



**United Nations Commission
on International Trade Law**
**CASE LAW ON UNCITRAL TEXTS
(CLOUT)**
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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 web-site 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 UNCITRAL Model Arbitration Law (MAL)

Case 1326: MAL 5

Nigeria: Court of Appeal, Lagos Judicial Division

No: CA/L/758/12

Statoil (Nigeria) Limited, Texaco Nigeria Outer Shelf Limited v Nigerian National Petroleum Corporation & Others

12 July 2013

Original in English

Unpublished

Abstract prepared by Chukwuka Ikwuazom, Hamid Abdulkareem, and Tosin Iyayi

[**Keywords:** *judicial intervention; jurisdiction*]

The parties had entered into a contract which provided for disputes to be resolved through arbitration. Two of the parties had issued an arbitration notice. The other party sought an injunction to prevent the arbitration from continuing on the basis that the subject matter involved taxation over which only the Tax Appeal Tribunal had jurisdiction. The injunction was granted.

On appeal the Court interpreted Section 34 of the Nigerian Arbitration and Conciliation Act (Article 5, UNCITRAL Model Law) which provides that “a Court shall not intervene in any matter governed by this Act except where so provided in this Act” as meaning that there should be no interference by a domestic court in an arbitration except in the specific instances provided for in the Act. The court rejected the argument that the Nigerian Constitution and statutes vest the courts with inherent powers that would enable a court to interfere in arbitration even outside the specific instances permitted in the Act. In addition, the Court rejected the argument that the Constitution gives superior courts supervisory powers over inferior courts and that an arbitral tribunal is equivalent to an inferior court.

The court made it clear that the purpose of the Arbitration and Conciliation Act was to enable the settlement of commercial disputes through arbitration. Domestic judicial interference would defeat this purpose. It therefore decided that the Federal High Court had improperly exercised its powers by granting the ex parte injunction and the interim injunction was discharged.

Cases Relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards — The “New York” Convention (NYC)

Case 1327: NYC II; II(3)

Israel: Supreme Court, Application for Leave of Appeal no. 8613/10

Caspi Aviation LTD v JSC Aeroavit Airlines

11 July 2012

Original in Hebrew: JSC AEROAVIT AIRLINES ארע"א - ספי תעופה בע"מ נ' - רע"א 8613/10

8613/10

Published in Hebrew

Abstract prepared by Arie Reich, National Correspondent

The case dealt with an agreement signed between the applicant, an Israeli travel agency and the respondent, a Ukrainian company, according to which the applicant acted as the general sales agent for the respondent in Israel.

The agreement included a provision that stated that any dispute between the parties would be subject to English law and that in any legal proceeding relating to the agreement the parties would be entitled to approach the Courts of England. Furthermore, it was agreed that any dispute arising from the agreement would be referred to a single arbitrator to be appointed by the Chamber of Commerce and Industry in London, and that this arbitrator would rule in accordance with the ICC rules.

The applicant had originally petitioned the Tel Aviv District Court for a declaratory judgment to the effect that the respondent had breached the agreement and also requested an interim injunction against further breaches by the respondent and by a third party. The District Court rejected the petition for the interim injunction, after which the applicant withdrew its petition for a declaratory judgment.

Following the applicant's offset of sums owed to the respondent, the latter sued the applicant in the Tel-Aviv District Court. The applicant then filed a motion to stay these proceedings based on Article 5 of Israel's Arbitration Law of 1968 [a provision which refers to domestic arbitration agreements]. The motion was denied and hence these proceedings where the applicant applies for leave to appeal the District Court's decision. The leave was given and the Supreme Court heard the appeal. Only on appeal did the applicant raise the issue of the New York Convention.

On appeal, the applicant argued that it had initiated court proceedings instead of arbitration proceedings because the urgency of the matter left it with no other recourse and because it sought to apply the injunction against the third party, which was not a party to the arbitration agreement. The applicant further argued that a stay of proceedings should have been ordered by virtue of Article 6 of the Arbitration Law [Stay of proceedings under an international convention] in conjunction with Article II NYC. The respondent countered that the Convention did not apply to the dispute because the arbitration agreement had been implicitly cancelled by the parties through their conduct. It also argued that even if the Convention did apply, the arbitration agreement was inoperative, null or incapable of being performed and thus fell under the exception of Article II(3) NYC.

