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

Case 1571: NYC V(1)(e)
Austria: Oberster Gerichtshof (Supreme Court)
3 Ob 39/13a
16 April 2013
Original in German
Unpublished

Abstract prepared by Martin Adensamer.[1]

The arbitration agreement between the parties allowed for a revision of the arbitral award by a higher arbitral tribunal where so requested by a party within 30 days after service of the award. Within this time frame, one of the parties applied for such a revision by an ad hoc tribunal in the Czech Republic. This resulted into a proceeding to appoint a third arbitrator at this higher tribunal. In the meantime, the District Court in the "Innere Stadt" (Vienna), on request of the other party, declared the award enforceable. On appeal the County Court in Vienna, however, dismissed the request. The Supreme Court upheld this decision and ruled that the award is not binding in terms of Article V(1)(e) NYC until all proceedings to render the award final have been exhausted. If the award can be contested before a higher arbitral tribunal, a request for such a revision prevents the award to take effect as long as the proceeding is pending and the second arbitral instance which has been invoked in due time has not decided. Recognition and enforcement of the award is thus to be refused.

Since the parties also argued about whether the application for the revision of the award by the higher tribunal was submitted by a person having the power to do so, the Supreme Court held that this question was to be decided by the ad hoc higher arbitral tribunal and not by the court deciding on the recognition of the award.

Case 1572: NYC V(1)(b)
Austria: Oberster Gerichtshof (Supreme Court)
3 Ob 38/12b
18 April 2012
Original in German
Unpublished

Abstract prepared by Martin Adensamer.[2]

An award of the arbitral tribunal of the Chamber of Commerce in the canton Tessin was declared enforceable by the District Court in the "Innere Stadt" (Vienna). On appeal by the opposing party, the County Court in Vienna upheld this decision. In its appeal to the Supreme Court, the opposing party pleaded that the recognition of the award was to be refused on the basis of Article V(1)(b) NYC. The party argued that the opinion of the expert appointed in the proceedings had not been discussed orally

[1] At the time the abstract was received by the UNCITRAL secretariat, Martin Adensamer was CLOUT National Correspondent for Austria.
[2] Ibid.

and the parties could only pose questions in writing. The expert did not answer several of such questions claiming that they were of legal nature and not to be answered by him.

Referring to its established jurisprudence, the Supreme Court observed that the rationale of Article V(1)(b) NYC is to refuse recognition where a party had no chance (at all) to present its case and its arguments on all facts and proofs relevant for the decision. That the party could not address all its questions to the expert does not mean that it had no possibility to argue on the results of the expert's verification. Considering the legal opinion of the County Court sufficiently grounded, the Supreme Court dismissed the appeal.

Case 1573: NYC IV(1)(a); V(1)(e); V(2)(b)
Austria: Oberster Gerichtshof (Supreme Court)
3 Ob 65/11x
24 August 2011
Original in German
Unpublished

Abstract prepared by Martin Adensamer.[3]

The District Court in Hernals (Vienna) declared enforceable an award rendered by the International Court of Arbitration of the International Chamber of Commerce (ICC). The County Court in Vienna, on appeal by the aggrieved party, refused the recognition of the award. The Supreme Court eventually set aside this decision and remanded the case to the County Court which should decide in particular on the request to suspend the proceeding on the appeal. The Supreme Court held, however, that there was no reason to refuse recognition and enforcement of the award. The Supreme Court dealt with the objections by the aggrieved party as follows:

Article IV(1)(a) NYC: For the purpose of this provision it is sufficient that any person having an official function within the arbitral institution, but not linked to any of the parties, certifies that the copy of the arbitral award submitted for recognition is a true copy of the original award if this is allowed by the rules of arbitration chosen by the parties. Such certification also includes the validity of the signatures if expressly provided for by the rules of arbitration or — as the ICC rules do — if the institution takes responsibility for the service of the award on the parties and the original award is to be deposited with the institution. Since in such cases the legal assessment depends on the arbitration rules these rules are to be submitted by the applicant — though not expressly set forth in the NYC.

Article V(1)(e) NYC: In order to assess if the award is binding on the parties it is not relevant if an exequatur is needed in the country of origin or if the award can still be set-aside or if the proceedings aiming to set aside the award is pending. Only when the award has been set aside, it is no longer binding. Since Article 28(6) ICC Arbitration Rules[4] provides for the immediate binding effect of the award, which cannot be reviewed by another arbitral instance or by a court, the award is deemed binding.

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[3] At the time the abstract was received by the UNCITRAL secretariat, Martin Adensamer was CLOUT National Correspondent for Austria.

[4] This refers to the 1998 version of the ICC Arbitration Rules.

Article V(2)(b) NYC: The Court cannot review the award as to the facts or the legal assessment of the case (no *revision au fond*). Therefore, it cannot question the decision of the arbitral tribunal which considered the arbitration agreement to be valid. The aggrieved party alleged that the other party acted fraudulently by claiming reimbursement although being in breach of contract itself and as a matter of public order no one should gain advantage from criminal acts. The Supreme Court held that the award was based on an agreement between the parties and that the claim had no connection with any later behaviour of one of them. Even if claiming reimbursement could be qualified as an abuse of rights in the case at hand, the award is not to be seen as running counter the Austria's public order. According to the Court, the fact that such a claim has to be raised by a party and cannot be considered by the court on its own motion shows that this matter is not an infringement of public order. Therefore, the award does not conflict with Article V(2)(b) NYC.

