the present decision, the United States District Court for the Southern District of New York, per Richard J. Sullivan, US DJ, reached the opposite conclusion and granted Bulgaria's motion to dismiss the case on grounds of forum non conveniens.

The court first held that although the 1958 New York Convention establishes an exhaustive list of grounds on which enforcement may be refused, a court may also refuse enforcement on procedural grounds: the Convention itself contemplates in Art. III that different procedural rules may be applied in the courts of the signatory states, as long as these rules are not "substantially more onerous" than those applied in domestic cases. Thus, a court in the United States deciding a petition to confirm a foreign arbitral award may enforce a forum selection clause in the underlying agreement.

The court then concluded that the forum selection clause in the present case was valid and enforceable because it satisfied four relevant conditions. First, it

was undisputed that the clause was reasonably communicated to the party resisting enforcement and that it was mandatory, rather than permissive. The parties disputed, however, whether the forum selection clause applied to the claim before the court. On the basis of expert reports on Bulgarian law, the context of the Agreement and the plain meaning of words, the court found that "execution" in Sect. 15.3 of the Agreement included actions brought to enforce an award rendered under the Agreement. The present action therefore fell within the scope of the forum selection clause.

Under the applicable test, if the first three conditions are satisfied, a forum selection clause is presumptively enforceable. The court must then examine whether the resisting party – here, Zeevi – has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement of the forum selection clause would be unreasonable or unjust, or that the clause was invalid. This was not the case here.

Zeevi argued that the corruption of the Bulgarian judiciary – as shown in reports of the European Union and various organizations – and the Bulgarian government's bias against Zeevi rendered Bulgaria a fundamentally unfair forum. The court agreed that the submitted materials permitted Zeevi "to draw out unseemly aspects of the Bulgarian government generally, and the Bulgarian judiciary specifically". However, they did not support a finding that Bulgaria was a fundamentally unfair forum in which to hear Zeevi's claim. The court noted that principles of comity strongly caution against declaring the entire court system of a country to be inadequate, the more so when, as here, the parties consented to jurisdiction in that forum in the first place. Also, prior to becoming a member state of the European Union Bulgaria was monitored to ensure that its judiciary met the standards required for European Union membership.

Zeevi further alleged that Bulgarian law does not provide for a procedure for enforcing a judgment against the state; rather, execution is determined freely by the same state entity against which the award was rendered. The district court noted, however, that Bulgaria is a party to the New York Convention and, as such, is required to provide a forum to hear confirmation proceedings of foreign arbitral awards. Even if enforcement of arbitral awards is procedurally different in Bulgaria than in the United States, that fact alone cannot lead the court to conclude that enforcement of the Agreement's forum selection clause would be fundamentally unfair.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152070-n>.

741. United States District Court, Southern District of New York, 15 April 2011 10 Civ. 8134 (DLC)

Parties:	Plaintiff: Maritima de Ecologia, S.A. de C.V. (Mexico) Defendant: Sealion Shipping Ltd. (UK)
Published in:	Available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 41148
Articles:	II(3)
Subject matters:	– arbitration agreement "in writing" – intention to arbitrate may not be evidenced by previous contracts containing arbitration clause – applicable law to existence, validity of arbitration clause – stay of court proceedings pending related arbitration – discretion to stay court proceedings
Topics:	[3]-[10] = ¶¶ 203-204; [3]-[14] = ¶ 217

Summary

The court denied a motion to compel arbitration, finding that there was no arbitration agreement in writing between the parties in respect of the dispute and dismissing the argument that an agreement to arbitrate can be implied from the parties' prior course of conduct. Under federal maritime choice-of-law rules, which applied to this maritime contract, the law of the United States applied, and there is no basis in federal law for implying an agreement to arbitrate from a past course of conduct. The court then exercised its discretion to stay proceedings pending arbitration on an earlier contract between the parties, because the arbitration's outcome could affect the present litigation.

On 27 November 2002, Maritima de Ecologia, S.A. de C.V. (Marecsa), a company providing support services to oil companies and rigs operating in the Gulf of Mexico, entered into a Collaboration Agreement with Sealion Shipping Ltd. (Sealion), a company acting as a manager for vessels owned by Toisa Limited (Toisa), and another company. The parties agreed to work jointly to supply a

well-testing services vessel to Pemex Exploration and Production (PEP), a state-owned Mexican oil exploration company.

Also on 27 November 2002, Sealion and Marecsa executed a Side Letter in which (1) they recognized that the Collaboration Agreement was not binding on the parties as it was executed solely for the purpose of permitting Marecsa to present to PEP a fully complying tender proposal and (2) agreed that they would conclude a separate Joint Venture Agreement in respect to the work. The Side Letter further provided that English substantive law applied and that all disputes would be referred to arbitration in London under the rules of the London Maritime Arbitrators Association (LMAA).

On 8 June 2003, Marecsa was awarded a five-year contract to supply a well-testing services vessel, the *TOISA PISCES*, to service PEP's oil rigs in the Gulf (the First PEP Contract). Marecsa and Sealion then entered into two agreements concerning the execution of the First PEP Contract: a Joint Venture Agreement and a Subcontractor Agreement. Both agreements provided that English law was the governing law, and that disputes would be referred to LMAA arbitration. The First PEP Contract expired on 4 March 2008.

On 3 June 2008, Sealion and Marecsa entered into a Transaction Agreement in respect of dispute that had arisen between them concerning unpaid charter hire and other expenses related to the First PEP Contract. The Transaction Agreement provided for the application of English law and referred disputes to arbitration in London.

In the meantime, on 8 March 2008, PEP awarded Marecsa a second contract (the Second PEP Contract). On 14 March 2008, Marecsa, Sealion and a third company entered into a Tripartite Agreement in respect of the parties' role and responsibilities in fulfilling the Second PEP Contract. Also on 14 March 2008, Marecsa and Sealion executed a separate agreement (the Disputed Terms Agreement), pursuant to which Marecsa agreed to request that PEP amend certain disputed terms in the Second PEP Contract. Both the Tripartite Agreement and the Disputed Terms Agreement included the same choice of law provision (English law to apply) and LMAA arbitration provision used in the Joint Venture Agreement and the Subcontractor Agreement.

After the Second PEP Contract expired on 21 March 2010, the vessel *TOISA PISCES* remained on standby while Sealion and Marecsa negotiated a third contract with PEP. At the end of April 2010, however, BP plc (BP) hired the *TOISA PISCES* to assist in the cleanup of the oil spill caused by the Deepwater Horizon oil drilling rig. Sealion's New York agent arranged with Marecsa for Marecsa to provide the personnel necessary for Sealion to perform the BP contract. The *TOISA PISCES* commenced work with Marecsa personnel on board

on 21 May 2010. The parties did not conclude a written agreement concerning this transaction.

A dispute arose when Sealion failed to pay the invoices sent by Marecsa for the services provided in respect of the Deepwater Horizon cleanup. On 27 October 2010, Marecsa commenced an action against Sealion in the United States District Court for the Southern District of New York, seeking US$ 1,152,946.57 in fees.

On 7 December 2010, Sealion served Marecsa with a request for LMAA arbitration for alleged breaches of the Joint Venture Agreement and the Transaction Agreement relating to the First PEP Contract.

On 13 January 2011, Sealion filed a motion in the district court to compel arbitration of the Deepwater Horizon cleanup dispute and to stay court proceedings pending arbitration of the dispute under the First PEP Contract in London.

