United Nations A/CN.9/SER.C/ABSTRACTS/152

General Assembly

Distr.: General
21 November 2014

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.14-07565 (E) 251114 261114

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 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York" Convention (NYC)

Case 1423: NYC
India: High Court of Bombay
Company Appeal (L) No. 47 of 2012
Masumi SA Investment LLC v. Keystone Realtors and ors
6 November 2012
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[1]

Masumi SA Investment LLC ("Masumi") entered into a shareholder agreement with Keystone Realtors ("Keystone"), which provided for arbitration in Mumbai. Masumi filed a claim before the Company Law Board ("CLB") alleging that Keystone and the other respondents had mismanaged the affairs of some of the respondent companies. The second respondent filed an application to the CLB under Section 8 of the Arbitration and Conciliation Act 1996 (the "1996 Act") to have the proceeding referred to arbitration. The CLB found for the second respondent and stayed the proceedings before it, referring the matter to arbitration. Masumi applied to the High Court of Bombay, seeking to appeal the decision of the CLB by relying on Section 10F of the Companies Act 1956, which, as the Court remarked, allowed "any person aggrieved by a decision or order of the Company Law Board … [to] file an appeal to the High Court".

The High Court of Bombay rejected Masumi's application and ordered that the matter be referred to arbitration. In reaching this conclusion, the High Court relied on Section 37 of the 1996 Act, a section which the High Court considered as setting out the situations in which a court order may be appealed when concerning arbitration. Importantly, the High Court referred to Section 50 of the 1996 Act, which — the High Court remarked — "applies to international arbitration covered by New York Convention [sic]". The High Court noted that, under Section 50 of the 1996 Act, an appeal against an order is possible only if the order refuses to refer the matter to arbitration; when the order is for the matter to be referred to arbitration, Section 50 does not allow for an appeal. The High Court used the provision in Section 50 by analogy, to illuminate the effect of Section 37. In conclusion, the High Court considered that the 1996 Act is "a self-contained, complete and exhaustive code in all respects". In the Court's view, since Section 37 did not mention the right to appeal against an order referring parties to arbitration, no such remedy lied in the present case.

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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 1424: NYC V; V(1)(a); V(1)(d); V(1)(e)
India: Supreme Court of India
Civil Appeal No. 7019 of 2005
Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.
6 September 2012
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[2]

Bharat Aluminium Co. ("Bharat") entered into a contract with Kaiser Aluminium Technical Service, Inc. ("Kaiser") for the supply and installation of a computer-based system, which provided for arbitration in London and was governed by Indian law. A dispute arose and Kaiser initiated an arbitration proceeding, culminating in two awards in Kaiser's favour. Bharat filed applications with the District Court of Bilaspur in India in order to have the two awards set aside. According to Bharat, Part I of the Arbitration and Conciliation Act 1996 (the "1996 Act") also applied to awards made in arbitrations which have their seat outside India, therefore allowing Bharat to apply to have the awards set aside. Bharat also argued that the wording "has been set aside or suspended by a competent authority of the country … under the law of which, the award was made" in Section 48(1)(e) of the 1996 Act (mirroring Article V(1)(e) NYC) entitled an Indian court to set aside the awards made in London. This was because, according to Bharat, "the law [under] which" the awards were made was Indian law, as it was the law applicable to the contract. The District Judge refused Bharat's application and Bharat appealed to the High Court of Judicature at Cattisgarh, Bilaspur. The High Court rejected its appeal and Bharat appealed to the Supreme Court.

The Supreme Court rejected Bharat's appeal, holding that "under the law of which the award was made" in Section 48(1)(e) of the 1996 Act referred to the law governing the arbitral process, and not the law governing the contract or the law governing the arbitration agreement. The Supreme Court expressly stated that Article V was "bodily lifted and incorporated" in Section 48 of the 1996 Act, noting that it is the party which seeks to resist the enforcement of the award which has to prove one or more of the grounds set out in Sections 48(1) and 48(2) of the 1996 Act. The Supreme Court found that the NYC established a "territorial link" between the place of arbitration and the law governing that arbitration, as made evident by both Article V(1)(d) NYC which referred to "the law of the country where the arbitration took place" and Article V(1)(e) NYC which referred to "the law of the country where the award is made". Consequently, the Supreme Court considered that Part I of the 1996 Act only applied to domestic arbitrations, that is — according to the Supreme Court — proceedings with their seat in India. Additionally, the Court reasoned that Part II of the 1996 Act only deals with enforcement proceedings in India and not with the challenge of the validity of

