United Nations A/CN.9/SER.C/ABSTRACTS/151

General Assembly

Distr.: General
20 October 2014
English
Original: Spanish/English

**United Nations Commission on International Trade Law**

**CASE LAW ON UNCITRAL TEXTS (CLOUT)**

Contents



V.14-06984 (E) 181114 191114

## 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.

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

**Case 1416: NYC III; IV; V; V(1)(c); V(1)(d); V(2)(b)**
Spain: Supreme Court of Justice of the Basque Country (Civil and Criminal Division, 1st Section)
19 April 2012
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

The Supreme Court of Justice of the Basque Country granted an exequatur for an award made in arbitration proceedings on 6 July 2010 by the International Chamber of Commerce (ICC) requiring a Spain-based telephone company to pay compensation to various French companies. The award arose from various contracts between the parties, and aspects were discussed relating to infringement of competition law and ownership of the telephone services customer base.

First, the Court discussed at length the conceptual framework in which arbitration and the exequatur procedure were conducted under the New York Convention.

The party opposing the exequatur of the arbitral award claimed that the award was contrary to public policy. The Court noted the great difficulty of determining the precise content of public policy, which was neither rigid nor immutable but flexible and changing, and also the problems of reconciling public policy with the prohibition on reviewing the merits of the case, a situation which had given rise to two conflicting positions — minimalist and maximalist. The Court appeared to favour the minimalist position on the basis of the principle of prohibiting a review of the merits of the case and the exceptional and limited manner in which public policy should be invoked: the notion of international public policy was more restricted than that of domestic public policy, and recognition could be refused only where the most essential principles of the exequatur State were infringed.

In the Spanish system and in the context of international arbitration, public policy was principally understood in a material and procedural sense of minimum values, a sense identified with internationally binding law and the fundamental values of the Spanish Constitution. This was the indispensable content of public policy (both domestic and international public policy and in accordance with international conventions on fundamental rights and on transnational public policy) that had to be taken into account in the post-arbitral review of an award granted in an international arbitration proceeding.

Concerning the thoroughness of the review, the Court considered that the reasons stated for the award must be reviewed according to the principle of reasonableness, that is, for an arbitral decision to be deemed properly reasoned it must state clearly the factors and reasons explaining the criteria on which it was based. The Court also considered that the grounds for the award must have a legal basis, that is, they must make clear that the arbitral decision was the result of an interpretation and application of recognizable law.

Considering more concretely the grounds for opposing the exequatur, the first ground related to infringement of article V(1)(c) NYC, that is, the majority award contained decisions on matters beyond the scope of the submission to arbitration

(inconsistency due to jurisdictional overreach, and breach of procedural public policy causing lack of a proper defence under article V(2)(b) NYC). To that end it should be borne in mind that one of the contracts was not subject to ICC arbitration agreement and interpreting the contract went beyond what was agreed by the parties.

The Court considered, however, that the exequatur interpreting the contracts between the parties could not be refused and that there was no inconsistency due to overreach in applying the principle of maximum effectiveness, that is, interpreting the contract not subject to ICC arbitration agreement was absolutely necessary to determine the issues addressed by the arbitral award, and was also in accordance with the arbitration agreement itself, which considered as arbitrable not only the disputes that might arise from them, but also those related to them.

Article V(2)(b) NYC was cited in connection with the second reason for opposing the exequatur, that is, that a majority award was contrary to the public policy of Spain owing to its weakening of Spanish and EU competition law. The Court considered competition law to be one of the areas particularly recognized by internationally binding law and therefore also by public policy, which must be borne in mind during post-arbitral review. Such proceedings must be carried out according to the standard of reasonableness. After analysing the award, the Court concluded that the award contained reasons and that these reasons were based in law, thus making it clear that the arbitral decision was the result of an interpretation and application of fully recognizable law. It also concluded that the decision could not be deemed arbitrary or manifestly unreasoned or unreasonable, nor tainted by a patent error.

With respect to the third reason for opposing the exequatur, the Court based its opinion on articles V(1)(d) and V(2)(b) NYC, and considered specifically the infringement of Spanish material public policy, more concretely the essential/structural principles of domestic law on the interpretation of contracts and the essential/structural principles of domestic law on contractual liability.

