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# CASE LAW ON UNCITRAL TEXTS (CLOUT)

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.

# Cases relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The "New York" Convention

**Case 1222: NYC IV; V; V(1)(a); V(2)**
Federal Court of Australia
Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696
29 June 2012
Original in English
Published in www.austlii.edu.au/au/cases/cth/FCA/2012/696.html

Abstract prepared by Luke Nottage and Albert Monichino, National Correspondents

The applicant, a ship owner, chartered a vessel through an Australian broker to an Australian Company. Disputes arising out of this charter party were to be governed by English law and settled by arbitration with the seat in London. The applicant claimed demurrage resulting from the charterer's delayed transportation of coal from Australia to China. It agreed with the respondent on a sole arbitrator. The applicant sought and obtained from the arbitrator a first "Declaratory Arbitration Award" that held that the charterer's name was incorrectly recorded in the charter party documentation, and ordered rectification to state that the charterer was actually the respondent in the arbitration proceedings. The arbitrator later issued a Final Arbitration Award against the respondent, comprising damages, interests and costs. The applicant sought enforcement of both awards against the respondent in Australia under s. 8 of the *International Arbitration Act 1974* (Cth) (*IAA*), which gives effect to Art. V NYC.

The Court refused enforcement because s. 2C of the *IAA* provides that nothing in the *IAA* affects the operation of the *Carriage of Goods by Sea Act 1991* (Cth) (*COGSA*). The latter states that an "agreement (whether made in Australia or elsewhere) has no effect so far as it purports to" restrict the jurisdiction of Australian courts to resolve certain disputes (s. 11(2)), unless the parties agree on "arbitration … conducted in Australia" (s. 11(3)). Under *COGSA* s. 11(1), such disputes encompass those arising from "(a) a sea carriage document relating the carriage of goods from any place in Australia to any place outside Australia; or (b) a non-negotiable instrument of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods". The Court held that the charter party fell within category (a), based on the wording and legislative history of *COGSA* (including 1997 amendments), although not a "non-negotiable instrument" pursuant to category (b). In this regard, the Court disagreed with a contrary recent short "Ruling on Preliminary Question" by the Supreme Court of South Australia, who had decided that s. 11 of *COGSA* covered persons holding bills of lading or similar instruments, not charter parties (*Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50). The Court, in the case at hand, held that the parties' agreement on arbitration in London had "no effect", and accordingly refused enforcement of the awards.

The Court, however, did not specify what aspect of s. 8 of the *IAA* was relied on to reach this conclusion. It noted that the applicant (the award creditor) had argued that the respondent had not proven that the arbitration agreement was "not valid under the law expressed in the agreement to be applicable to it or, where no law is so

expressed to be applicable, under the law of the country where the award was made" (s. 8 (5) (b) of the *IAA* which is the counterpart to NYC Art. V (1) (a)). The applicant had further contended that this was "the matter which must be established for the purposes of engaging s. 8 (5) (b) of the Act, that provision being the only provision which would justify a refusal on the part of the Court to enforce the Awards in the present case". Yet, earlier in the judgment, the Court had remarked that: "The onus of establishing one or more of the grounds on which enforcement may be refused under s. 8(5) and s. 8(7) rests upon the party resisting enforcement". Section 8 (7) of the *IAA* is the counterpart to NYC Art. V (2), whereby a foreign award can be refused enforcement if (a) the dispute's subject matter is not capable of enforcement (i.e., not arbitrable) under the laws of the State where enforcement is sought (here: Australia), or (b) enforcement would be contrary to its public policy.

The Court justified approving of rectification of the arbitration agreement, by pointing out that s. 30 of the English Arbitration Act 1996, the *lex arbitri*, empowers the arbitrator to rule on his own substantive jurisdiction — including the validity of the arbitration agreement; s. 48 (5) (c) gives arbitrators the same powers as the English Commercial Court to order rectification of documents. Under s. 67, a party who has unsuccessfully challenged jurisdiction before the arbitrator may appeal to the Court but within 28 days of the arbitrator's decision. Because that had not occurred, the Court concluded that "the first Award cannot now be challenged under English law and is therefore determinative of the point at issue".