Case 1574: NYC V(1); V(1)(d); V(2); V(2)(b); V(2)(d)
Austria: Oberster Gerichtshof (Supreme Court)
3 Ob 154/10h
13 April 2011
Original in German
Unpublished

Abstract prepared by Martin Adensamer.[5]

The District Court in the "Innere Stadt" (Vienna) declared enforceable an award of the International Tribunal at the Chamber of Commerce and Industry in the Russian Federation. On appeal by the opposing party, the County Court of Vienna upheld this decision. In its appeal to the Supreme Court the opposing party pleaded that the recognition of the award should be refused on the basis of Articles V(1)(d), V(2)(b) and V(2)(d) NYC.

The Supreme Court observed that only grounds for refusal of the recognition under Article V(2) NYC can be taken up by the Court on its own motion, whereas the objections based on Article V(1) NYC must be raised and proved by the party. For this reason, the Court only considered the three objections based on Article V(2):

- The recognition of an award which was signed by only two of the arbitrators and not by the third one is not contrary to Austria's public policy. Under Austrian law, as under the laws of many other countries and the UNCITRAL Model Law on International Commercial Arbitration, it is sufficient that the majority of the arbitrators sign the award stating why the signature of the other arbitrators is missing. This rule also applies when the signature is missing for reasons of mere obstruction.
- Further, it is not against Austria's public policy if the arbitrators have not taken the decision in a plenary meeting.
- A dissenting opinion of an arbitrator is not a necessary part of the award and therefore does not need to be submitted together with the award.

[5] At the time the abstract was received by the UNCITRAL secretariat, Martin Adensamer was CLOUT National Correspondent for Austria.

Case 1575: NYC V(1)(b)
Austria: Oberster Gerichtshof (Supreme Court)
3 Ob 122/10b
1 September 2010
Original in German
Unpublished

Abstract prepared by Martin Adensamer.[6]

The International Commercial Arbitration Court at the Chamber of Trade and Industry in Ukraine awarded a certain amount of money to the claimant. The Court of Appeal in Vienna dismissed the objection of the aggrieved party that the recognition of the award should be refused under Article V(1)(b) NYC.

It was not contested that the application initiating the proceedings was served to that party and it had opportunity to nominate an arbitrator, that it was given notice of the hearing date and that its request to reschedule was dismissed; it sent a representative who, however, could not establish the power of attorney by a document. The argument that the delivered goods did not meet what stipulated in the agreement was instead taken into consideration. Since the aggrieved party did not submit the laboratory report which it referred to in its written statement claiming that the goods were defective, the arbitral tribunal assumed that that fact was not proven.

The Supreme Court, considering these circumstances, upheld the ruling of the Court of Appeal.

Case 1576: NYC I(1); V(1)(a)
People's Republic of China
Intermediate People's Court of Dongguan, Guangdong
(2011) D.Zh.F.M.S.R.Zi. No. 1
Proton Automobiles (China) v. Jinxing Heavy Industry Manufacturing Co.
1 August 2013
Original in Chinese

This case primarily deals with the validity of a contract provision stipulating arbitration as the dispute resolution method, and consequently whether two Singaporean arbitral awards could be recognized and enforced in China.

The applicant and the respondent entered into a Joint Venture Contract whose provision on dispute resolution specified that all disputes arising from the contract had to be submitted to the Singapore International Arbitration Centre ("SIAC") for arbitration in accordance with the UNCITRAL rules. Subsequently, when disputes arose, the applicant commenced arbitration with SIAC. However, the respondent objected to the jurisdiction of SIAC. It held that the parties had signed a memorandum, replacing the arbitration clause in the Joint Venture Contract with a provision requiring that all disputes arising from the contract had to be brought before the People's Court of the People's Republic of China, and settled in accordance with Chinese law. SIAC dismissed the respondent's objections with regard to its jurisdiction, and subsequently ruled in favour of the applicant. The

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respondent refused to perform the awards. Thus, the applicant filed an application to the Court to recognize and enforce them. Before the court, the respondent presented evidence of a memorandum, but the applicant held that that memorandum was a forgery.

The Court first established that China and Singapore both are Contracting States to the New York Convention and that in accordance with Article I(1) NYC the Convention was applicable to the dispute in question. The key issue before the Court was whether recognition and enforcement of the awards could be refused pursuant to Article V(1)(a) NYC, on the ground that the agreement to arbitrate was invalid under the law governing the contract. This question relied on whether the parties had validly amended the initial arbitration clause through a subsequent memorandum. The Court found that there was not sufficient evidence to conclude that the memorandum was false. Hence, the Court found that the parties had amended the contract provision on dispute settlement from arbitration to litigation through the memorandum, and that the arbitration provision in the Joint Venture Contract was invalid.

