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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual Articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

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Cases relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York" Convention (NYC)

Case 1319: NYC II; II(3)
United States of America: U.S. Bankruptcy Court, District of Connecticut
06–50421
Nattel, LLC and NatTel, LLC v. Oceanic Digital Communications, Inc., ODC St. Lucia Limited, PCI Holdings Ltd., Oceanic Digital Jamaica Limited, S.A.C. Capital Advisors, LLC, S.A.C. Capital Management, LLC, S.A.C. Capital Associates, LLC, América Móvil S
26 September 2012
Original in English
Available on the Internet: www.pacer.gov/;
www.newyorkconvention1958.org/index.php?lvl=cmspage&pageid=9

Abstract published on www.newyorkconvention1958.org[1]

Defendant, Ocean Digital Communications, Inc. ("Ocean Digital), relied on the NYC to compel one of its minority shareholders, Plaintiff, NatTel LLC ("NatTel"), to arbitration pursuant to an arbitration agreement contained in its Articles of Association. The dispute concerned a discrete issue in the broader context of the bankruptcy proceedings concerning NatTel. NatTel opposed arbitration on the grounds that it was not bound by the arbitration provision because it was not a signatory to it and that, in any case, the arbitration agreement was unenforceable because it did not provide a venue for the proceedings.

The United States Bankruptcy Court for the District of Connecticut compelled arbitration, staying the remaining, non-arbitrable claims, pending arbitration. It held that NatTel was bound by the arbitration provision and that the claims were arbitrable in light of the Bankruptcy Code. The Court remarked that by previously seeking and consenting to arbitration pursuant to the same clause, NatTel had waived its defences based on its status as a non-signatory and the alleged unenforceability of the clause. Regardless, the Court determined that NatTel was bound by the arbitration agreement because under Bahamian law shareholders were automatically deemed to be signatories of the corporation's Articles of Association. Furthermore, the absence of a venue in the arbitration agreement was not fatal according to the Court because it could designate one under the Federal Arbitration Act. Finally, the Court held that the parties' dispute concerning the valuation of NatTel's shareholding was arbitrable because such an action would not impede any of the objectives of the Bankruptcy Code.

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[1] The website www.newyorkconvention1958.org is a project supported by UNCITRAL with a view to providing information on the application of the New York Convention (1958). It supplements the cases collected in the CLOUT system. The abstracts are reproduced as part of the CLOUT documentation so they can be officially translated into the six languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

Case 1320: NYC II; II(3)
Lithuania: Supreme Court (Lietuvos Aukščiausiasis Teismas)
3K-3-199/2012
UAB "Tarptautinės statybos korporacija" v. ALSTOM Power Sweden Aktienbolag (AB).
2 May 2012
Original in Lithuanian
Available on the Internet: www.lat.lt

Abstract published on www.newyorkconvention1958.org[2]

UAB "Tarptautinės statybos korporacija"("Statybos korporacija") entered in a construction contract with ALSTOM Power Sweden Aktienbolag (AB) ("Alstom"), which contained an arbitration clause providing for arbitration in Stockholm, Sweden. Both parties also entered into other agreements concerning related works, which did not provide for arbitration. A dispute arose and Statybos korporacija brought a claim against Alstom before the Vilnius district court. Alstom objected to the jurisdiction of the local court, arguing that the dispute fell within the scope of the arbitration agreement contained in the construction contract. The Vilnius district court held that it lacked jurisdiction over the dispute and referred the parties to arbitration. Statybos korporacija appealed, arguing that the dispute fell outside the scope of the construction contract and that the Lithuanian courts therefore had jurisdiction to hear the dispute. Alstom objected to the jurisdiction of the Lietuvos Apeliacinis Teismas (Court of Appeals of Lithuania) on the basis of Article II(3) NYC, arguing that the dispute should be resolved through arbitration pursuant to arbitration clause contained in the construction contract. The Lietuvos Apeliacinis Teismas overturned the decision of the Vilnius district court, finding that the dispute was not covered by the arbitration agreement.

The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) held that it was not possible to rule on whether the parties had entered into a valid arbitration agreement according to the NYC, and remanded the case to the Lietuvos Apeliacinis Teismas for re-examination. The Lietuvos Aukščiausiasis Teismas stated that Article II(3) NYC can only be applied to disputes arising from an agreement containing an arbitration clause and that the NYC would not apply where the applicant's claim is based on a contract that does not contain an arbitration agreement. The Lietuvos Aukščiausiasis Teismas held that in the present case, it was not clear whether the dispute was covered by the arbitration agreement.