The district court, per Denise Cote, US DJ, denied Sealion's motion to compel arbitration and stayed court proceedings pending the London arbitration.

The court reasoned that arbitration must be compelled under the 1958 New York Convention when (1) there is a written agreement; (2) the writing provides for arbitration in the territory of a signatory of the Convention; (3) the subject matter is commercial; and (4) the subject matter is not entirely domestic in scope. In the present case, only the first element was in dispute. Sealion acknowledged that there was no agreement in writing in which the parties agreed to arbitrate claims arising from the Deepwater Horizon cleanup. However, it argued that the term "agreement in writing" in the Convention and the statute implementing the Convention in the United States, the Federal Arbitration Act (FAA), should not be given an "overly literal" interpretation and that, under English law, an agreement to arbitrate can be implied from the parties' prior course of conduct.

The district court found that this argument was meritless. Sealion assumed that English law applied, while upon a proper analysis the controlling law was US federal law. Federal maritime law, including federal choice-of-law rules, governs maritime contracts such as the present one. Under federal choice-of-law rules, the law of the United States applied to the dispute, because Marecsa negotiated the Deepwater Horizon transaction with Sealion's New York agent, the contract was to be performed on the US side of the Gulf of Mexico and the subject matter of the contract – Marecsa's services – were to be provided in US waters.

The court held that there was no basis in US law for implying an agreement to arbitrate solely from a past course of conduct.

The district court exercised its discretion to stay proceedings pending arbitration, because Marecsa recognized that the fees it earned for providing

services under the PEP contracts – thus also under the First PEP Contract being discussed in the London arbitration – were relevant to determining a reasonable rate for the Deepwater Horizon transaction.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152071-n>.

742. United States District Court, Southern District of Texas, Houston Division, 25 April 2011, Civil Action No. H-11-0542

Parties:	Plaintiff: S&T Oil Equipment & Machinery, Ltd (nationality not indicated) et al. Defendant: Juridica Investments Limited (Guernsey) et al.
Published in:	2011 U.S. Dist. LEXIS 44176
Articles:	II(3)
Subject matters:	– requirements for referral to arbitration (in general) – nationality of parties – "nerve center" test – reasonable relationship to foreign state
Topics:	¶¶ 214-216

Summary

The court granted a motion to compel arbitration in Guernsey, finding that all four prerequisites for enforcing an arbitration agreement falling under the New York Convention were met: there was an arbitration agreement in writing, the agreement provided for arbitration in a Convention country and arose out of a commercial legal relationship. Further, the defendant was a foreign corporation, and in any event the relationship had an important foreign element.

In May 2008, S&T Oil Equipment & Machinery, Ltd (S&T Oil) and Juridica Investments Limited (JIL) – a company providing litigation financing to businesses involved in expensive, complex and high-risk commercial legal disputes – entered into an Investment Agreement under which JIL agreed to fund part of the legal fees and costs of an arbitration before the International Centre for Settlement of Investment Disputes (ICSID) that S&T Oil had brought against the Government of Romania arising from commercial activity in Romania (the Romanian Arbitration). In exchange, S&T Oil assigned JIL a percentage of any proceeds from the Romanian Arbitration and granted JIL a security interest in all "collateral", which included S&T Oil's rights in a Romanian joint stock company.

The Investment Agreement provided for arbitration in Guernsey, under the rules of the London Court of International Arbitration (LCIA).

The Romanian Arbitration took place in Washington, DC, from 2007 to 2009 and was ultimately dismissed. A dispute arose between the parties. On 22 December 2010, JIL commenced LCIA arbitration against S&T Oil as provided for in the Investment Agreement. In turn, S&T Oil filed an Ex Parte Emergency Application for Temporary Restraining Order (the TRO Application) in the United States District Court for the Southern District of Texas, Houston Division, seeking to enjoin the LCIA arbitration from proceeding. The district court refused to grant ex parte relief, whereupon JIL filed a response to the TRO Application and then moved to dismiss. By order dated 10 March 2011, the court denied the TRO Application.

By the present decision, the district court, per Nancy F. Atlas, US DJ, granted JIL's motion to dismiss S&T Oil's action and referred the dispute to LCIA arbitration in Guernsey.

The court reasoned that when an arbitration clause falls under the 1958 New York Convention, arbitration must be compelled if four jurisdictional prerequisites are met: there must be a written agreement to arbitrate the matter; the agreement must provide for arbitration in a Convention signatory and must arise out of a commercial legal relationship; at least one party to the agreement must not be a US citizen or the commercial relationship must have some important foreign element.

S&T Oil claimed that the fourth requirement was not met here because JIL was a US citizen for purposes of the Convention. The court disagreed, finding that for purposes of the Convention a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. JIL was undisputedly incorporated in Guernsey. The court dismissed S&T Oil's argument that JIL had its principal place of business in the United States because that was where JIL's officers allegedly directed, controlled and coordinated JIL's activities. The court found that this contention was without merit because it relied on the actions of a Guernsey company and its US subsidiary, with which JIL had an Investment Management Agreement, but of which it was not a corporate affiliate. A company's principal place of business, opined the court, is to be determined solely by looking to the activities of that company, and JIL's activities were based only in Guernsey.

The district court added that even if JIL were a US company, the fourth prerequisite would be met because the parties' commercial relationship had a reasonable relation with one or more foreign states: the Investment Agreement stated that it was executed in Guernsey and that performance of its terms would

occur in Guernsey, JIL wired the funds from Guernsey and S&T Oil granted JIL a security interest in, inter alia, a Romanian joint stock company. Further, the Investment Agreement granted JIL an interest in the proceeds from any judgment in the Romanian Arbitration; in order to collect any such judgment, JIL and/or S&T Oil would then have had to enforce the judgment against the Government of Romania in Romania.

Finally, the district court dismissed S&T Oil's argument that the arbitration clause was unenforceable because it was unconscionable. The court noted that it already rejected this contention in its 10 March 2011 order.

The court therefore dismissed the action in favor of arbitration in Guernsey.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152072-n>.

743. United States District Court, District of Columbia, 2 June 2011, Civ. Action No. 10-1741 (EGS)

Parties:	Plaintiff: Nanosolutions, LLC (US) et al. Defendant: Rudy Prajza (Canada) et al.
Published in:	Available online at <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv1741-26>; 2011 U.S. Dist. LEXIS 66127
Articles:	II(1); II(3)
Subject matters:	– fraud in the inducement of contract – separability of arbitration clause – scope of arbitration clause – relationship Chapters 1 and 2 (1958 New York Convention) of Federal Arbitration Act (FAA)
Topics:	[2]-[3] = ¶ 217; [9]-[13] = ¶¶ 214-216 + ¶ 220; [14]-[18] = ¶ 222; [19]-[38] = ¶ 201

Summary

The court stayed proceedings pending arbitration. The issue of the validity of the arbitration clause was to be decided by the arbitrator, not the court, as the party resisting arbitration claimed to have been fraudulently induced into entering the contract, rather than the arbitration clause specifically. Further, all of the claims fell within the scope of the broad arbitration clause, including claims arising out of an earlier employment agreement between one of the plaintiffs and the first defendant, because that agreement was part of an ongoing relationship between the parties.

In 2007, Rudy Prajza entered into an Employment Agreement with Aquiss Beverage Technologies, Inc. (ABT). The Employment Agreement was terminated in mid-2008, when Prajza allegedly failed to perform the required functions of his position as Chief Marketing Officer.