In addition, the Court presented another set of (more extensive) reasons for rejecting the respondent's argument against enforcement on the basis that the respondent was never a party to the original arbitration agreement. The Court noted that s. 9(1) of the *IAA* (substantially reproducing Art. IV NYC) required the applicant to produce the award and the arbitration agreement under which the award "purports" to have been made (or certified copies of either document). Further, under s. 9(5) such a document filed in accordance with s. 9(1) "is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates". By producing such documents, the Court found that the respondent had provided prima facie evidence of: "(a) the fact that each Award was made as it purports to have been made; (b) the subject matter of each Award; and (c) the fact that each Award purports to have been made pursuant to cl 32 of the Charter party … the only place suggested either by the Arbitrator or the applicant as the place where the relevant arbitration clause was to be found".

The Court noted that the respondent had not attempted to demonstrate by evidence that it was not truly the charterer, and held that mere asserting that it was not named as charterer on the face of the charter party did not overcome the evidentiary effect. Accordingly, the Court concluded that the applicant had established to a prima facie level that each award was a foreign award within s. 8(1) of the *IAA*. To resist enforcement, the respondent therefore needed to identify which ground applied under s. 8(5) or s. 8(7) — and then to "prove to the satisfaction of the Court" that such a ground was applicable. Nevertheless, the Court noted that although the applicant "has had some success in overcoming some of the arguments advanced on behalf of [the respondent], it did not overcome the argument based upon the engagement" of *COGSA* to the case at hand. For this reason the Court dismissed the applicant's request.

**Case 1223: NYC V**
Federal Court of Australia
Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) [2012] FCA 276
23 March 2012
Original in English
Published in www.austlii.edu.au/au/cases/cth/FCA/2012/276.html

Abstract prepared by Luke Nottage and Albert Monichino, National Correspondents

A Luxembourg company entered into a contract with an Indian one regarding coke supplied by an Egyptian company. The contract was governed by English law and provided for arbitration in London under the London Court of International Arbitration rules. The Indian company refused to pay for the coke and the Luxembourg company duly commenced an arbitration against it in accordance with the arbitration agreement. The arbitrators gave an award in favour of the applicant, which successfully sought enforcement in the Federal Court of Australia. Enforcement was sought in Australia since the award debtor appeared to have shares in an Australian company. At the same time as it sought enforcement of the foreign award, the applicant sought a freezing order in respect of the shares that it sought to attach by way of enforcement. Meanwhile, the Indian High Court had made an order purportedly setting aside the award and restrained the Luxembourg company from taking any step to enforce the award. This order was made via an ex parte injunction, and the Luxembourg company was only notified a month after the order being handed down.

The award debtor (the Indian company) raised various arguments in an attempt to resist enforcement. First, it argued that the court has no power to make an order giving effect to the award, and that this is distinct from "executing" the award as if it were a court order. The award debtor conceded that the court has power to execute the award, but argued it could not be enforced as the appointment of receivers to the shares does not fall under "enforcement" within Part II of the *International Arbitration Act 1974* (Cth) (*IAA*). Since the award creditor had not yet applied for enforcement under s. 8(3) of the *IAA*, the court can only execute but not enforce the award. The court held that the appointment of receivers to the shares cannot be regarded as a measure properly within the notion of "enforcement" under Part II of the *IAA* (which gives effect to the NYC). The Court noted that s. 53 of the *Federal Court of Australia Act 1976* (Cth) "does not confine enforcement to the enforcement of judgments to execution … [and] expressly contemplates other methods of enforcement".

Secondly, the award debtor argued that the award creditor had an evidentiary onus of establishing that the award debtor had assets in the jurisdiction which were capable of being the subject of an order for enforcement. The Court held that "nothing in the *IAA* …, as a matter of law, prevents entry of judgment or the making of an order in the terms of the relevant award if there is [then] evidence that proves … there may be or, even, definitely are, no assets within Australia against which execution may be levied".