The Court again rejected this reason for opposition since it was evident that the award, which developed its reasoning by referring to both legal and doctrinal Spanish judicial references, applied Spanish law. The Court therefore concluded that the award had applied Spanish law to the fundamental subject of the dispute in accordance with what had been agreed by the parties. Furthermore, the Court did not consider domestic public policy to be comparable to international public policy, and did not think it possible to identify the rules of contractual interpretation or liability (articles 1281 to 1289 and, in essence, 1101 and 1106 of the Civil Code) with public policy, which, in a material sense of minimum values, must be considered, in the context of the post-arbitral review of an award granted in international arbitration, as being identified with internationally binding law and the core values of the Spanish Constitution. Neither was it possible to perceive public policy to have been infringed for failure to state reasons for the award.

Finally, formal public policy (article V(2)(b) NYC) was alleged to have been infringed in various ways: violation of the right to evidence, late granting of the award, breach of the principle of consultation, failure to state reasons on which the award was based, and partiality of the award. The Court dismissed all of these allegations after a comprehensive review of the award and the circumstances of the

award. Concerning the late granting of the award, the Court furthermore relied on estoppel, given that the Spanish company had not objected to the successive extensions granted by the Secretariat of the International Chamber of Commerce, which is why continuing in arbitration it waived its right to object. Concerning violation of the principle of consultation, it was alleged that there had been no deliberation when in fact it should be understood that deliberation had indeed taken place. In that regard it was irrelevant that this deliberation was not "in person" and was conducted mostly or entirely, which would amount to the same, in writing. Moreover, the Court considered that deliberation in writing was not strange or unusual in the practice of international commercial arbitration as demonstrated by the explanatory note to the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, which comments, in paragraph 42, on the subject of "Making of award and other decisions", that "[...] for the same reason that the arbitral proceedings need not be carried out at the place designated as the legal 'place of arbitration', the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place."

**Case 1417: NYC [II]; V(I)(a); [V(2)(b)]; Recommendation regarding the interpretation of article II, paragraph 2 and article VII, paragraph 1 NYC**
Spain: High Court of Justice of Catalonia (Civil and Criminal Chamber, 1st Section)
29 March 2012
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

Recognition was sought of an arbitral award issued in London the object of which was the failure to fulfil certain terms of a charter party. The party against whom recognition of the award was sought was the same as that in the Order of the High Court of Justice of Catalonia of 15 March 2012 (CLOUT case 1418).

As grounds for opposing the enforcement it was claimed that public policy had been violated on account of breach of the principle of effective judicial protection established in article 24 of the Spanish Constitution on account of there being no arbitration agreement between the parties (articles V(2)(b) and V(1)(a) in relation to article II NYC).

The Court reiterated the doctrine already consolidated by Spanish judges in relation to the New York Convention: namely, the limited nature of the grounds for opposition; the distinction between the grounds provided at the request of either party (the burden of proof falling on whoever invokes such grounds) and those provided *proprio motu*, leaving the review of the merits of the case excluded from the judicial examination.

The central issue for the opposition to enforcement was the alleged absence of a written agreement to submit to arbitration. On this point, the Court held that the allegation was inconsistent with the e-mails exchanged by the parties. The Court recalled the settled case law of Spain in accordance with which it favoured a non-formalist approach, that is to say, it was understood that the requirement for a written document in the New York Convention was merely for the purpose of there being a record of the existence of an agreement. Likewise, an interpretative

approach was taken in the Recommendation[1] by UNCITRAL regarding the interpretation of article II, paragraph 2 NYC, in the sense that the mechanisms envisaged in that provision were not exhaustive and should include electronic media, which was recognized, furthermore, by article 9(3) of Arbitration Act No. 60/2003 of 23 December 2003.

In this connection, the Court referred to the e-mail correspondence between the parties and, specifically, between the intermediaries of the charterer and the ship-owner. Within the framework of the order placed, the series of clauses in the time-charter policy was accompanied by the "BALTIME 1939" Uniform Time-Charter (as revised in 2001), which included LMAA (London Maritime Arbitrators Association) arbitration clause 61, acceptance thereof being conveyed in the form of an e-mail.