In March 2010, ABT concluded an endorsement agreement with professional tennis player Andy Roddick to promote ABT vitality beverages, including a beverage called Aqiss, based on a technology developed by Nanosolutions, LLC

(Nano), of which ABT was an affiliate (the Roddick Agreement). The Roddick Agreement provided for arbitration of disputes "upon mutual agreement of the parties".

ABT and Nano subsequently entered into a new business relationship with Prajza. On 24 June 2010, they executed an Agreement in Principle (AIP) with Prajza and two companies created by him, 2221267 Ontario Ltd. (Ontario) and Aqiss Canada, Ltd. (ACL), to market and distribute Aqiss products in Canada. In the AIP, ABT and Nano (collectively, Plaintiffs) agreed to license Nano's technology to Prajza and his companies (collectively, Defendants) and convey other rights in connection with the development, production and marketing of Aqiss in Canada. In exchange for these rights, ACL and Ontario agreed to pay royalties and other fees to Plaintiffs and also agreed to provide other services, including a website. ABT also agreed to sub-license to ACL its rights under the Roddick Agreement, so as to permit ACL to use Roddick's endorsement in the marketing of Aqiss. As a condition of receiving the sub-license from ABT, ACL agreed to be bound by all of the terms and conditions of the Roddick Agreement (AIP para. 2(a)). AIP para. 10 provided that Prajza agreed "to forgive any and all accrued salary, expenses and other amounts payable to him by ABT" in lieu of any payment to plaintiffs under the AIP for a period of twelve months. The AIP further provided for arbitration of disputes in Toronto, Canada.

A dispute arose between the parties when Defendants allegedly breached the AIP by changing the price at which they promised to sell Aqiss, misrepresenting information about Plaintiffs on ACL's website and failing to abide by the terms of the Roddick Agreement. On 19 August 2010, ABT sent a letter to ACL terminating ACL's rights under the Roddick Agreement. On 13 September 2010, ABT and Nano sent a letter to all Defendants, terminating the AIP. On 14 September 2010, Defendants commenced arbitration against Plaintiffs in Canada. Plaintiffs refused to participate in the arbitration. On 20 September 2010, they filed a complaint in the Superior Court for the District of Columbia, alleging fraud in the inducement of the AIP. Defendants removed the case to federal court and sought to compel arbitration and stay court proceedings.

While court proceedings were pending in the United States, an arbitrator appointed by the Ontario Supreme Court of Justice issued a decision in the arbitration.

In the US proceedings, on 31 January 2011, Plaintiffs filed a motion for leave to amend their complaint. The Amended Complaint contained eight counts: (1)-(2) Counts One and Two were common law claims of negligence, breach of contract and conversion against Prajza only, and arose from Prajza's 2007 Employment Agreement with ABT; (3) Count Three alleged fraudulent

inducement to enter into the AIP against all Defendants; (4) Count Four alleged that Defendants breached the AIP and the Roddick Agreement in several ways; (5) Count Five asserted that Prajza converted plaintiffs' property by registering the Aqiss website in his own name; (6) Count Six claimed that Prajza made false statements and representations to Plaintiffs in 2009 regarding his interest in again working for ABT; (7) Count Seven claimed fraud in the arbitration proceeding and (8) Count Eight asserted that Defendants tortiously interfered in Plaintiffs' business relationships by contacting one of Nano's owners and Andy Roddick regarding the parties' underlying disputes. Plaintiffs sought a declaratory judgment that the AIP was null and void, that the arbitrator lacked jurisdiction and that his decision was not binding on Plaintiffs, an injunction preventing Defendants from using the Roddick endorsement and damages in the amount of US$ 330 million.

By the present decision, the United States District Court for the District of Columbia, per Emmet G. Sullivan, US DJ, granted Defendants' motion to stay court proceedings pending arbitration.

The court first reasoned that an arbitration agreement is enforceable under the 1958 New York Convention if there is an agreement in writing, providing for arbitration in a signatory State, the subject matter is commercial and not entirely domestic in scope. This was the case here. The court further noted that international arbitrations subject to the New York Convention are governed by Chapter 2 of the Federal Arbitration Act (FAA). However, Chapter 1 of the FAA, which governs domestic arbitration, applies to actions under Chapter 2 to the extent that Chapter 1 is not in conflict with Chapter 2. Chapter 1 of the FAA provides that an agreement to arbitrate a commercial dispute is enforceable save upon such grounds as exist at law or in equity for the revocation of any contract; thus, an arbitration agreement may be invalid under Chapter 1 of the FAA on the basis of generally applicable contract defenses, such as fraud, duress, or unconscionability.

In the case at issue, Plaintiffs argued that the arbitration agreement was not valid because the AIP was obtained by fraud in the inducement. The court referred to the Supreme Court decision in *Buckeye*, in which it was held that specific challenges to the validity of the agreement to arbitrate are to be adjudicated by the courts, while challenges to the contract as a whole are to be determined in arbitration. Here, Plaintiffs alleged that they were fraudulently induced into entering into an agreement to do business with Prajza; they did not allege any fraud in the inducement of the arbitration clause specifically. Accordingly, the issue of the validity of the arbitration clause in the AIP was for the arbitrator, not for the court, to decide.

Plaintiffs also claimed that even if the arbitration clause was valid and bound them to arbitrate certain claims under the AIP, it did not encompass all of the claims asserted in their Amended Complaint. Defendants argued in response that all claims fell within the scope of the broad arbitration agreement in the AIP and thus the entire litigation should be stayed. The district court agreed.

The court reasoned that it approached this matter in the light of the principle that, once the court determines that an arbitration agreement is valid, any doubts concerning the scope of the arbitration clause are resolved in favor of arbitration. It then examined Plaintiffs' Counts arising under the AIP – Counts Four, Seven and Eight – and concluded that all should be stayed pending arbitration. Counts Seven and Eight should be treated as conceded since Plaintiffs failed to respond to them specifically. As to Count Four, a combined interpretation of the AIP and the Roddick Agreement showed that the alleged breaches of ACL's obligations under the Roddick Agreement were encompassed by the broad arbitration clause in the AIP. Also Count Four should be stayed.

Counts One, Two, Five and Six of the Amended Complaint arose from Prajza's prior employment relationship with ABT. The district court found that also these claims were covered by the arbitration clause in the AIP. It first noted that several circuits have held that a broad arbitration clause may encompass claims between the parties that arise out of their ongoing relationship, even if those claims predate the agreement to arbitrate and even if the claims are not related to the subject matter of the agreement containing the arbitration clause. In the present case, the arbitration clause in the AIP was extremely broad and, importantly, the AIP contained language (para. 10) relating back to the employment relationship between Prajza and ABT. This strongly indicated that the parties accounted for and attempted to resolve issues relating to Prajza's previous employment with ABT in the AIP.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152073-n>.