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[2] The website www.newyorkconvention1958.org is a project supported by UNCITRAL with a view to providing information on the application of the New York Convention (1958). It supplements the cases collected in the CLOUT system. The abstracts are reproduced as part of the CLOUT documentation so they can be officially translated into the six languages of the United Nations. In order to ensure consistency with the website www.newyorkconvention1958.org, the editorial rules of that website have been maintained even when they differ from CLOUT editorial rules.

Case 1321: NYC V; V(1)(d); V(1)(e)
People's Republic of China: Supreme People's Court
[2010] Min Si Ta Zi No. 51 ([2010] 民四他字第51号)
DMT Limited Company (DMT S.A.) v. Chaozhou City Huaye Packing Materials Co., Ltd. and Chaoan County Huaye Packing Materials Co., Ltd.
12 October 2010
Original in Chinese
Published in: Guide on Foreign-related Commercial and Maritime Trial, pp. 144-152 (People's Court Press, Vol. 2, 2010)
Available on the Internet: www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=12

Abstract published on www.newyorkconvention1958.org[3]

DMT Limited Company (DMT S.A.) (DMT) and Chaozhou City Huaye Packing Materials Co., Ltd. (Chaozhou City) entered into a sales contract, which provided that any disputes were to be submitted to the International Chamber of Commerce (ICC) for arbitration pursuant to the applicable rules and laws of Singapore. A dispute arose and DMT filed for an arbitration with the ICC on 19 August 2004. An award was issued in favour of DMT on 27 July 2007. An addendum to the award was issued by the tribunal on 19 November 2007 changing the name of the respondent in the arbitration, Chaoan County Huaye Packing Materials Co., Ltd. (Chaoan County), from "Chaozhou City Huaye Packing Materials Co., Ltd." to "Chaoan County Huaye Packing Materials Co., Ltd.". DMT then applied for recognition and enforcement of the award against Chaozhou City and Chaoan County with the Chaozhou Intermediate People's Court. Chaozhou City challenged the application on the grounds that it was not a party subject to the dispute whereas Chaoan County objected, among other things, to the application on the basis that the appointment of the presiding arbitrator did not conform to the parties' agreement or the arbitration rules and the arbitration proceedings were not in accordance with the arbitration rules. The Chaozhou Intermediate People's Court opined that Chaozhou City was not a party to the dispute and thus the application should be rejected under Article V(1)(e) NYC with respect to Chaozhou City. The court also opined according to Article V(1)(d) NYC that the award should be refused recognition and enforcement as to Chaoan County on the basis that the appointment of the presiding arbitrator did not conform to the parties' agreement or the arbitration rules. The Chaozhou Intermediate People's Court reported its opinion to the Guangdong Higher People's Court for review. The Guangdong Higher People's Court confirmed that the award should not be recognized or enforced in relation to Chaozhou City. In particular the court opined, inter alia, that Chaozhou City was not a party to the dispute. With respect to Chaoan County, the court opined that there were no grounds for refusing recognition or enforcement of the award. The Guangdong Higher People's Court reported its opinion to the Supreme People's Court

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(最高人民法院) for review in accordance with the Notice of the Supreme People's Court on the Adjudication of the Relevant Issues About Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court.

The Supreme People's Court confirmed that the award should not be recognized and enforced against Chaozhou City as it was not a party to the dispute and that the award should be recognized and enforced against Chaoan County as the court opined that there were no grounds for refusal established by Chaoan County. The court opined that the NYC applied to the review of the award, but made no reference to any specific provision of the NYC in its opinion.

Case 1322: NYC V; V(2)(b)
People's Republic of China: Supreme People's Court
[2008] Min Si Ta Zi No. 48 ([2008] 民四他字第2)
GRD Minproc Limited v. Shanghai Feilun Industrial Co.
13 March 2009
Original in Chinese
Published on: Guide on Foreign-related Commercial and Maritime Trial, pp. 135-142 (People's Court Press, Vol. 1, 2009)
Available on the Internet: www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=12

Abstract published on www.newyorkconvention1958.org[4]