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arbitral awards rendered outside India. The Court expressly referred to Article V(1)(e) NYC in interpreting Section 48(1)(e) of the 1996 Act, rejecting Bharat's argument that it was open to the legislature of State parties to the NYC to enact situations where an award could be annulled in places other than the two situs provided for in Article V(1)(e) NYC. According to the Court, even the two situs where an award may be annulled pursuant to Article V(1)(e) NYC are alternative and not concurrent jurisdictions: it is only if the court of the seat has no power to annul the award under that court's national law (what the Supreme Court labelled the "first alternative") that the court of the place of the law under which the award was made would have the power to annul the award (the "second alternative"). Any other interpretation, the Court feared, would lead to "chaos […] created by two court systems, in two different countries, exercising concurrent jurisdiction over the same dispute", which would undermine the policy of the NYC. The Supreme Court remarked that annulment of an award by the courts of the place of the law under which the award was made is a "highly unusual 'once-in-a-blue-moon' occurrence". Finally, the Supreme Court noted that the 1996 Act did not deal with awards made outside India but in States not parties to the NYC. In such cases the Court confirmed that neither Part I nor Part II of the 1996 Act applied, as Section 44 of the 1996 Act (implementing Articles I and II NYC) limits the application of Part II to awards made in pursuance of an agreement to which the NYC applies, including the reservation of reciprocity. The remedy of this lacuna, in the view of the Supreme Court, would be the enactment of appropriate legislation by Parliament.

Case 1425: NYC
India: High Court of Delhi, New Delhi
Ex. P. 386/08 and EA Nos. 451/2010, 704-705/2009 and 77/2010
Penn Racquet Sports v. Mayor International Ltd
11 January 2011
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[3]

Penn Racquet Sports ("Penn", a company incorporated in the United States of America) entered into a contract with Mayor International Ltd ("Mayor", a company incorporated in India) whereby Penn licensed Mayor to use its trademark, which provided for arbitration under the auspices of the International Chamber of Commerce ("ICC") in Paris. The contract was expressed to be governed by Austrian law. A dispute arose and Penn initiated an arbitration proceeding which culminated in an award in its favour. When Penn sought to enforce the award in India, Mayor resisted enforcement arguing that the award's enforcement would be contrary to public policy, pursuant to Section 48(2)(b) of the Arbitration Act 1996 (the "1996 Act") (mirroring Article V(2)(b) NYC), because the arbitrator's award was

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based on an interpretation of the contract which contradicted the contract's express terms. Mayor further argued that it had been unable to present its case.

The High Court of Delhi ordered the enforcement of the award, rejecting Mayor's arguments and holding that when a foreign award is enforceable under Part II of the Arbitration Act, it is deemed a decree of the court. In the Court's view, the term "public policy of India", found in Section 48(2)(b) of the 1996 Act, had a narrow meaning compared to the same term when used in the enforcement of domestic awards. The High Court considered that the interpretation of the contract was a matter entirely for the arbitral tribunal, with the consequence that a court called to enforce an arbitral award should not interfere with the award on the ground that the arbitral tribunal had adopted a particular interpretation of a contract, unless it could be shown that the contractual interpretation complained of was contrary to the contractual terms as interpreted under the applicable law. The Court held that the applicable law was that of Austria, therefore Mayor's submissions, which focused on India law, were irrelevant. Finally, the judge considered that "public policy" meant the "fundamental policy of Indian law". The judge concluded by stressing that a monetary award against an Indian entity on account of its commercial dealings would not make the award contrary to the interests of India, or contrary to justice or morality.

Case 1426: NYC
India: High Court of Delhi, New Delhi
CS (OS) 2447/2000 and IA 12332/2008
Fittydent International GmbH v. Brawn Laboratories Ltd
11 May 2010
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[4]

Fittydent International GmbH ("Fittydent") entered into a contract with Brawn Laboratories Ltd ("Brawn") licencing Brawn to manufacture and sell Fittydent's products in India, which provided for arbitration under the rules of the International Chamber of Commerce ("ICC"). A dispute arose between the parties and Fittydent initiated an arbitration proceeding which culminated in an award in its favour. Fittydent sought to enforce the award in India, a motion which Brawn resisted by arguing that, pursuant to Section 48 of the Arbitration and Conciliation Act 1996 (the "1996 Act") (mirroring Article V NYC), the enforcement of the award would be contrary to public policy. According to Brawn, enforcement would be contrary to public policy for three reasons: (i) because the contract between the parties on which the award was based was expressed to be subject to the approval(s) by the Government of India and/or the Reserve Bank of India and, such approval(s) not

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having been obtained, the contract was void and did not give rise to any legal obligations; (ii) because the award ordered damages to be paid to Fittydent reflecting the entire consideration under the contract in circumstances where Fittydent had not performed some of its obligations under the contract; and, finally, (iii) because the damages which had been awarded included a licence fee which had not been triggered on the terms of the contract. Finally, Brawn argued that the 8.5 per cent rate of interest imposed by the arbitrator had been usurious and excessive.