The appeal was rejected by the Supreme Court. While the Court recognized that an application for stay based on the Convention (invoking Article 6 of the Arbitration Law) is subject to more restrictive exceptions than one that is based on Article 5, it held that it was too late to raise this claim at this stage. The Court noted that the respondent disputed that the Convention applied to this dispute, and also claimed that even if it did apply, the exceptions found in Article II(3) of the Convention applied and would exempt the Court from having to refer the parties to arbitration. The Court reasoned that since the claim that the Convention applied had only been raised in the appeal, there was no evidence in the file that could provide the factual basis required to make a finding in relation to whether it applied or not, and whether the Article II(3) exceptions applied. Hence, the Supreme Court was unable to accept such a claim on appeal, holding that the applicant had had the opportunity to raise the claim in the District Court and cannot be permitted to do so at this late stage.

The Supreme Court also rejected the applicant's argument under Article 5 of the Arbitration Law, stating that when parties to a contract do not insist on implementing their right to refer the dispute to arbitration (and in fact refer it to the

court), it is only reasonable to infer that they view the arbitration clause as no longer being in force.

The Supreme Court stated that the applicant's general expression of its willingness to satisfy the arbitration clause was contradicted by its actions, which showed the opposite. It further ruled that the burden to prove willingness to refer the dispute to arbitration rests with the party that requested the stay of proceedings. The Supreme Court agreed with the District Court's conclusion that the applicant had not met the requisite burden of proof.

Case 1328: NYC II(3)

Israel: Supreme Court No. 5394/09 and 1926/10

Sochnut Mechoniot Leyam Hatichon Ltd. v. Kia Motors Corporations.

27 June 2012

Original in Hebrew:

רע"א 5394/09; רע"א - KIA Motors Corporations- סוכנות מכוניות לים התיכון בע"מ 1926/10

Published in Hebrew:

<http://elyon1.court.gov.il/files/09/940/053/p05/09053940.p05.htm>

Abstract Prepared by Itai Apter, National Correspondent

The claimant, an Israeli company, had filed two separate lawsuits in the Tel Aviv District Court, the first against an auto maker based in Korea (the "first defendant") and the second against an individual and certain corporations under his control (collectively, the "second defendant"). In the first lawsuit, the claimant, which had been the exclusive distributor of the first defendant's cars between 2004 and 2007 in Israel, claimed that its distribution agreement with the first defendant (the "Distribution Agreement") had been unlawfully terminated. The claimant asserted that there was an implicit agreement between the parties to extend the term of the claimant's exclusive distributorship, in consideration for which the claimant had undertaken to build a logistical centre in Israel to handle the distribution of the first defendant's cars (the "Implicit Agreement"). The claimant claimed that it had agreed to build the logistical centre — at considerable expense — in reliance upon the first defendant's alleged agreement to extend the duration of the distributorship. In the second lawsuit, the claimant alleged that the second defendant, which was the first defendant's new distributor in Israel, had conspired with the first defendant to cause the termination of the Distribution Agreement.

The Distribution Agreement included an agreement to refer disputes to arbitration in South Korea. The first defendant therefore sought a stay of proceedings on the grounds that the dispute should be referred to arbitration. The second defendant sought a stay of proceedings, arguing that the matter should only be decided after resolution of the claim against the first defendant through arbitration.

With respect to the action against the first defendant, the District Court ordered a stay of proceedings, on the basis of the arbitration clause in the Distribution Agreement. It further held that questions regarding the Implicit Agreement should be decided by arbitration as well, since they involved the same facts. With respect to the second defendant, the District Court rejected the request to stay the proceedings in Israeli courts, holding that even if arbitration proceedings against the first defendant were to be filed, they would have no bearing on the action against the

second defendant. Each of these rulings was appealed to the Supreme Court. The question before the Supreme Court was whether to maintain the proceedings in the Israeli court system or to stay the proceedings in order to enable arbitration to take place in South Korea.

The Supreme Court first sought to determine the applicable legal framework. It referred to article 6 of Israel's Arbitration Law, 1968. This law, provides that a court may order a stay of proceedings where there exists an arbitration agreement between the parties, and that the court's authority in that regard must be exercised in accordance with and subject to any international convention to which Israel is party, if that convention applies to the dispute and includes provisions regarding stays of proceedings. The Court interpreted this article to refer specifically to the New York Convention, to which Israel is a party. The Court then cited Article II(3) of the Convention, pursuant to which, in the presence of an arbitration agreement, a court that has been seized of a dispute must refer the parties to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The Supreme Court, citing a previous ruling, affirmed that a claim could be referred to a court instead of to arbitration only in the circumstances set forth in Article II(3) or otherwise in highly exceptional circumstances. The Court added that, in matters of international arbitration, precedence should be given to considerations of certainty in the interpretation of an international convention and to the parties' desire, in international commercial agreements, to avoid the risk of bias by national courts, over efficiency considerations. The Court stated that the grounds invoked by the claimant to maintain the proceedings in the court system were not among the exceptions listed in Article II(3) NYC. The Supreme Court upheld the District Court's decision to stay the proceedings with respect to the Distribution Agreement.