744. United States District Court, Eastern District of Missouri, Eastern Division, 22 June 2011, Case Nos. 4:11CV44 CDP, 4:11CV45 CDP, 4:11CV46 CDP, 4:11CV47 CDP, 4:11CV48 CDP, 4:11CV49 CDP, 4:11CV50 CDP, 4:11CV52 CDP, 4:11CV55 CDP, 4:11CV56 CDP and 4:11CV59 CDP

Parties:	Plaintiff: A.O.A. (Peru) et al. Defendant: Doe Run Resources Corporation (US) et al.
Published in:	Available online at <https://ecf.moed.uscourts.gov/documents/opinions/A._et_al_v._Doe_Run_Resources_Corporation_et_al-CDP-45.pdf>; 2011 U.S. Dist. LEXIS 66691
Articles:	II(3) (by implication)
Subject matters:	– state court action "relates to" 1958 New York Convention arbitration agreement – removal from state court to federal court – general removal provisions apply to removal under 1958 New York Convention
Topics:	¶ 217

Summary

Motion to remand denied, because the action related to a pending arbitration. The "related to" language must be interpreted broadly: an action may be removed whenever it may conceivably be affected by an arbitration agreement. This was the case here, where the pending arbitration would determine whether Peru was in breach of a contractual obligation to clean up the soil around an ore-processing complex and the US case was brought on behalf of Peruvian children allegedly injured by pollution in that area. Also, Peru may have had to be added as a defendant to the US action if it were found in breach of a further obligation to defend the US companies which bought the complex (the present defendants) from all liability for claims arising from the complex's toxic emissions released before the sale. Finally, the case was properly removed and removal was not barred under general removal rules.

In 1974, the Peruvian government expropriated the La Oroya Complex, a complex of smelters and refineries that had been operating since 1922. Ownership and operations were transferred to Centromin, a state-owned company. When studies in the 1990s revealed significant pollution of the environment, including lead contamination in the soil, Peru enacted an environmental program – the Environmental Adaptation and Management Program (*Programa de Adecación y Manejo Ambiental* – PAMA). Under the PAMA, Centromin was to complete certain environmental projects around the Complex by 2007.

In 1997, The Renco Group and other US investors purchased the La Oroya Complex from Centromin pursuant to a Share Transfer Agreement (STA). Under the STA, Centromin agreed to continue some environmental clean-up projects begun under the PAMA and to assume all liability for any claims by third parties arising from the Complex's toxic emissions released before the sale. Peru guaranteed Centromin's agreements in a separate Guaranty. The Renco Group and the investors agreed to take over some clean-up projects and to be responsible to third parties for any damages they alone caused.

On 4 October 2007, Sisters Kate Reid and Megan Heeney, as next friends of 137 Peruvian children from La Oroya (collectively, Plaintiffs), filed a case in Missouri state court against Renco Holdings, Doe Run Resources Corporation and D.R. Acquisition Corporation, some of the US investors, and their executives Marvin Kaiser, Albert Bruce Neil, Jeffrey Zelms, Theodore Fox, Daniel Vornberg and Ira Rennet (collectively, the US Parties). Plaintiffs claimed that the children were injured by exposure to toxic substances emitted from the La Oroya Complex, including lead. On 2 November 2007, the US Parties removed the case to the United States District Court for the Eastern District of Missouri, Eastern Division; on 18 March 2008, the court, per Catherine D. Perry, US DJ, remanded the case to state court. In state court, The Renco Group, Inc. (The Renco Group) was added as a defendant. A new attempt to remove the case to federal court was dismissed without prejudice on 6 August 2008 when Plaintiffs voluntarily dismissed their claims.

On 7 August 2008, two new cases based on the same facts were brought on behalf of eight more Peruvian children. The US Parties sought to remove the case; Judge Perry again dismissed the notice of removal and remanded the case to state court. On 9 December 2008, nine more cases were filed on behalf of seventeen children. The US Parties unsuccessfully filed motions to transfer venue in all these cases.

In the meantime, the US Parties sought to get Peru to enter into the US cases and defend them against Plaintiffs' claims, contending that Plaintiffs' injuries, if

any, were caused by exposure to toxic substances emitted by the La Oroya Complex while Peru owned and operated it through Centromin and that Peru and Centromin failed to complete environmental clean-up projects as promised in the STA. On 26 November 2010, Peru ultimately refused to enter the US cases. The Renco Group notified Peru of its intent to arbitrate pursuant to the Trade Promotion Agreement between the United States and Peru of 12 April 2006, which provides for the arbitration of any investment disputes between US companies and Peru. On 29 December 2010, The Renco Group submitted its claims against Peru to arbitration.

On 7 January 2011, The Renco Group, D.R. Acquisition Corporation, Renco Holdings Inc. and Ira L. Rennet (collectively, Defendants) removed the eleven actions still pending in state court to federal district court, claiming that Plaintiffs' claims were related to the pending arbitration and thus removable under the 1958 New York Convention. Plaintiffs moved to remand.

The district court, again per Catherine D. Perry, US DJ, denied Plaintiffs' motion to remand, finding that the claims at issue were related to the arbitration pending between The Renco Group and Peru. It also held that Defendants were not procedurally barred from removing the cases under general removal law.

The court noted that Sect. 205 of the Federal Arbitration Act (FAA) allows removal of actions whose subject matter "relates to an arbitration agreement or award falling under" the 1958 New York Convention. Since the United States Court of Appeals for the Eighth Circuit has not yet considered the scope of this term, the district court referred to case law of the Fifth and Ninth Circuit, which both held that the "relates to" language must be interpreted broadly and that whenever an arbitration agreement falling under the Convention can conceivably affect the outcome of the plaintiff's case, the agreement "relates to" the action.

This was the case here. The arbitral tribunal's decision in the arbitration between Peru and The Renco Group was to examine whether Peru violated the STA by failing to clean up the environment around the La Oroya Complex and by failing to defend the US investors in the actions pending in the United States.

If the arbitrators found, in respect of the first issue, that Peru failed to fulfill a contractual obligation to clean up the soil, this determination would affect the issues in the US case of whether Defendants polluted the environment and whether Plaintiffs' injuries were caused by Defendants' or Peru's pollution. If the arbitrators found, in respect of the second issue, that Peru was contractually obligated to defend Defendants, Peru could be required to enter into the pending US cases as a defendant. The district court therefore concluded that the award could conceivably affect Plaintiffs' claims.

The court then held that the case was properly removed: Plaintiffs need not be parties to the arbitration agreement for this case to be removable, and it was irrelevant that their claims were not commercial. Chapter 2 of the FAA, which contains Sect. 205 and implements the New York Convention in the United States, applies to agreements that arise out of commercial legal relationships. It does not say that only commercial actions are removable.

The court also dismissed Plaintiffs' argument that Defendants were barred from seeking removal because removal had been denied on previous occasions.

The court agreed that general removal rules apply to removals under the New York Convention. Sect. 205 FAA provides that general removal rules apply, except that the defendant may remove an action at any time before trial and the basis for removal need not appear on the face of plaintiff's complaint.

However, Defendants did not attempt here to remove the action based on the same ground or facts, which would be prohibited. Rather, they alleged for the first time that Plaintiffs' claims were related to the pending arbitration, an arbitration that was commenced more than two years after the cases were remanded.

Nor was it necessary that the new grounds making second removal appropriate must be the result of Plaintiffs' voluntary actions. Under general removal rules, a suit which, at the time of filing, could not have been brought in federal court must remain in state court unless a "voluntary" act of the plaintiff brings about a change that renders the case removable. The court found that this rule does not apply to removals under the New York Convention.

Finally, Plaintiffs argued that Defendants waived their right to remove by filing motions to transfer venue in state court. The district court disagreed. Sect. 205 FAA expressly allows a defendant to remove a case at any time before trial. By providing for removal any time before trial, the FAA necessarily assumes that the parties could engage in litigation activities in the state court before the removal.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152074-n>.