Likewise, the Court referred to the fact that since the dispute and arbitral proceedings had begun no mention had been made as to the non-existence of the arbitration clause or to lack of awareness of the clause.

The Court also rejected the claims that the arbitration agreement was invalid on the grounds of violation of the Spanish Law of 1998 on general contractual conditions, as article V(1)(a) NYC contained a conflicting enforcement rule that prevented application of the Spanish regulations, especially as the parties had agreed to submit to English law. The Court was of the view that, in any event, defects in the arbitration agreement should have been opposed in the arbitral proceedings under the Kompetenz-Kompetenz principle (article 22 of the Arbitration Act). In addition, the validity of pre-formulated submission to arbitration clauses in standard contracts concluded between entrepreneurs was acknowledged in the case law of the Supreme Court as being customary in maritime trade.

**Case 1418: NYC [II]; V(1)(a); [V(2)(b)]; Recommendation regarding the interpretation of article II, paragraph 2 and article VII, paragraph 1, NYC**
Spain: High Court of Justice of Catalonia (Civil and Criminal Chamber, 1st Section)
15 March 2012
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

Recognition was sought of an arbitral award issued in London the object of which was the failure to fulfil certain terms of a charter party. The party against whom the recognition of the award was sought was the same as that in the Order of the High Court of Justice of Catalonia of 29 March 2012 (CLOUT case 1417).

As grounds for opposing the enforcement it was claimed that public policy had been violated on account of breach of the principle of effective judicial protection established in article 24 of the Spanish Constitution on account of there being no arbitration agreement between the parties (articles V(2)(b) and V(1)(a) in relation to article II NYC).

The Court reiterated the doctrine already consolidated by Spanish judges in relation to the New York Convention: namely, the limited nature of the grounds for

[1] The Recommendation was adopted on 7 July 2006.

opposition; the distinction between the grounds provided at the request of either party (the burden of proof falling on whoever invokes such grounds) and those provided *proprio motu*, leaving the review of the merits of the case excluded from the judicial examination.

The central issue for the opposition to enforcement was the alleged absence of a written agreement to submit to arbitration. On this point, the Court held that the allegation was inconsistent with the e-mails exchanged by the parties. The Court recalled the settled case law of Spain in accordance with which it favoured a non-formalist approach, that is to say, it was understood that the requirement for a written document in the 1958 New York Convention was merely for the purpose of there being a record of the existence of an agreement. Likewise, an interpretative approach was taken in the Recommendation[2] by UNCITRAL regarding the interpretation of article II, paragraph 2 NYC, in the sense that the mechanisms envisaged in this provision were not exhaustive and should include electronic media, which was recognized, furthermore, by article 9(3) of Arbitration Act No. 60/2003 of 23 December 2003.

In this connection, the Court referred to the e-mail correspondence between the parties, and in particular to those e-mails in which the parties referred to already agreed conditions in previous commercial relations, modifying, adding or removing some of them, but not clause 61, which contained the arbitration agreement to submit to arbitration in London (London Maritime Arbitrators Association) and English law. Moreover, one of the e-mails sent by the party opposing the enforcement contained an explicit reference to arbitration, and therefore it could not be claimed that a submission to arbitration clause did not exist or was not known about.

Likewise, the Court referred to the fact that since the dispute and arbitral proceedings had begun no mention had been made as to the non-existence of the arbitration clause or to lack of awareness of the clause.

The Court also rejected the claims that the arbitration agreement was invalid on the grounds of violation of the Spanish Law of 1998 on general contractual conditions, as article V(1)(a) NYC contained a conflicting enforcement rule that prevented application of the Spanish regulations, especially as the parties had agreed to submit to English law, with no finding that the agreement was not valid under said law. The Court was of the view that, in any event, defects in the arbitration agreement should have been opposed in the arbitral proceedings under the Kompetenz-Kompetenz principle (article 22 of the Arbitration Act). In addition, the validity of pre-formulated submission to arbitration clauses in standard contracts concluded between entrepreneurs was acknowledged in the case law of the Supreme Court as being customary in maritime trade.