Thirdly, the award debtor argued that seeking to enforce an award where the award debtor may not have assets in the jurisdiction is contrary to "public policy", pursuant to s. 8 of the *IAA* [giving effect to Art. V NYC]. The Court rejected this argument.

Fourthly, the award debtor relied on the fact that an Indian court had set aside the award. It contended that it was a breach of public policy under s. 8(7) of the *IAA* to allow the award creditor to enforce the award in the face of the Indian court order. The Australian Court held no public policy violation arising from the creditor seeking enforcement in Australia "simply because the debtor has pursued an appeal in India from an unfavourable decision in India (which had refused its application for a stay of the award from the arbitration in London) and has somehow convinced the Indian High Court to grant an ex parte interim injunction against the creditor, restraining the latter from 'putting the award into execution'".

The Court held that the Indian court order purporting to set aside the award made in an arbitration seated outside of India was ineffectual. The Court's view was that an award made in England, under the laws of England, could only be set aside by a court in that jurisdiction.

Repeating the views expressed in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415 at 439, and following case law from the United States (e.g. *MGM Productions Group Inc. v Aeroflot Russian Airlines* 2004 WL 234871) and Hong Kong (*Hebei Import and Export Corporation v Polytek Engineering Co Ltd* [1999] HKCFA 16 ), the Court reasoned:

> "… the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state".

**Case 1224: NYC [IV]; V(1)(a)**
Victorian Court of Appeal
IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248
22 August 2011
Original in English
Published in www.austlii.edu.au/au/cases/vic/VSCA/2011/248.html

Abstract prepared by Albert Monichino and Luke Nottage, National Correspondents

This case arose out of a mining operations contract between a Mongolian company and a company registered in the British Virgin Islands (i.e. BVI). The contract contained a clause referring future disputes to arbitration in Mongolia. A dispute arose concerning the provision of engineering services under the contract, so the Mongolian Company commenced an arbitration in Mongolia.

The arbitral tribunal rendered an award in favour of the applicant, requiring the respondent to pay over US$ 6 million. The tribunal also ordered that an Australian company pay these damages on behalf of the respondent. The Australian Company was not a signatory to the arbitration agreement: it was related to the BVI company, but had not participated in the arbitration. The award did not explain how the arbitral tribunal had jurisdiction to make any order against the Australian Company.

The applicant sought to enforce the award in Australia against both companies. The respondent in the arbitration proceedings did not appear in the enforcement proceedings, but the Australian Company did, objecting to the award's enforcement against it. The Court dismissed the award debtor's objections and ordered enforcement of the foreign award. The trial judge held that, upon the applicant producing a copy of the award and the arbitration agreement (as required by s. 9(1) of the *International Arbitration Act 1974* (Cth) (*IAA*)), the award debtor bore the onus of establishing that it was not a party to the arbitration agreement as a ground for resisting enforcement under s. 8 (5) (b) of the *IAA* (equivalent to Article V (1) (a) NYC). The Court held that the award debtor had not, on the evidence, discharged this onus. Accordingly, the Court enforced the Mongolian award. The Australian company appealed.

The Victorian Court of Appeal overturned this decision on two different approaches, on the basis that the award debtor was not a party to the arbitration agreement. First, one of the judges held that where enforcement of a foreign award was sought against a non-signatory to the arbitration agreement, the legal onus was on the award creditor to establish, at the threshold stage of the enforcement process, that the award debtor was a party to the arbitration agreement.

The other two judges of the panel followed the English cases and accepted that the award debtor had the legal onus of establishing at the second stage of the enforcement process that there was no valid arbitration agreement between it and the award creditor. Nonetheless, the two judges held that the award creditor at the first stage bore an 'evidential' onus of establishing that there was a prima facie arbitration agreement between the award debtor and the award creditor. In their view, where enforcement of a foreign award was sought against a non-signatory to the arbitration agreement, the mere production of the award and the arbitration agreement, pursuant to which the award was purportedly made, would not be enough to satisfy this evidential onus.