The High Court of Delhi refused to stay the enforcement of the award, finding that none of the arguments advanced by Brawn showed that enforcement would be contrary to public policy, but nonetheless adjusted the rate of interest to 2 per cent. The High Court found that it was Brawn's obligation to obtain the said approval(s) and, on that view, a party in breach could not benefit from its own wrong. The learned judge stressed that the arbitrator had made a finding of fact that Brawn had breached its contractual obligations by failing to secure the necessary approval(s). The Court considered the arbitrator's view to be plausible, and, moreover, held that an enforcing court was precluded by Section 48 of the 1996 Act from interfering with the arbitrator's views. Turning to the concept of public policy, the judge remarked that it is to be narrowly construed as representing the fundamental policy of the law of India. An expansive construction of the concept of public policy, the judge opined, would vitiate the NYC's "basic intent of removing obstacles to enforcement". The High Court also rejected the second and third of Brawn's arguments, again finding that the arbitrator had considered the matters raised by Brawn and, according to the arbitrator's construction of the contract, he had found against Brawn. In the Court's view these were questions of fact, beyond the scope of the enforcing court when dealing with proceedings filed under Sections 48 and 49 of the 1996 Act. The learned judge did deem it appropriate to adjust the rate of interest to 2 per cent and declared the award to be enforceable with the reduced rate of interest.

Case 1427: NYC
India: High Court of Madras
A. No. 2670 of 2008, A. No. 1236 of 2008, O.A. No. 277 of 2008, and A. No. 2671 of 2008
Ramasamy Athapan and Nandakumar Athappan v. Secretariat of Court, International Chamber of Commerce
29 October 2008
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[5]

Plaintiffs (India) entered into a Joint Venture agreement with several companies located in various countries and agreed to arbitrate any disputes at the ICC in Paris

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under Indian law. Following a dispute, and after the initiation of criminal and civil proceedings against the plaintiffs and some of the defendants, two of the defendants (6 and 10) sought arbitration in Paris. The plaintiffs and some of the defendants resisted arbitration arguing, among other things, that the arbitration agreement was void, inoperative, and incapable of being performed under Section 45 of India's 1996 Arbitration and Conciliation Act ("Act") (which directly incorporates Article II(3) NYC).

The Court enjoined defendants 6 and 10 from submitting the matter to arbitration, on the grounds that their decision to bring numerous civil and criminal suits before Indian courts rendered the arbitration agreement inoperative under Section 45 of the Act. Although the agreement was neither void nor incapable of performance under Indian contract law, the Court found that the defendants were thwarting the purpose of the arbitration clause by filing several suits before submitting the matter to arbitration, and that these actions negated their ability to invoke the clause here. The Court further noted that the plaintiffs had not submitted to the jurisdiction of the arbitral tribunal by requesting a stay of the arbitration, and therefore an injunction was appropriate in this case.

Case 1428: NYC II; II(2)
India: Supreme Court of India
Civil Appeal No. 6039 of 2008
M/S Unissi (India) Pvt Ltd v. Post Graduate Institute of Medical Education and Research
1 October 2008
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[6]

M/S Unissi (India) Pvt Ltd ("Unissi") made an offer to a tender floated by the Post Graduate Institute of Medical Education and Research ("PGI") which PGI accepted, placing purchase orders with which Unissi complied by sending the appropriate equipment. PGI, after receiving the equipment and installing them, demanded the execution of an agreement containing an arbitration clause. Unissi signed the agreement and sent it to PGI, but PGI did not revert with its signature to Unissi. Further, no payment was made by the PGI for the equipment received, installed and used by it. Unissi argued that the matter should be referred to arbitration, alleging the existence of a duly executed contract with an arbitration clause. The PGI contended that no arbitration agreement had been entered into by the parties. It also informed Unissi that a Technical Committee of the PGI had not approved the purchase and installation of the equipment, with the result that the equipment was rejected. Unissi applied to the Additional District Court in Chandigarh to have an

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arbitrator appointed. The Additional District Court held that there was no agreement executed between the parties, rejecting Unissi's motion to appoint an arbitrator. In the Additional District Court's view, the conditions of Section 7 of the Arbitration and Conciliation Act 1996 (the "1996 Act") (incorporating, in modified language, Articles II(1) and (2) NYC) had not been satisfied. Unissi appealed this decision to the Supreme Court.