On 24 July 1994, Shanghai Foreign Trade Corporation, Warman International Co., Ltd. ("Warman") and Shanghai Feilun Industrial Co., Ltd. ("Feilun") entered into an agreement for the sale and purchase of equipment and material used for battery recycling. The parties' agreement included an arbitration clause where any dispute arising from the performance of or relevant to the contract would be resolved by arbitration under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), failing amicable negotiations. On 30 April 1995, GRD Minproc Limited ("GRD") replaced Warman in the parties' agreement. A dispute arose between the parties regarding the equipment's effectiveness and Feilun filed an arbitration with the SCC on 21 January 2003. A final award was rendered in favour of GRD on 20 November 2006 dismissing Feilun's claim and awarding costs to GRD. GRD then applied to the Shanghai No. 2 Intermediate People's Court for recognition and enforcement of the award. Feilun opposed the application on the basis that (i) the arbitration agreement was invalid, (ii) the award was against China's public order, (iii) GRD had bribed and stolen evidence, which violated Chinese public policy, (iv) GRD never submitted a counter-claim in respect of costs and as such the award dealt with a dispute beyond the arbitration claims, (v) the arbitral tribunal never conducted on-site inspections as indicated and (vi) the award never indicated the reasoning of the decision and did not demonstrate that the

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unsigned arbitrator participated in the decision. The Shanghai No. 2 Intermediate People's Court held that the award should not be recognized or enforced. In particular, the court decided that the award contradicted the public interests of China under Article V(2)(b) NYC because it concerned equipment that was contrary to Chinese occupational health and safety regulations. The Shanghai No. 2 Intermediate People's Court reported its opinion to the Shanghai Higher People's Court for review. The Shanghai Higher People's Court opined that the award should not be recognized or enforced under Article V(2) NYC since the award was contrary to Chinese public interest. The Shanghai Higher People's Court reported its opinion the Supreme People's Court （最高人民法院）for review in accordance with the Notice of the Supreme People's Court on the Adjudication of the Relevant Issues About Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court.

The Supreme People's Court opined that the award should be recognized and enforced. In particular, the court decided that whether an arbitral award was fair and just on the merits is not the standard by which an award is deemed to have violated China's public policy for purposes of recognition and enforcement under Article V(2)(b) NYC. In addition, the court found no other grounds for refusal under Article V NYC.

Case 1323: NYC II; IV; IV(1); V ; V(1); V(1)(a); V(1)(c); V(1)(e); V(2)(b); VI; VII; VII(1)

United Kingdom: Supreme Court
UKSC 2009/0165
Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan
3 November 2010
Original in English
Published in English: [2010] UKSC 46, [2011] 1 AC 763;
Available on the Internet: BAILII www.bailii.org;
www.newyorkconvention1958.org/index.php?lvl=notice_display&id=798

Abstract published on www.newyorkconvention1958.org[5]

Dallah, a Saudi Arabian company, entered into a memorandum of understanding with the Pakistani government regarding housing in Mecca, Saudi Arabia, for Pakistani pilgrims. A Pakistani presidential ordinance established a trust, which entered into an agreement with Dallah. This agreement provided for disputes between Dallah and the trust to be resolved by arbitration under the rules of the International Chamber of Commerce ("ICC"). After the trust had expired and therefore ceased its legal existence, Dallah instituted ICC arbitration in Paris against the Pakistani government's Ministry of Religious Affairs. In a partial award on

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jurisdiction, the tribunal sitting in Paris held that the Ministry was bound by the arbitration agreement and that the tribunal accordingly had jurisdiction. It issued another partial award on liability and a final award in favour of Dallah. Dallah sought to enforce the final award in England. The government of Pakistan successfully resisted enforcement in the English High Court. The High Court set aside a previous order granting leave to enforce the award, under section 103(2)(b) of the Arbitration Act 1996 (U.K.) ("the Act") (which directly incorporates and whose wording is equivalent to Article V(1)(a) NYC's provision regarding invalidity of the arbitration agreement). Specifically, enforcement was refused due to the lack of a valid arbitration agreement between the parties under the law of the country where the award was made. Dallah appealed to the Court of Appeal, which dismissed Dallah's appeal. Dallah then appealed to the Supreme Court and also applied for enforcement of the final award in France. The Pakistani government applied in France to set aside all three awards. The U.K. Supreme Court refused to grant Dallah a stay of its appeal pending resolution of its French proceeding. The parties' submissions to the Supreme Court proceeded on the basis that the party resisting enforcement under Article V(1)(a) NYC had the burden to prove that it was not bound by the arbitration agreement.