Irrespective of the onus question, the Court of Appeal held (reversing the trial judge) that the award debtor had, on the evidence, established a ground for refusal of the foreign award under s. 8 (5) (b) of the *IAA*, on the basis that the Australian company was not party to the arbitration agreement and that therefore the arbitral tribunal had no jurisdiction over it. The Court of Appeal considered that it was not bound by the arbitral tribunal's conclusions as to its jurisdiction.

**Case 1225: NYC VI**
Federal Court of Australia
ESCO Corporation v Bradken Resources Pty Ltd [2011] FCA 905
9 August 2011
Original in English
Published in www.austlii.edu.au/au/cases/cth/FCA/2011/905.html

Abstract prepared by Albert Monichino and Luke Nottage, National Correspondents

A US company concluded a manufacturing agreement with an Australian company, referring disputes to arbitration according to International Chamber of Commerce (ICC) rules. The Australian company initiated an ICC arbitration in Oregon, United States of America. The arbitrator dismissed its claims and ordered costs in favour of

the respondent, which sought to have the award enforced by a United States District Court in Oregon.

The applicant objected to paying a certain portion of the US$ 7.7 million in legal costs found by the arbitrator to have been incurred by the defendant — in particular, the costs pertaining to that part of the dispute concerning United States antitrust law. The applicant contended this portion might comprise up to $6 million and that in this respect the award showed a "manifest disregard for the law" and that to enforce this aspect would be contrary to public policy. The award was enforced by the United States District Court and the applicant was ordered to pay all of the costs awarded by the arbitrator, plus post-judgment interest at the United States Federal interest rate. The applicant immediately appealed the decision.

Meanwhile, the respondent sought to enforce the award in Australia. The applicant applied for an adjournment of the enforcement proceedings until the matter was finally resolved by the appeal court in Oregon. It relied on section 8(8) of the *International Arbitration Act 1974* (Cth), equivalent to Article VI NYC. This gives an Australian superior court a discretion to adjourn enforcement proceedings where an application to set aside the award has been made to the appropriate authority (here, the Oregon Court).

The Court accepted the Australian company's application and adjourned the enforcement proceeding, on condition that the company provide security to protect the defendant against any loss arising from enforcement being delayed. The security required was the full amount due under the award, excluding interest. The Court refused to accept the defendant's submissions for greater security to be provided.

In deciding to exercise the discretion to adjourn the enforcement proceedings, the Court emphasised that the applicant's challenge to the award in Oregon's courts appeared to be bona fide and that:

> [the defendant] did not seek to enforce the Award in Australia until after the US District Court entered judgment in its favour in May 2011. It came to Australia only after it failed in its bid to secure interest on the amount of the legal costs awarded to it at the higher rate provided under the State law of Oregon. It could have sought to enforce the Award in Australia in June 2010 but chose not to do so at that time.

The Court also noted that as a company with annual revenue of over $1 billion, it was unlikely that the applicant would try to hide its assets or be unable to pay damages at the end of the adjournment period, and that the applicant's offer to provide security would fully cover the defendant against any loss arising out of the adjournment.

However, the Court ordered that the applicant pay its own costs, despite the fact that it had essentially succeeded in its application. The Court's reason for this appeared to be that the adjournment involved "the grant of an indulgence by the Court".

**Case 1226: NYC V**
Federal Court of Australia
Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131
22 February 2011
Original in English
Published in www.austlii.edu.au/au/cases/cth/FCA/2011/131.html

Abstract prepared by Luke Nottage and Albert Monichino, national correspondents

A Ugandan corporation (the applicant) entered into a services contract with an Australian corporation (the defendant). The contract contained an arbitration clause, although it did not specify the seat, the arbitral law, or the procedural rules to be followed. The Ugandan corporation claimed that the other party, in breach of contract, failed to provide a guarantee or pay invoices. It thus commenced an arbitration in Uganda before a sole arbitrator. The Australian corporation did not participate, and an award was made in favour of the applicant which applied in the Federal Court of Australia to seek enforcement of the award under s. 8 of the *International Arbitration Act 1974* (Cth) (*IAA*), which gives effect to Art. V NYC. The respondent raised several arguments in resisting enforcement of the award, all of which were rejected by the Court.