745. United States District Court, Northern District of California, 6 July 2011, No. M 07-1827 SI, MDL No. 1827, No. C 09-05609 SI

Parties:	Plaintiff: Nokia Corporation (Finland) et al. Defendant: AU Optronics Corporation (US) et al.
Published in:	Available online at <www.justia.com>; 2011 U.S. Dist. LEXIS 72389
Articles:	II(3)
Subject matters:	– scope of arbitration clause ("related to") – waiver of arbitration by substantial participation in court proceedings – discretion to stay court proceedings
Topics:	[1]-[5] + [20]-[31] = ¶ 217; [1]-[5] + [9]-[10] = ¶¶ 214-216; [11]-[19] = ¶ 201

Summary

The court stayed proceedings pending arbitration, holding that the four jurisdictional requirements for compelling arbitration under the 1958 New York Convention were met. The plaintiff's argument that its price-fixing conspiracy claims were unrelated to the contractual relationship between the parties – and therefore were not covered by the arbitration clause in the contract regulating that relationship – was meritless. The arbitration clause referred to any disputes "related to" the contract; this language was sufficiently broad to cover any matter that "touches" the contractual relationship between the parties. Also, the defendant did not waive its right to compel arbitration by engaging in aggressive litigation in court: its actions were not inconsistent with that right and there was no evidence of a significant prejudice on the plaintiff's part.

In 2005, AU Optronics Corporation (AUO), a supplier of liquid crystal display (LCD) panels, entered into a Product Purchase Agreement (PPA) to supply LCD panels to Nokia Corporation. The PPA – which was likely drafted by Nokia as a copyright notice that reserved all rights in the document to Nokia appeared at the bottom of each page – stated that it would apply "retroactively to previous

deliveries". It further provided for arbitration of disputes in London under the rules of the International Chamber of Commerce.

On 25 November 2009, Nokia Corporation and its US subsidiary Nokia, Inc. (collectively, Nokia) commenced an action in the United States District Court for the Northern District of California against several US and foreign defendants, including AUO, alleging violations of state and federal antitrust laws and seeking treble damages and injunctive relief. Nokia claimed that the defendants, suppliers of LCD panels for use in mobile wireless handsets, engaged in a price-fixing conspiracy between 1996 and 2006. On 27 August 2010, AUO filed an answer asserting several affirmative defenses, including an arbitration objection based on the arbitration clause in the PPA. On 7 January 2011, AUO filed a motion to compel arbitration and stay the court proceedings.

The district court, per Susan Illston, US DJ, granted AUO's motion to compel arbitration, finding that the arbitration agreement in the PPA covered all of Nokia's claims and that AUO did not waive its right to seek an order compelling arbitration.

The court noted at the outset that in determining whether a dispute should be referred to arbitration under the 1958 New York Convention, a court may not review the merits of the dispute but must limit its inquiry to determining whether: (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or the commercial relationship has some reasonable relation with one or more foreign states. If these questions are answered in the affirmative, a court is required to compel arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

In the present case, the four jurisdictional requirements above were not disputed. Nokia asserted, however, that arbitration should not be compelled because its claims, which related to an alleged price-fixing conspiracy, existed wholly apart from the parties' contractual relationship and were thus not governed by the PPA and the arbitration agreement therein.

The district court disagreed, finding that the broad language of the arbitration clause at issue – all disputes "related to" the PPA – allowed for an interpretation covering all claims related, though not integral, to the PPA. The court referred to Ninth Circuit precedent that the language "related to" encompasses any matter that "touches" the contractual relationship between the parties.

Nokia also argued that some of the actions on which it based its claim for damages took place before the PPA was signed in 2005 and should not be arbitrated. The court found that the explicit indication in the PPA that the agreement as a whole applied retroactively, as the final, integrated contract between the parties, combined with the broad language of the arbitration clause, indicated that the parties intended to submit all disputes relating to their contractual relationship, regardless of whether the actions giving rise to the dispute occurred before or after the signing of the PAA, to ICC arbitration.

The district court then dismissed Nokia's claim that AUO implicitly waived its right to compel arbitration by engaging in aggressive litigation in court. The court concluded that AUO's behavior did not amount to waiver under the three-part *Fisher* test established by the Ninth Circuit for determining whether a party has waived its right to compel arbitration. Here, AUO was aware of the existence of its right to compel arbitration but did not act inconsistently with that right. Also, there was no evidence of a significant prejudice on Nokia's part.

The district court concluded that Nokia failed to meet its heavy burden of proving that an otherwise enforceable arbitration agreement should not apply to the case at issue, particularly in light of the strong federal policy in favor of enforcing arbitration agreements, which applies with special force in the field of international commercial disputes. It therefore exercised its discretion to stay court proceedings pending arbitration of Nokia's claims.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152075-n>.

746. United States Court of Appeals, Ninth Circuit, 26 July 2011, No. 09-15682

Parties:	Plaintiff/Appellee: Cape Flattery Limited (nationality not indicated) Defendant/Appellant: Titan Maritime, LLC, a Crowley KSC Company, d/b/a Titan Salvage (nationality not indicated)
Published in:	Federal Reporter, Third Series (9th Circuit) p. 914 et seq.; available online at <www.ca9. uscourts.gov/datastore/opinions/2011/07/26/09-15682.pdf>
Articles:	II(3) (by implication)
Subject matters:	– applicable law to arbitrability of claims – scope of arbitration clause ("arising under") – scope of arbitration clause and tort claim – arbitrability of tort claims
Topics:	¶ 223

Summary

Parties may agree to apply a law other than US federal law to the question whether a dispute is arbitrable. However, a finding that they did so requires "clear and unmistakable evidence" rather than the showing of intent generally required in contract interpretation. The presumption in favor of the arbitrability of disputes on the merits is thus replaced by a presumption against the arbitrability of arbitrability. Here, there was no clear and unmistakable evidence that the parties agreed to apply English arbitrability law, so that US law applied. Under US law, the claimant's tort claims were not arbitrable, because they were not related to the interpretation or performance of the contract and the arbitration clause in the contract was narrow, as it referred to disputes "arising under" the contract.

On 2 February 2005, the *M/V CAPE FLATTERY* ran aground on a submerged coral reef off Barbers Point, Oahu, Hawaii. The US Coast Guard issued a Notice of Federal Interest in connection with the vessel's grounding and activated Unified Command to respond to the threat of potential oil discharge. Cape Flattery

Limited (Cape Flattery), the vessel's owner, entered into an agreement with Titan Maritime, LLC, a Crowley KSC Company, d/b/a Titan Salvage (Titan) to salvage the vessel (the Agreement). The Agreement provided that:

> "Any dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English Arbitration Act 1996 and any amendments thereto, English law and practice to apply."

Titan succeeded in removing the vessel and eliminating the threat of oil discharge. However, serious damage was inflicted on the reef due to Titan's decision to use submerged, rather than floating, tow lines. Under US law, Cape Flattery, as the vessel's owner, was liable to the US government for all damage to natural resources resulting from the grounding. On 8 August 2008, the government informed Cape Flattery that it would likely be liable for damages in excess of US$ 15 million.

On 24 October 2008, Cape Flattery filed a complaint in the United States District Court for the District of Hawaii against Titan, seeking indemnity based on the damage Titan allegedly caused through gross negligence in removing the vessel from the reef. On 17 December 2008, Titan filed a motion to compel arbitration based on the arbitration clause in the Agreement.