The Supreme Court affirmed the decisions of the lower courts and dismissed the appeal. Enforcement of the award was refused under section 103(2)(b) of the Act. Since there was no explicit choice of the law governing the arbitration agreement, the law governing its validity was held to be the law (excluding conflicts of law rules) of France, the country where the award was made. The Court stated that despite the NYC's pro-enforcement policy and the fact that the burden of proof is on the resisting party, the Court was not bound or limited by the tribunal's jurisdictional decision. The tribunal's reasoning was considered flawed as it did not follow what the Court considered to be the appropriate French legal standards. Under Article V(1)(a) NYC, validity of an arbitration agreement included the issue of whether a party was in fact bound by it. Accordingly, enforcement was refused under that provision. Given the lack of a valid and binding arbitration agreement between the parties, as required by Article II NYC, the Court also declined to enforce the award under any discretion stemming from the word "may" in Article V(1) NYC. The Court suggested, drawing on Article V(2)(b) NYC, that a different result could ensue if the foreign law invalidating the arbitration agreement violated an important public policy. It was also noted that absent party agreement in compliance with Article IV(1) NYC to submit the question of arbitrability to the tribunal, the NYC is not concerned with preliminary awards on jurisdiction (as against final awards). The Court also made brief references to Articles V(1)(c), V(1)(e), VI, and VII(1) NYC, distinguishing the effect of these provisions or case law applying them from this case.

Case 1324: [NYC]
Australia: Federal Court of Australia
NSD 173 of 2009
China Sichuan Changhong Electric Co. Ltd v. CTA International Pty Ltd
27 March 2009
Original in English
Published in English: [2009] FCA 397;
Available on the Internet: AustLII www.austlii.edu.au;
www.newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=9

Abstract published on www.newyorkconvention1958.org[6]

The applicant sought enforcement in the Federal Court of Australia of an arbitral award rendered by the Mianyang Arbitration Commission in China pursuant to s 8(3) of the International Arbitration Act 1974 (Cth) ("the Act") (providing for the enforcement in the Federal Court of NYC awards, as defined by the Act, as if the award were a judgment or order of that court). The award, which arose out of a dispute in connection with a distribution agreement between the parties, ordered the respondent to pay to the applicant a sum of money, together with interest on that sum, as well as part of the arbitration fee which had been borne by the applicant.

The Federal Court granted enforcement of the award. In so ruling, it observed that s 8(1) of the Act provided that a foreign award was binding for all purposes on the parties to the underlying arbitration agreement, the term "foreign award" being defined in s 3(1) of the Act to mean an arbitral award rendered in pursuance of an arbitration agreement in a country other than Australia and in relation to which the NYC applied. It also pointed out that both Australia and China were parties to the NYC.

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Case 1325: NYC V; V(1)(a); V(1)(e); V(2)(b)
Egypt: Court of Cassation
2010/64
Misr Foreign Trade Co. v. R.D Harboties (Mercantile)
22 January 2008
Original in Arabic
Published in: Journal of Arab Arbitration 2009, No. 1, pp. 145-147, 174-178
Available on the Internet: www.newyorkconvention1958.org/index.php?lvl=notice_display&id=389
Abstract published on www.newyorkconvention1958.org[7]

On 16 November 1977, Misr Foreign Trade Co. ("Misr Foreign Trade") and R.D Harboties (Mercantile) ("Harboties") concluded a contract for the supply of fertilizers which provided in its Article 13 for arbitration in London. Claiming that one of the conditions of the contract was breached, Harboties initiated arbitration proceedings which led to the issuance of an arbitral award ordering Misr Foreign Trade to pay damages to Harboties. Misr Foreign Trade then filed a claim before the South Cairo Court of First Instance requesting a declaration that it was not liable for any obligations under the contract, but the Court rejected its claim on 15 December 1991 because it had already been settled by the arbitral award. The decision of the Court of First Instance was confirmed by the Cairo Court of Appeal in a judgment dated 30 December 1993. Misr Foreign Trade challenged the judgment of the Court of Appeal before the Court of Cassation and alleged (i) that the arbitral award issued in its regard was a preliminary award and not a definitive one, which is contrary to Article V(1)(e) NYC, (ii) that Misr Foreign Trade signed the contract on behalf of other entities, meaning that the contract and the arbitration agreement it contained were binding to these entities and not Misr Foreign Trade which is not a party to the arbitration agreement according to Articles II and V(1)(a) NYC, and (iii) that the award was contrary to public policy as it breached Article 226 of the Civil Code by awarding interest from the date they were due and not from the date of the award.

The Court of Cassation rejected the Claimant's challenge. The Court considered that arbitral awards have a res judicata effect ("autorité de la chose jugée") starting from the date of their issuance and maintain this res judicata effect as long as they exist. The Court rejected the claim made by Misr Foreign Trade that the arbitral award was not definitive as well as its claim that it is not a party to the arbitration agreement given that it signed the contract containing said arbitration agreement. The Court also ruled that the arbitral award was not contrary to public policy as Article 226 of the Civil Code is a mandatory rule that is unrelated to public policy under Article V(2)(b) NYC.

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