Recognition and enforcement of the awards was thus refused pursuant to Article V(1)(a) NYC as the parties had not validly agreed to arbitrate.

Case 1577: NYC V(1); V(1)(d)
People's Republic of China
Tianjin Maritime Court
(2010) J.H.F.Q.Zi. No. 6
Western Bulk Pte Ltd. v. Beijing CSGC Tiantie Iron & Steel Trade Co. Ltd.
12 July 2012
Original in Chinese

This case primarily deals with whether an arbitral award from the United Kingdom of Great Britain and Northern Ireland could be recognized and enforced in China pursuant to Article V(1)(d) NYC. The case also contains statements on the burden of proof under Article V(1) NYC.

The applicant and the respondent entered into a contract of affreightment that contained an arbitration clause, which provided that arbitration was to take place in London and in accordance with the rules of the London Maritime Arbitrators Association. Furthermore, the parties had agreed that United Kingdom law would govern the contract. The respondent failed to perform in accordance with the contract, and the applicant then gave notice of arbitration to the respondent and appointed an arbitrator. In accordance with the contract, the respondent appointed a second arbitrator, and notified the applicant of this. Later, the arbitrator appointed by the respondent resigned and, despite requests by the applicant, the respondent failed to appoint a new arbitrator to fill the vacant seat. The arbitrator appointed by the applicant proceeded to hear the case as a sole arbitrator and rendered an award in favour of the applicant. The respondent failed to perform the award and the applicant made an application to the Tianjin Maritime Court to recognize and enforce the award in China.

The key issue in this case was whether the vacant seat on the arbitral authority had been filled in accordance with the procedure prescribed by the contract and the governing law. The contract contained no agreement on the procedure for replacing

a resigned arbitrator. The Court found that the applicant had not followed the procedure prescribed by the governing law for filling a vacancy on the arbitral authority. Hence, the arbitrator appointed by the applicant could not lawfully function as a sole arbitrator. The Court concluded that the arbitral procedure and the composition of the arbitral authority was not in accordance with the procedure set out by the governing law, and consequently that the arbitral award could not be recognized and enforced in China pursuant to the New York Convention Article V(1)(d).

With regard to the burden of proof, the Court stated that under Article V(1) (NYC) the burden to prove the existence of any such circumstances as laid out in the said article is on the party seeking refusal of enforcement of an award. Furthermore, the Court stated that the provision must be understood and applied in light of China's provisions on the burden of proof. The Court found that the burden of proof had been satisfied by the respondent in this case.

Cases relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1578: MAL 34(2)(a)(ii); 34(2)(b)(ii)
Austria: Oberster Gerichtshof (Supreme Court)
5 Ob 272/07x
1 April 2008
Original in German

Abstract prepared by Markus Schifferl.

[**Keywords**: *ordre public; arbitral proceedings*]

The heirs of an Austrian wealthy industrialist with Jewish background who had to flee Austria around the time of world war II, requested from the Republic of Austria the restitution of five paintings by the Austrian artist Gustav Klimt that had formerly belonged to their forefather. This request was rejected by the Republic of Austria and subsequently became the issue of proceedings before United States courts. Ultimately, the parties agreed to submit the issue to an arbitral tribunal with seat in Vienna consisting of three arbitrators. The arbitral tribunal rendered a decision in favour of the heirs of the industrialist. By joinder agreement to the underlying arbitration agreement the same arbitral tribunal was then called upon to decide a further claim brought by the heirs of the industrialist and by another family as regards to the restitution of another painting by Gustav Klimt. Here the arbitral tribunal held that the rightful owner had not been dispossessed and, therefore, the requirements for the restitution were not met. Subsequently, both claimants challenged the arbitral award and claimed that the award was tainted by such grave procedural and legal errors, as well as false consideration of evidence, that the award was contrary to the fundamental values of the Austrian legal system (ordre public).

The Supreme Court noted that under Austrian law an arbitral award might be set aside if its outcome is contrary to the fundamental values of the Austrian legal system (ordre public) [corresponding to Article 34(2)(b)(ii) MAL]. There is, however, no basis in Austrian law for state courts to examine if and to what extent

an arbitral tribunal has correctly solved the questions of fact and law before it. Even the examination of that question (i.e. whether an arbitral award is contrary to the ordre public) must not lead to a full review of the award on questions of law and fact. In the opinion of the Supreme Court, the appeal filed by the plaintiffs sought to have the arbitral tribunal's interpretation of Austrian law reviewed; such a review would lead to the examination of a legal question which had no connection to the ordre public.

The Supreme Court further observed that by entering into an arbitration agreement a party may validly waive some of its rights as granted under Article 6(1) European Convention of Human Rights. Only if a party's right to be heard [corresponding to Article 34(2)(a)(ii) MAL] is totally denied will the setting aside of the underlying arbitral award be justified. In the case brought before it, the Supreme Court could not find a total denial of the right to be heard. In this regard, the Supreme Court noted that even a multitude of procedural errors would not have led to the setting aside of the arbitral award.