First, the respondent submitted that the arbitration agreement was void for uncertainty because it did not specify the seat of the arbitration, the number of arbitrators, the arbitral law or the procedural rules to apply. The court rejected this argument noting that the services contract was made in Uganda and was expressly governed by Ugandan law and that a mechanism for resolving all of the omissions raised by the respondent was provided by the *Ugandan Arbitration and Conciliation Act 2000* (consistent with the MAL, and applicable because Uganda was the agreed seat).

Secondly, the respondent contended that the award was neither an "arbitral award" nor a "foreign award" within the meaning of the *IAA*. The Court ruled that the award met the definition of an arbitral award under both the Ugandan Act and the *IAA* and that, having been rendered in Uganda, it was clearly a foreign award.

Finally, the respondent submitted that the award should not be enforced because it contained errors of fact and law; in particular, that the arbitrator had miscalculated the quantum of damages. The Court decided that no such ground to resist enforcement existed under the *IAA*. The Court also rejected the respondent's submission that errors of fact and law could fall under the public policy ground in s. 8 (7) (b) of the *IAA* (equivalent to Article V (2) (b) NYC). According to the Court, erroneous legal reasoning or misapplication of law is not a violation of public policy; rather, Australia's public policy is to enforce arbitral awards "wherever possible". Importantly, the Court held that under the *IAA* (as amended in 2010) the grounds for resisting enforcement of a foreign award were set out exhaustively in s. 8(5) and (7) and that the court had no residual discretion to refuse enforcement.

# Cases relating to the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration

**Case 1227: NYC II; MAL 8**
Supreme Court of the Australian Capital Territory
Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB [2011] ACTSC 59
12 April 2011
Original in English
Published in www.austlii.edu.au/au/cases/act/ACTSC/2011/59.html

Abstract prepared by Albert Monichino and Luke Nottage, National Correspondents

This case arose out of a non-exclusive distributorship agreement between Swedish and Australian software companies to develop products for the Australian Department of Defence. The agreement contained an arbitration clause referring disputes to arbitration under the expedited arbitration rules of the Stockholm Chamber of Commerce (SCC). It provided that "arbitration shall take place in Stockholm, Sweden". Swedish law was nominated as the governing law of the agreement. The agreement also contained the following time-bar clause: "No action or claim of any type relating to this Agreement may be brought or made by [either party] more than six months after [the relevant party] first knew or should have known of the basis of the action or claim".

The Australian company initiated proceedings against the Swedish company in the Supreme Court of the Australian Capital Territory alleging, inter alia, unconscionable conduct contrary to ss 51AA and 51AC of the *Trade Practices Act 1974* (Cth) (renamed in 2010 the *Australian Consumer Law*). The defendant applied for the proceedings to be permanently stayed in favour of arbitration as contemplated by the parties' agreement. The Court heard the application in May 2008, but did not render judgment until April 2011.

The Court accepted that s. 7 of the *International Arbitration Act 1974* (Cth) (*IAA*) applied, after considering the four pre-conditions to its application. (Section 7 aims to restate Article II NYC.) However, the Court held that the stay should not be granted due to s. 7(5), which prevents a stay where the arbitration agreement is "null and void, inoperative or incapable of being performed". In particular, the Court relied on the time-bar clause in the agreement. The Court concluded that the Swedish defendant failed to bring proceedings within six months of becoming aware of the dispute under the agreement and that therefore the time-bar clause was engaged. Based on this, the Court held that the arbitration agreement was essentially "waived" and thus was "inoperative or incapable of being performed". In particular, the Court found that, on its proper interpretation, the time-bar clause precluded arbitration proceedings but did not bar the substantive claim (or at least the Court was not persuaded without full argument that the time-bar clause barred the substantive claim). Therefore, the arbitration agreement was rendered inoperative, but the plaintiff was able to continue with its proceeding in the Supreme Court.