The Supreme Court allowed Unissi's appeal, reversing the decision of the Additional District Court in Chandigarh and ordering that an arbitrator be appointed. According to the Supreme Court, Section 7 of the 1996 Act "is in pari materia" to Article II(2) NYC. Relying on a previous decision interpreting Article II(2) NYC, the Supreme Court considered that "agreement in writing" could mean: (i) a contract containing an arbitration clause; (ii) an arbitration agreement signed by the parties; (iii) an arbitration clause in a contract contained in an exchange of letters or telegrams; or, (iv) an arbitration agreement contained in an exchange of letters or telegrams. Turning to the facts of the case, the Supreme Court held that Unissi had sent the agreement containing the arbitration clause and had duly signed it; it was PGI who had not returned the agreement with its signature. Further, the Supreme Court noted that PGI had used the machines for about a year before it returned them to Unissi. In the Supreme Court's view, the tender offer made by Unissi, which contained an arbitration clause, and the supply order placed thereafter by PGI meant that the parties had entered into an arbitration agreement. It was also important, in the Court's view, that the tender of Unissi was accepted and that Unissi had acted upon it. According to the Court, PGI should not now be allowed to "wriggle out" of the arbitration agreement between the parties.

Case 1429: NYC
India: Supreme Court of India
Civil Appeal No. 309 of 2008
Venture Global Engineering v. Satyam Computer Svcs. Ltd. & Anr.
10 January 2008
Original in English
Available at: http://judis.nic.in
Abstract published on www.newyorkconvention1958.org[7]

In October 1999, Venture Global Engineering ("VGE") (a United States company) entered into a Joint Venture agreement with Satyam Computer Services (an Indian Company) and agreed to arbitrate any disputes at the London Court of International Arbitration. A subsequent dispute led to an April 2006 award in favour of Satyam. Satyam obtained leave to enforce the award in Michigan in September 2006, and the Sixth Circuit affirmed this decision in May 2007. Prior to this, however, VGE had commenced proceedings in India seeking an injunction on payment and annulment of the award, and had received a permanent injunction in June 2006. Satyam

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appealed, and the High Court granted an interim suspension of the injunction. In February 2007, the High Court also dismissed VGE's appeal from a decision denying annulment, holding that Part II of India's 1996 Arbitration and Conciliation Act ("Act") (implementing the NYC) did not permit Indian courts to set aside a foreign award. The court found that Part I of the Act, which allows Indian courts to set aside awards on grounds of public policy, did not apply to foreign awards.

The Supreme Court reversed the judgment of the High Court, holding that unless the parties provide otherwise, foreign awards can be challenged in India under the Act. The Court affirmed its previous holding in the 2002 case Bhatia International, that the general arbitration provisions set forth in Part I of the Act apply to arbitration proceedings that occur abroad, unless this Part is expressly excluded by the parties. It remanded the case to the lower court to determine whether the award violated Indian law, and therefore Indian public policy provisions. It further held that the United States proceedings had no effect because the injunction in India was issued prior to the decision of the Michigan District Court.

Case 1430: NYC
India: High Court of Bombay
Company Appeal (L) No. 47 of 2012
JS Ocean Liner LLC v. MV Golden Progress; Abhoul Marine LLC
25 January 2007
Original in English
Available at: http://judis.nic.in

Abstract published on www.newyorkconvention1958.org[8]

JS Ocean Liner ("JS") had entered in a charter party with Abhoul marine ("Abhoul") for the charter of MV Golden Progress, a vessel owned by Abhoul. The charter party provided for arbitration in London. JS initiated arbitration in London, claiming that the vessel did not comply with the terms of the charter party. JS also brought an action in rem before the High Court of Bombay asking that the vessel be arrested in order to force Abhoul to compensate JS for its losses. Alternatively, JS claimed that the vessel should be arrested as a form of security for the pending arbitration proceedings in London, pursuant to Section 9, concerning interim measures, of the Arbitration and Conciliation Act 1996 (the "1996 Act"). The Single Judge of the High Court found for the defendants; his decision was reversed by the Division Bench, which found for JS. The defendants appealed the decision of the Division Bench to the High Court.

The High Court of Bombay dismissed the appeal, holding that the Court could entertain an action in rem for the arrest of a vessel in a situation where the parties have an arbitration agreement. At the same time, the High Court held that the vessel could not be arrested as an interim measure pursuant to Section 9 of the 1996 Act.

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In deciding that it nonetheless had jurisdiction to entertain the action in rem the High Court cited Section 45 of the 1996 Act (mirroring Article II(3) NYC). Commenting on the effect of Section 45 the High Court stressed that while, in circumstances where the arbitration agreement is not null and void or inoperative or incapable of being performed, a court would have no discretion but to refer the parties to arbitration, the Court also noted that it is for the court itself to decide whether an agreement to arbitrate is null and void, inoperative or incapable of being performed. This, the High Court considered, meant that some jurisdiction remains vested in the court itself. The High Court also noted that Chapter I of Part II of the 1996 Act (Sections 44 to 52 of the 1996 Act) "deals with New York Convention Awards" and that Section 44 defines a foreign award as an arbitral award (i) in pursuance of an agreement in writing for arbitration to which the NYC applies; and (ii) in a territory which also applies the NYC, as indicated by a declaration made by the Central Government of India by way of notification in the Official Gazette.