On 19 March 2009, the district court denied the motion, holding that US law governed the question whether the dispute should be referred to arbitration and that under US federal law the dispute did not "arise under" the Agreement. The court noted that the "arising under" language denotes a narrow arbitration agreement and that under Ninth Circuit case law claims that relate "only peripherally" to the agreement to arbitrate are not arbitrable. Titan's duty to prevent damage to the coral reef was based on a federal statute and was thus separate from its duties under the Agreement. Thus, Cape Flattery's tort claims against Titan were not arbitrable.

By the present decision, the United States Court of Appeal for the Ninth Circuit, before A. Wallace Tashima, William A. Fletcher and Marsha S. Berzon, CJJ, in an opinion by William A. Fletcher, affirmed the lower court's decision.

The court noted at the outset that the Federal Arbitration Act (FAA) creates a body of federal law of arbitrability that is applicable to any arbitration agreement within the coverage of the FAA. However, neither the Supreme Court of the United States nor the Ninth Circuit have dealt with the question whether federal arbitrability law allows contracting parties to agree to apply a non-federal law of arbitrability to interpret a given arbitration agreement.

The Court of Appeals relied on the Supreme Court's holding in *Volt* (see below) – that there is a federal policy to ensure the enforceability, according to their terms, of private agreements to arbitrate – to answer this question in the affirmative. The court reasoned that *Volt* strongly suggests that courts should respect the contracting parties' agreement to be governed by non-federal arbitrability law. This conclusion was consistent with decisions of other Circuits.

The court then dealt with "the more difficult question", equally undecided, of what criterion the courts should apply to ascertain whether the parties have agreed to apply non-federal arbitrability law. It concluded that while the general rule in interpreting arbitration agreements, just like any other contract, is to ascertain the parties' intent, a higher showing of intent is required in the determination of arbitrability. The court referred to the Supreme Court's decision in *First Options of Chicago v. Kaplan* (see below), where the Supreme Court held that courts must require clear and unmistakable evidence that the parties have agreed to arbitrate arbitrability: where the parties have included an arbitration agreement in their contract, it can be assumed that they gave some thought to the scope of arbitration. Considering "the law's permissive policies in respect to arbitration", it is understandable why the law would require that it appears clearly that the parties did not want to arbitrate a related matter. However, the parties seldom focus on the "arcane" question of arbitrability. The presumption in favor of the arbitrability of disputes on the merits is thus replaced by a presumption against the arbitrability of arbitrability. Although the court noted that the other Circuits have taken different approaches to this question, it sided with those courts applying the "clear and unmistakable evidence" standard.

In the present case, there was no clear and unmistakable evidence that the parties agreed to apply English arbitrability law. The reference in the arbitration clause to the English Arbitration Act 1996 and to English law and practice clearly applied to disputes that were subject to arbitration, and to the law and practice to be applied by the arbitrator, respectively. Since the agreement was ambiguous as to whether English law also applied to determine whether a given dispute was arbitrable, the court concluded that US federal law applied.

Applying federal arbitrability law, the Court of Appeals held that the case at issue was not arbitrable, because the phrase "arising under" denotes a narrow arbitration agreement and Cape Flattery's claim against Titan was in tort and did not relate to the interpretation and performance of the contract itself.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152076-n>.

747. United States District Court, District of Columbia, 3 August 2011, 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?2008cv2026-47>; 2011 U.S. Dist. LEXIS 85016
Articles:	VI
Subject matter:	– stay of enforcement proceedings pending annulment action (no)
Topics:	¶ 601

Summary

The court granted enforcement, finding that the proceedings commenced in Nigeria for the annulment of the award had been resolved by a finding that the award was valid and could not be set aside.

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) 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 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.[1] 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. Proceedings followed in the United States, the United Kingdom and Nigeria.

On 9 December 2008, Continental sought enforcement of the award in the United Kingdom. On 26 June 2009, the High Court entered judgment for Continental in the terms of the award (the confirmation decision). On 30 March 2010, the High Court granted a stay of enforcement on the condition that Nigeria provide security in the amount of UK£ 100 million.[2] This decision is reported in Yearbook XXXV (2010) pp. 472-474 (UK no. 91).

In the meantime, on 24 November 2008, Continental also sought enforcement of the award in the United States. On 18 November 2009, following the English confirmation decision, Continental amended its complaint to add a claim for enforcement of the English confirmation decision pursuant to the District of Columbia's Uniform Foreign-Money Judgments Recognition Act (UFMJRA).

On 20 April 2009, Nigeria in turn commenced proceedings before the Nigerian Federal High Court, Lagos Division, seeking a declaration that the award was domestic and therefore did not fall under the 1958 New York Convention, and the award's annulment.

On 23 March 2010, in the enforcement proceedings in the United States, the United States District Court for the District of Columbia, per Paul L. Friedman, US DJ, 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 12 July 2010, Continental filed a motion for summary judgment.

At some time after 12 July 2010, the Nigerian High Court dismissed the annulment action, finding that the arbitral award "cannot be set aside" and "is valid and enforceable". Continental filed a status report in the proceedings before the US court, in which it indicated that the Nigerian High Court had dismissed the annulment action.

By the reported decision, rendered on 3 August 2011, the District Court for the District of Columbia, again per Paul L. Friedman, US DJ, granted

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1. It was uncertain where the award was rendered: in the award's enforcement proceedings in the United States the court stated that the award was rendered in London; the court in the English enforcement proceedings stated that the arbitration took place in Nigeria; the Federal Government of Nigeria, in its setting aside proceedings in the Nigerian courts, argued that the award was domestic.
2. It appears from the enforcement proceedings in the United States that no security was ever posted.

enforcement. It noted that it had already dismissed in its earlier decision Nigeria's arguments that the present matter should be stayed or dismissed on forum non conveniens grounds or in light of the Nigerian court's consideration of Nigeria's challenge to the arbitral award. Also, "the premise underlying Nigeria's arguments no longer exists" since the Nigerian High Court ruled in favor of Continental and against annulment of the award. As a result, there was no reason to refuse enforcement.

The district court also found that the English confirmation decision was enforceable under the UFMJRA.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152077-n>.

748. United States District Court, Southern District of New York, 3 August 2011, 10 Civ. 5256 (KMW)

Parties:	Petitioners: (1) Thai-Lao Lignite (Thailand) Co., Ltd. (Thailand); (2) Hongsa Lignite (Lao PDR) Co., Ltd. (Laos) Respondent: Government of the Lao People's Democratic Republic
Published in:	Available online at <http://blogatory.s3.amazonaws.com/wp-content/uploads/2011/08/Thai-Lao.pdf>; 2011 U.S. Dist. LEXIS 87844
Articles:	III; V; V(1)(*c*)
Subject matters:	– personal jurisdiction over foreign State – subject matter jurisdiction – (1958 New York Convention) arbitration exception to sovereign immunity under Foreign Sovereign Immunities Act (FSIA) – forum non conveniens – excess of authority of arbitrators (no) – incorporation of arbitration rules evidence that arbitrability is to be decided by arbitrator – competence-competence and judicial review – review of contract interpretation by arbitrators (no)
Topics:	[3]-[23] = ¶ 301; [28] = ¶ 501; [29]-[30] = ¶ 503; [31]-[63] = ¶ 502 + ¶ 512

Summary

The court granted enforcement. It found first that it had personal and subject matter jurisdiction and that the foreign state did not meet its burden of proving forum non conveniens. It then dismissed the argument that the arbitrators exceeded their powers because they both relied on sources other than the original contract (other contracts between the parties) and amalgamated the costs of non-signatories in order to assess damages. The court found that this argument concerned the arbitral tribunal's interpretation of the contract and

its calculation of damages, which could not be reviewed. Further, even if the defendant did raise issues of arbitrability (that is, whether the parties agreed to arbitrate the dispute), these issues had been delegated to the arbitrators by the parties' choice in their arbitration agreement for the UNCITRAL rules, which so provide. Thus, the arbitral tribunal's findings required deference.