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[2] The Recommendation was adopted on 7 July 2006.

## Cases relating to the UNCITRAL Model Arbitration Law (MAL)

**Case 1419: MAL 12; 34(2)(a)(iv); 34(2)(b)(ii)**
Spain: Madrid Provincial High Court (Section 12)
30 June 2011
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

[**Keywords**: *independence of arbitrator; conflicts of interest; appointment procedures; setting aside*]

The setting aside of an award was under consideration on the ground that the arbitrator should have been challenged. In the Court's view, independence meant the absence of ties binding the arbitrator to the participants in the trial and implying the existence of some kind of relationship that might reasonably lead to the suggestion that the arbitrator was predisposed or inclined to accept the claims of one or other party. Impartiality meant the absence of causes or reasons arising from the relationship of the challenged arbitrator with the participants in the trial that could justifiably raise doubt about the challenged arbitrator's ability to discharge his responsibilities with the necessary objectivity towards and distance from the parties when adjudicating the claims that were the object of the arbitral proceedings.

Having reviewed the concept of independence and impartiality, the Court was of the view that, for the challenge to be successful, circumstances had to concur that "[gave] rise to justifiable doubts", and therefore it was not enough to prove the existence of a link between the arbitrator and the participants in the process, it having to be analysed case by case whether the relations or circumstances evidenced were significant enough to question the impartiality or objectivity of the challenged arbitrator, that is, whether the concurring circumstances made it possible to reasonably argue that, in carrying out the arbitration, the arbitrator might act biasedly for or against either side, or that he might not behave in an impartial and objective manner when resolving the issues before him.

In the instant case, the Court considered that circumstances were present that highlighted a relationship between the challenged arbitrator and the law firm defending one of the parties to the arbitration that went beyond a temporary, occasional relationship, since, in the Court's view, one could not qualify as such a relationship with a law firm in which a close relative, namely a son-in-law, worked, and in which friends of the arbitrator worked, including the managing partner of the firm; further, the arbitrator acted as a consultant on educational materials for the Masters in Business Law course at a study centre linked to the said firm, and, while this was an honorary role, clearly his position on the Advisory Council implied the consequent relationship, which obviously should be presumed positive, with members of the centre linked to the law firm defending the interests of one of the parties. In addition, he had dedicated a legal publication to the person after whom the firm was named, which, irrespective of the import of the publication in question, implied a relationship of friendship and/or admiration. Concerning the relationship of the challenged arbitrator with the now respondent, from his clarifications in this regard it should be taken into account that he had issued legal opinions at the request of entities associated with the respondent, and while issuing a legal opinion need not necessarily mean defending the interests of the requesting party, it clearly

involved work of a legal advice nature. Furthermore, while he demonstrated that he did not have any relationship whatsoever with senior executives of the firm, he did acknowledge having held meetings prior to the arbitration with two of the executives, although he did not clarify the dates of, the reason for, or the content of these conversations with the said senior managers of the respondent entity, and nor was it possible to ascertain from the duly verified records the content of those conversations.

Such circumstances, if considered separately, would not have been sufficient to support the challenge to the arbitrator; considered as a whole, however, they indicated a relationship of proximity and connection with the law firm defending the interests of one of the parties, and affirmed the existence of grounds for the challenging party to doubt the impartiality and independence of the challenged arbitrator. The Court added that the fact that the challenged arbitrator had not previously disclosed the circumstances referred to, or at least some of them, had a bearing on the foregoing.

Concerning the IBA's guidelines on conflicts of interest in international arbitration, to which both parties referred, the Court was of the view that those guidelines were not applicable, as they were not rules of positive law, and by classifying the possible relationships of arbitrators into various categories according to these guidelines, and by applying them, even for guidance only, would give full legitimacy, in addressing issues of a constitutional nature, to rules issued by an association, while the rules constituting the current legal system already provided a suitable mechanism for addressing the challenge at issue. However, the Court, for the sole purpose of responding to this issue, examined the IBA Guidelines and concluded that there were at least two circumstances that would fall within the Orange List, which meant that the arbitrator must, if in doubt, disclose them (General Standard 3), the circumstances being the fact that the arbitrator's son-in-law worked for the law firm representing the now respondent in the arbitration proceedings (situation 3.3.5) and the issuance of legal opinions for entities linked to the now respondent (situation 3.1.1); therefore, were these standards to be applied, such circumstances would have to be disclosed, thus constituting a reason that, while not being grounds for a challenge, would have a bearing upon the legitimacy of the challenge.