The Court rejected the defendant's separate argument for a stay under Art. 8 MAL (given force of law by s. 16 of the IAA), concluding that the parties had opted out of the MAL. In doing so, the Court applied *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing GmbH* (2001) 1 QdR 461, holding that by agreeing to

arbitrate in accordance with the arbitration rules of the SCC, the parties had impliedly opted-out of the MAL under s. 21 of the *IAA* (before its amendment in 2010).

Finally, the Court considered whether the proceeding should be stayed under s. 53 of the *Commercial Arbitration Act 1986* (ACT) (*CAA*). It refused a stay on the basis that there was "sufficient reason" for the purposes of s. 53 why the matter should not be referred to arbitration. One of the matters relied upon in this regard was that unconscionability proceedings under the *Trade Practices Act 1974* (Cth) may not be susceptible to determination in Sweden under Swedish law.

**Case 1228: NYC II(3); MAL 1(3)(b)(i)**
Supreme Court of Queensland
Re ACN 103 753 484 Pty Ltd (in liq) [2011] QSC 64
4 April 2011
Original in English
Published in www.austlii.edu.au/au/cases/qld/QSC/2011/64.html

Abstract prepared by Luke Nottage, National Correspondent, and Diana Hu

The primary issue of the case was whether an arbitration agreement between the plaintiff (liquidators) and the defendants should be disclaimed for imposing a harsh and unnecessary burden on the plaintiff in the circumstances. The plaintiff had formerly commenced proceedings in court, but not in arbitration. In response, the defendant was seeking for the court proceedings to be stayed, and that the matter be referred to arbitration.

The plaintiff argued the arbitration agreement imposed an "undue and burdensome financial obligation", as Clause 12 required the claimant (as the party referring the dispute) to pay $20,000 to each respondent as that party's "anticipated costs", as well as all anticipated costs of the arbitrator. It also provided that the parties would submit disputes to arbitration with the seat in New Zealand (MAL Article 1(3)(b)(i)).

The Court held that the arbitration agreement should be disclaimed under the *Corporations Act 2001* (Cth) Division 7A s. 568(1A), where a liquidator may apply for court leave to disclaim a contract, releasing the company from any rights and liabilities not yet accrued. It therefore declined the defendants' request for a stay of Court proceedings pursuant to s. 7 of the *International Arbitration Act 1974* (Cth) (*IAA*), which gives effect to Article II(3) NYC, that a contract is "null and void [or] inoperative" under non-*IAA* laws. The plaintiff was therefore able to continue with its claim in court against the defendants.

Clause 1 of the agreement required the parties to submit to arbitration "all or any disputes which have arise or which may arise between them in respect of a defined legal relationship, whether contractual or not". In addition, Clause 12 required the party seeking arbitration (here, the plaintiff's liquidators) to pay AUD$ 20,000 to each of the defendants and full costs to the arbitrator, as well as giving power of appointing a sole arbitrator to a specific person related to the defendants. This mandatory referral to arbitration and associated costs was held to unnecessarily cause detriment to creditors, as the plaintiff company was in liquidation at the time of the Court proceedings.

The defendants argued that requiring the party commencing the arbitration to pay costs of the parties and the arbitrator is not an unusual requirement. They furthermore relied on *Tanning Research Laboratories v O'Brien* (1990) 169 CLR 332 to contend that an international arbitration agreement should be binding on a company's liquidator where the dispute involves a general claim.

The Court held, however, that in the present case:

> The arbitration agreement imposes harsh and unnecessary burdens upon the applicants to the detriment of creditors in the winding up of the company. Those burdens require the company to pay large sums to the defendants, as well as to pay all the arbitrator's costs. The defendants are related to Mr […] who has the sole power to appoint the arbitrator. Whilst it is contended arbitration will be cheaper than Court proceedings, that contention does not have regard to the fact that as there is no connection between the proposed place of arbitration and the proceeding, which relates solely to Queensland and [is] governed by Queensland law, costs are likely to be significant.

The Court also noted that the defendants had not sought to refer the matter to arbitration pursuant to the arbitration agreement, since this would trigger financial obligations on them to the plaintiff, namely, the payment of $20,000 pursuant to the arbitration agreement and payment of the arbitrator's costs. This fact was considered by the Court a relevant factor in its conclusion that leave ought to be given to the applicants to disclaim the arbitration agreement.