In 1992, Thai-Lao Lignite (Thailand) Co., Ltd. (TLL) and the Government of the Lao People's Democratic Republic (Laos) entered into a First Mining Agreement under which Laos granted TLL the right to conduct lignite survey and mining operations in the Hongsa region of Laos. Pursuant to the First Mining Contract, a company called Hongsa Lignite (Lao PDR) Co., Ltd. (HLL) was created in 1992; TLL owned 75 percent of HLL, while the remaining 25 percent was owned by the Agriculture Forestry and Import-Export Development Co., Ltd. of Laos (AFIED), an entity owned by the government of Laos. In July 1993, TLL and Laos entered into an additional agreement that expanded the project area and authorized TLL to proceed with feasibility studies for the construction of a lignite-fired power station within the concession area (the Second Mining Contract). Both Mining Contracts were governed by Lao law; they also contained a dispute resolution clause providing that any dispute that could not be settled be referred to arbitration in Laos.

Around the same time, Laos was negotiating with the government of Thailand an agreement under which Laos would sell electrical power to the Electricity Generating Authority of Thailand (EGAT), a Thai government agency. In June 1993, Laos and the Thai government entered into a memorandum of understanding, pursuant to which certain new power plants in Laos would sell electricity to EGAT.

On 22 July 1994, TLL and Laos concluded a Project Development Agreement (PDA) granting TLL exclusive rights to locate and mine lignite coal reserves in the Hongsa region and to operate lignite-fired electricity generation plants adjacent to the mines, for sale of electricity to EGAT (the Hongsa Project). The PDA referenced the two Mining Contracts as contracts with HLL, stating that they did not limit TLL's rights and benefits under the PDA. The PDA's termination clause provided that

> "In the event of termination of this Agreement compensation shall be paid to TLL or the Government, as the case may be, as determined by the arbitration panel constituted in accordance with Article 13 hereof which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors in the event of a default on the part of the Government."

The PDA stated that it was governed by New York law (though certain provisions not relevant to the present case were to be interpreted under Lao law). It further contained a clause providing that disputes be solved by arbitration "conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules".

Pursuant to the PDA, TLL created an additional company under Lao law, Thai-Lao Power Co., Ltd. (TLP), to implement the PDA and to be the operating company for the Hongsa project. In September 2005, TLP and EGAT executed a memorandum of understanding for the purchase of electrical power by EGAT from Hongsa Project power plants. On 18 December 1997, TLP and EGAT initialed a Power Purchase Agreement, which remained subject to the final approval of governmental entities in Thailand and Laos.

Beginning in mid-1997 and continuing through 2000, a financial crisis in Asia severely affected the Thai economy, and as a result, the Thai government suspended further arrangements for the purchase of electrical power from Laos and did not complete the agreement to purchase electrical power from TLP. When the crisis lessened, TTL and HLL sought a joint venture partner to help financing the Hongsa Project. In January 2005, South East Asia Power Co. Ltd. (SEAP), a Thai company wholly owned by Mr. Siva Nganthavee, TLL's principal and Chief Executive Officer, signed a preliminary joint development agreement with Banpu Public Co., Ltd. (Banpu), Thailand's largest private energy company. On 5 April 2005, SEAP and Banpu executed a final joint development agreement (the Banpu agreement). The Banpu agreement was terminated on 18 July 2006 by Mr. Siva, TLL and HLL. Laos expressed displeasure with this turn of events. At a meeting called by Laos to discuss the situation, TLL and HLL stated that they were planning to replace Banpu with Castlepines Finance Pty. Limited (Castlepines), an Australian company with whom they had signed a memorandum of understanding on 20 July 2008.

Laos remained unsatisfied and, on 4 September 2006, sent TLL and HLL a notice of default under the PDA in respect of certain studies and agreements in connection with the Hongsa Project. On 2 October 2006, TLL and HLL wrote to Laos disagreeing with the allegations of default; on the same day, they wrote to Banpu offering to withdraw the notice of termination. On 5 October 2006, Banpu rejected the offer; on the same day, Laos sent TLL and HLL a notice of termination of the PDA. On 11 October 2006, it sent notices of termination of the First and Second Mining Contracts.

On 26 July 2007, TLL and HLL initiated arbitration in Malaysia as provided for in the PDA. The parties agreed that the International Chamber of Commerce (ICC) would replace the Kuala Lumpur Regional Centre for Arbitration as

Appointing Authority. An arbitral tribunal consisting of three attorneys from law firms in the United States was appointed. Conferences were held in New York but the arbitration hearing was held in July 2009 in Kuala Lumpur.

The arbitral tribunal eventually issued an award in favor of TLL and HLL, finding that Laos improperly terminated the PDA. The tribunal denied Laos's argument that TLL lacked standing to bring claims under the PDA because all of TLL's rights under the PDA had been vested in HLL, and that HLL lacked standing because it was not a signatory to the PDA. The arbitrators concluded that both parties had standing: TLL was a signatory and HLL an "intended beneficiary" of the PDA. The arbitral tribunal also awarded damages, including "TLL's total investment cost plus a premium and consideration of the Lenders and Investors". The parties disputed the meaning of these terms in the PDA. The tribunal applied New York State legal principles of contract interpretation to determine that "total investment costs" in the PDA meant the total amount of money that TLL and HLL "reasonably and unavoidably actually expended out-of-pocket in the normal course of preparation for performance or in performance up until the date of breach". The arbitral tribunal relied for its assessment of damages on expert reports filed by the parties as well as on the Banpu agreement (which stated that the existing rights and assets contributed to the Hongsa Project by TLL, HLL and TLP as of 2005 were "deemed to be in the amount of US$ 50 million") and the memorandum of understanding signed with Castlepines, which stated that the "existing sunk costs" of the Hongsa Project as of 2006 were US$ 40 million. TLL and HLL (collectively, Petitioners) sought enforcement of the award in the United States. Laos moved to dismiss the petition.

By the present decision, the United States District Court for the Southern District of New York, per Kimba M. Wood, US DJ denied Laos's motion to dismiss and granted Petitioners' petition to enforce the award.

The district court first denied the motion to dismiss, finding that, contrary to Laos's allegations, it had both personal and subject matter jurisdiction over Laos. The court noted that Laos had explicitly waived sovereign immunity in the PDA. Also, one of the exceptions to immunity in the Foreign Sovereign Immunities Act (FSIA) applied, because the action concerned an award rendered pursuant to an arbitration agreement governed by a treaty, the 1958 New York Convention.