In light of the above, the Court considered that the arbitral award should be set aside for violation of articles 41(1)(d) and (f) of the Arbitration Act (consistent with articles 34(2)(a)(iv); 34(2)(b)(ii) MAL) in relation to articles 17(1) and (3) of the Arbitration Act (consistent with article 12 MAL) and article 24 of the Spanish Constitution, and therefore for violation of procedural public policy.

Concerning the violation of the right to evidence, the Court held that evidence had not been admitted for reasons attributable to the Arbitration Tribunal. In the case in question, despite the claimant's request for the opposing party to be compelled to fully meet the requirement imposed upon it, it was not specified that any action had taken place in that regard, except the ruling which did not allow the request owing to the time period allotted for producing evidence having closed. In this regard, the Court, having examined the documents in the proceedings, deemed the taking of evidence to be incomplete, no decision having been made on the request for completion thereof, the period for the taking of evidence being open at the time the request was made.

Violation of the right to evidence should, furthermore, be considered relevant, that is, there must be a correlation between the fact that is intended to be established and the proof that it did not take place, and that the facts are of a nature that, had they taken place, the outcome of the trial might be different. In the Court's view, there were sufficient grounds for understanding that the evidence discussed was relevant, in the sense that certain facts were established by the evidence that might have justified an award of a different import from that which was made, and therefore it was appropriate to accept the plea to set aside pursuant to articles 41(1)(d) and (f) of the Arbitration Act, in relation to article 24 of the Spanish Constitution, for violation of procedural public policy.

**Case 1420: MAL 12; 34(2)(a)(iv); 34(2)(b)(ii)**
Spain: Madrid Provincial High Court (Section 14)
21 June 2011
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

[**Keywords**: *independence of arbitrator; appointment of arbitrators; setting aside; arbitral proceedings*]

An application was made for the setting aside of an arbitral award issued on the occasion of a claim for commissions due under an international intermediary contract on the grounds that articles 41(1)(b), (d) and (f) of Spanish Arbitration Act No. 60/2003 (consistent with articles 34(2)(a)(iv); 34(2)(b)(ii) MAL) had been violated owing both to the fact that the claimant had been prevented from asserting its rights in relation to evidence during the course of the arbitral proceedings, and to the lack of objective and subjective impartiality of the arbitrator, with violation of public policy.

The claimant considered that objective impartiality had been violated on account of alleged relations between the respondent and certain companies for which the arbitrator had allegedly provided services, according to information obtained from the Internet. In the Court's view, accessibility via the Internet to such information concerning circumstances that predated the appointment of the arbitrator rendered the information public and of general knowledge, and therefore the least the parties could do was take some measure (and certainly more than just an Internet search) to investigate the concurrent professional circumstances of the arbitrator. In addition to the above, the Court considered that the intervention of the party requesting the termination of the appointment of the arbitrator implied that any professional link between the arbitrator and one of the parties constituted an unsuitable circumstance on which to establish the challenge or to assume bias. On the one hand, article 17(3) of the Arbitration Act (consistent with article 12 MAL) prohibited basing the challenge on causes which were known prior to the appointment. On the other hand, the party, cognizant of said link, declared expressly on signing the terms of reference of the arbitration that he knew of "no fact or circumstance that might affect independence or impartiality, or any other cause permitting a challenge to his appointment".

In any case, the Court indicated that the professional services provided by the arbitrator to a company belonging to a group of companies which in turn allegedly maintained temporary business connections not with the respondent but with

companies linked to that company constituted a relationship so distant and mediated by different legal persons that, in themselves (in the absence of other factors or events, which had neither been alleged nor appraised), they were not liable to cause any interest or prejudice on the part of the arbitrator.