Finally, the Court stated that there was no suggestion that there was ever any element international trade or commerce in the activities undertaken by the parties to the agreement. Therefore, "to allow the applicants leave to disclaim will not contravene the objects of the Act or its purposes. It will also not jeopardise international trade and commerce".

In any event, seemingly pursuant to *IAA* s. 7(2) allowing a Court to stay its proceedings "upon such conditions (if any) as it thinks fit", the Court remarked that it could have only considered granting a stay if the "defendants agreed to refer the proceeding to arbitration pursuant to the agreement, necessitating that they pay the required sum of $20,000 to the plaintiff pursuant to (…) the arbitration agreement and the Arbitrator's costs …".

## Cases related to the UNCITRAL Model Law on International Commercial Arbitration

**Case 1229: MAL 1(1); 2(d); 2(e); 8(1); 19**
Queensland Court of Appeal
Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS [2010] QCA 219
20 August 2010
Original in English
Published in www.austlii.edu.au/au/cases/qld/QCA/2010/219.html

Abstract prepared by Albert Monichino and Luke Nottage, National Correspondents

The case arose out of a contract with a dispute resolution clause providing for arbitration under the UNCITRAL Arbitration Rules (UNCITRAL Rules) with the seat in Brisbane. Although the judgment does not mention this specifically, it is quite apparent that at least one of the parties had its place of business outside of Australia. Accordingly, the arbitration was "international" under Art. 1(1) MAL, given force of law by s. 16 of the *International Arbitration Act 1974* (Cth) (*IAA*), so the IAA was engaged. The respondent initiated arbitration proceedings, but the parties were unable to agree on whether the MAL was the applicable arbitral law. By agreement, the question of the applicable supervisory law of the arbitration was referred to the Queensland Court of Appeal for determination by way of a case stated, pursuant to r 483 of the *Uniform Civil Procedure Rules 1999* (Qld).

The appellant argued that by selecting the UNCITRAL Rules, the parties had opted-out of the MAL under s. 21 of the *IAA* (prior to its amendment in 2010). It noted that the UNCITRAL Rules provided a comprehensive arbitral framework, from composition of the tribunal through to the award. It invited the Court to follow its earlier decision in *Eisenwerk*.[1] In that case, the Court had interpreted s. 21 of the IAA, allowing parties to opt-out of the MAL (before amendment of s. 21 in 2010), as applying where parties choose (putatively) inconsistent arbitration rules (in that case parties had chosen the ICC Rules). The appellant also stressed the apparent differences between the UNCITRAL Rules and the MAL (although the judgment does not specifically mention any differences).

On the other hand, the respondent argued that arbitration rules are conceptually distinct from an arbitration law such as the MAL. It also argued that the UNCITRAL Rules were not inconsistent with the MAL, noting that the UNCITRAL Rules were silent on important issues which are only dealt with by the MAL, such as the role of the Courts.

In answer to the question stated whether, by selecting the UNCITRAL Rules, the parties had opted-out of the MAL, the Court's answer was "no": the parties' choice of the UNCITRAL Rules did not mean they had opted-out of the MAL. The Court emphasized that there is a "wealth of commentary" available on how the MAL operates alongside the UNCITRAL Rules; and the terms of the UNCITRAL Rules and the Model Law also demonstrate that this is so. However, there were significant differences between the ICC Rules (before the Court in *Eisenwerk*) and the UNCITRAL Rules. Accordingly, the Court held that the decision in *Eisenwerk* was "plainly distinguishable". The Court also expressly declined to consider whether *Eisenwerk* was correctly decided. It treated *Eisenwerk* as merely a particular factual ascertainment of the parties' objective intentions in that case. The Court stated that the *Eisenwerk* principle is "in truth, no principle at all", but rather "a conclusion as to the contractual intention of particular parties in particular circumstances".

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[1] *Australian Granites Ltd v Eisenwerk Hensel bayeruth Dipl-Ing GmbH* (2001) 1 QdR 461.