Laos's contention that the courts of the United States were forum non conveniens also failed. The court reasoned that while this doctrine may apply in proceedings to confirm a foreign award under the Convention – though it is not one of the grounds for refusing enforcement limitatively listed in the New York Convention – the conditions for its application did not exist here, because Laos

did not meet its burden of proving that Petitioners' choice of forum should not be respected.

The district court then granted Petitioners' request to confirm the award. Laos opposed enforcement arguing that the arbitrators wrongfully relied on the Mining Contracts, over which they had no jurisdiction, to award TLL and HLL a return of their investment costs made under those contracts. Also, when exercising jurisdiction under the PDA, the arbitrators wrongfully exercised jurisdiction over TLP and SEAP that were not signatories thereto, by amalgamating their costs with TLL's costs in awarding damages.

The district court reasoned that Laos's arguments concerned in fact the arbitral tribunal's interpretation of the PDA and its calculation of damages, which fell within the scope of arbitral jurisdiction and were not open to review.

Even if Laos's arguments did raise jurisdictional issues of arbitrability, that is, whether the parties agreed to arbitrate the dispute, they also failed. Arbitrability is not listed as a ground for a challenge in Art. V of the New York Convention, but United States courts have held that this absence does not foreclose a defense based on the ground that there never was a valid agreement to arbitrate. This issue is to be decided in principle by the court, unless there is clear and unmistakable evidence that the parties intended it to be decided by the arbitrators. In the present case, the arbitrators had already decided the issue of arbitrability. The court found that a review of that decision was inappropriate because, by referring in their clause to the UNCITRAL Rules – which provide for the competence-competence of the arbitrators – the parties clearly and unmistakably agreed to delegate questions of arbitrability and jurisdiction to the arbitrators, thus requiring deference to the arbitrators' conclusions on this issue.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152078-n>.

VENEZUELA

Accession: 8 February 1995
1st and 2nd Reservation

4. Tribunal Supremo de Justicia [Supreme Court of Justice], Constitutional Chamber, 3 November 2010, No. 1067/2010

Parties:	Claimant: Astivenca Astilleros de Venezuela, C.A. (Venezuela) Defendant: Oceanlink Offshore III AS (Norway)
Published in:	Available online at <www.tsj.gov.ve> and <www.cvarbitraje.com>
Articles:	II(3)
Subject matters:	– competence-competence regarding existence, validity of arbitration clause – competence-competence and judicial review – separability of arbitration clause – (tacit) waiver of right to arbitration
Topics:	¶ 217 + ¶ 220 + ¶ 222 + ¶ 228

Summary

The Constitutional Chamber reversed a decision of the Political-Administrative Chamber because it went against that Chamber's consistent jurisprudence that defendants who appear in court and fail to invoke the existence of an arbitration agreement as a preliminary objection are deemed to have waived their right to arbitration. The Chamber also held that (i) the principle of arbitral competence-competence and of the separability of the arbitration clause unquestionably applies in Venezuela; courts may only carry out a prima facie, summary examination of whether the arbitration agreement is in writing; (ii) opposition to an interim measure of protection granted by a court is no proof of the defendant's intention to waive arbitration; and (iii) recourse to a court for an interim measure of protection while the arbitral body is not yet constituted also does not show a party's intention to waive arbitration.

The facts of this case are also reported in Yearbook XXXIV (2009) at pp. 1198-1200 (Venezuela no. 3). On 22 March 2008, Astivenca Astilleros de Venezuela, C.A. (Astivenca) entered into a Memorandum of Agreement (MOA) with Oceanlink Offshore III AS and other Oceanlink entities (collectively, Oceanlink) to conclude two contracts to charter and purchase logistical support vessels to be used by Astivenca to perform under Astivenca's contract with a third company. Clause 16 of the MOA contained a London arbitration clause.

A dispute arose between the parties when Astivenca requested Oceanlink to finalize the two contracts as a condition for Astivenca's payment of the last installment of the agreed price. Oceanlink did not comply. On 6 October 2008, Astivenca commenced an action in the National Maritime Court of First Instance in Caracas against Oceanlink, seeking performance of the contract and damages. It also sought as an interim measure of protection that one of the vessels be prohibited from setting sail. On 7 October 2008, the court admitted the action against Oceanlink and granted the interim measure. Oceanlink then raised certain defenses on the merits and subsequently argued that the court lacked jurisdiction because of the arbitration clause in the MOA.

On 17 February 2009, the Caracas court held that it lacked jurisdiction. By an additional decision of 19 February 2009, it lifted the interim measure prohibiting the vessel from leaving. Astivenca requested a ruling on jurisdiction from the Political-Administrative Chamber of the Supreme Court of Justice.

On 21 May 2009, the Supreme Court affirmed the lower court's decision, finding that there was a valid arbitration clause between the parties and that Oceanlink did not tacitly waive its right to arbitration. It also affirmed the lifting of the interim measure. This decision is reported in Yearbook XXXIV (2009) pp. 1198-1208 (Venezuela no. 3).

By the present decision, the Constitutional Chamber of the Supreme Court of Justice, per Luisa Estella Morales Lamuño, reversed the decision of the Political-Administrative Chamber.

The Chamber first stressed the role and relevance of arbitration in Venezuela and the relationship of "assistance and control" that the Venezuelan courts have with arbitration. In this framework, the principles of competence-competence and autonomy of the arbitration agreement are essential guarantees of the right to use this alternative means of dispute resolution. The Chamber added that since the jurisdiction of arbitral tribunals derives from arbitration agreements, arbitral tribunals have jurisdiction to decide disputes concerning the validity of those agreements. Also, courts may carry out only a prima facie, summary examination, which (i) must be limited to examining whether the arbitration

agreement is in writing and (ii) excludes all analysis of vitiated consent [*vicios del consentimiento*] in respect of that agreement.

The Constitutional Chamber then noted that the Political-Administrative Chamber of the Supreme Court has consistently held that there is a tacit waiver of the right to rely on an arbitration agreement when the defendant, having been summoned in court, appears in the proceeding, does not duly invoke the arbitration agreement and submits to the jurisdiction of the court by either contesting the claim on the merits, filing a counterclaim or admitting the claim. The Political-Administrative Chamber thus postulates that any procedural act other than the preliminary objection of lack of jurisdiction must be deemed a tacit waiver of arbitration. In its 2009 decision, the Political-Administrative Chamber did not decide in accordance with its constant jurisprudence, when finding that "although raising the preliminary objection of lack of jurisdiction was not counsel for the defendant's first action" his action did not amount to a discussion of the merits, such as contesting the claim or filing a counterclaim. The Constitutional Court therefore concluded that there was jurisdictional inconsistency and the 2009 decision should be reversed.

The Constitutional Court then held that no intention to submit to the jurisdiction of the courts may be inferred from a defendant's opposition to interim measures of protection, when it appears, on a case-by-case basis, that the defendant needs to defend its interests against such measures.

The Constitutional Chamber also held that while arbitral tribunals have the power to issue interim measures of protection, state courts also have a general power to issue interim measures of protection in aid of arbitration, and recourse to the courts to this purpose cannot be deemed a tacit waiver of the arbitration agreement. The power of the courts expires when the dispute is submitted to the arbitrators, who will then have the power to modify or revoke the interim measures granted by the court. Accordingly, courts may grant interim measures of protection while the arbitral tribunal is not yet constituted, unless the applicable rules of the arbitral institution to which the dispute is referred provide for a referee procedure.

Only the relevant parts of the decision are reported.

A detailed report of this decision is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-1152079-n>.