As regards subjective impartiality, this referred to the arbitrator's relationship with the parties, and implied neutral conduct on the part of the arbitrator manifested in his mental disposition and attitude towards the disputing parties, with no preference being shown to either of them. In the instant case, the claimant alleged that bias was shown in particular procedural actions, which prevented it from asserting its rights in the arbitral proceedings. It was important here to examine not only the conduct of the arbitrator purportedly demonstrating bias, but also any consequences thereof prejudicing the claimant's right of defence (article 24(1) of the Spanish Constitution), always bearing in mind that right of defence violations should not be purely formal or hypothetical, but that the resulting lack of proper defence must be material, effective and of constitutional importance (Constitutional Court of Spain, Judgement Nos. 190/2004, 201/2000, 96/2000 and 276/1993).

It was alleged that public policy had been violated in the arbitral proceedings. In the Court's view, the concept of public policy was not part of any rule in the legal system, nor even of rules of a mandatory or prohibitive nature. On this matter, taking into account constitutional doctrine, public policy meant the set of principles that underpinned the legal system and that were absolutely mandatory for preserving a model of society for a specific people and time (Constitutional Court of Spain, Judgement Nos. 11/87, 116/1988 and 54/1989), whence it followed that an award would be detrimental to public policy if it violated any of the fundamental principles or rights in the Spanish Constitution. However, not all breaches of a legal rule, even of those of a mandatory or prohibitive nature as mentioned above, constituted a threat to public policy, just as not every breach of the principles of justice and equity could be put on a level with a breach of public policy, but only a violation of those principles of justice and equity that made up the concept of constitutional public policy as interpreted in case law.

In light of the above, the Court dismissed the claimant's allegations, on the one hand because the allegations were incomplete and imprecise, and on the other because, having examined the arbitrator's conduct, the Court considered that the arbitrator neither was passive nor acted inappropriately. Further, the Court deemed the arbitrator's conduct during the taking of evidence to be in keeping with the powers assigned to him to manage the procedural debate and the taking of evidence.

**Case 1421: [MAL 3, 31(4); 34(2)]**
Spain: Madrid Provincial High Court (Section 19)
No. 241/2006
27 September 2006
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

[**Keywords**: *notice; receipt; formal requirements; procedure; arbitration clause; setting aside*]

In this case[3] it was understood that a judge responsible for enforcement of an arbitral award may not consider the validity of the arbitral agreement concerned. Enforcement was refused, however, on the grounds that notification of the award had not been received. In the instant case, only an unsuccessful attempt at notification was established. In the Court's view, notification of awards may not erode the guarantees that must be complied with for notification of judgements, or, in other words, notification of an award may not be deemed to have been given attendant upon arguments that would not have served for notification of a judgement.

**Case 1422: MAL**
Spain: Supreme Court (Civil Chamber, 1st Section)[4]
No. 404/2005
26 May 2005
Original in Spanish

Abstract prepared by Pilar Perales Viscasillas, national correspondent

[**Keyword**: *arbitration agreement*]

The proceedings concerned an international dispute between two companies whose contract contained an arbitration agreement to submit to arbitration by the Geneva Chamber of Commerce and Industry. The contract was guaranteed by a demand guarantee issued by a Spanish bank, at the request of the Spanish party, in favour of the foreign party. The Spanish contracting party had brought the matter before the national courts, given that at both trial and appeal phases the courts had declined jurisdiction to hear the dispute. The Spanish party appealed in cassation and the Supreme Court again rejected the plea.

The Spanish party appeared to consider ineffective the agreement regarding third parties, in this case the bank issuing the independent guarantee. The Supreme Court considered, however, that the arbitration agreement necessarily had to be extended to the parties directly involved in the performance of the contract, supporting its assertion with the Statement of Purposes in the 2003 Arbitration Act — not directly applicable to the case, the 1988 Arbitration Act being in force during the relevant period — which refers to the reference arbitration clause, and which the Supreme Court defined as one that "does not appear in the main contract document, but in a separate document, but is understood as being incorporated into the contents of the former through reference made therein to the latter".

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[3] See also Order No. 240/2006 of the Madrid Provincial High Court (Section 19) of 27 September 2006.

[4] Previously heard by Barcelona Provincial Court Judgement, 16.11.1998, and Court of First Instance No. 13, Barcelona.