Turning to the alleged Implicit Agreement, the Supreme Court held that, even if such an agreement were proven to exist, it was extremely limited in scope, such that its terms would have to be supplemented by the terms of the original Distribution Agreement. The Court determined that the arbitration clause in the Distribution Arbitration was clearly a key clause for the first defendant and that there were no grounds to believe that the first defendant would have consented to a different dispute resolution mechanism in the Implicit Agreement. Accordingly, if there indeed was an Implicit Agreement, it would certainly have the same dispute resolution provision as in the Distribution Agreement, i.e. arbitration in South Korea. The Supreme Court decided to stay the proceedings in order to allow for the arbitration process to take place with respect to the Implicit Agreement. The Court emphasized that for the purposes the Arbitration Law, the acts of the parties were sufficient to establish that the writing requirement for the existence of an arbitration clause (as required by Article 1 to the Law) was satisfied even in the absence of a formally written agreement.

With respect to the second defendant, the Supreme Court concluded that the claims were extra-contractual in nature and that there was no arbitration agreement between the claimant and the second defendant. In such case, there may be reasons to stay the proceedings, based on considerations of efficiency and appropriate use of judiciary resources; however, this determination falls squarely within the District Court's appreciation. The Supreme Court did not see fit to question the District

Court's conclusions in that regard, and therefore upheld the decision to maintain the proceedings against the second defendant before an Israeli court.

Case 1329: NYC III; V

Israel: Supreme Court No. 1650/10

Gad Chemicals Ltd. v. BIP Chemicals Ltd. et. al.

27 December 2012

Original in Hebrew: ע"א 1650/10 גד כימיקלים בע"מ נ. BIP Chemicals

Published in Hebrew:

<http://elyon2.court.gov.il/files/10/500/016/V10/10016500.V10.pdf>

Abstract Prepared by Itai Apter, National Correspondent

In the 1970's, the claimant and the defendant, two Israeli companies, together with other parties, established a joint venture in Iran in the field of industrial chemicals, which subsequently failed. One of the individuals involved in the venture (the "third party") filed two claims with the International Chamber of Commerce (ICC), one against the claimant in which it demanded reimbursement of capital that it had provided for the venture, and another against the claimant and the defendant in which it demanded payment of the interest owed on the capital. In both cases, the arbitral tribunal rendered an award in favour of the third party (collectively, the "Foreign Arbitral Awards").

The claimant paid to the third party the sums awarded and sought reimbursement from the defendant in accordance with its pro rata holdings in the joint venture. An Israeli arbitrator ruled in favour of the claimant. The defendant moved to annul this award before the Haifa District Court (the court of first instance) on the grounds that, since the Foreign Arbitral Awards had not been formally recognized by an Israeli court, the Israeli arbitrator had erred in admitting them as evidence.

The District Court held that the Israeli arbitrator erred in admitting the Foreign Arbitral Awards as evidence because, under Israeli law, only judicial courts — and not arbitral tribunals — have the authority to recognize foreign arbitral awards. On this basis, the District Court annulled the domestic arbitral award and proceeded to rule on the merits. Regarding the question of whether the Foreign Arbitral Awards could be introduced as evidence in court, it interpreted Israel's Foreign Judgment Enforcement Law of 1958 as authorizing courts to recognize arbitral awards in the course of proceedings. The Court also relied upon Article III NYC, which it interpreted as allowing recognition of foreign arbitral awards as evidence. Accordingly, the District Court admitted the Foreign Arbitral Awards as evidence and found in favour of the claimant. The defendant appealed this ruling to the Israel Supreme Court.

The Supreme Court held that the Foreign Judgment Enforcement Law is not relevant to the recognition and enforcement of foreign arbitral awards. It also questioned whether the Convention was applicable. Given that the Foreign Arbitral Awards granted an enforceable right to the third party and not the claimant, the claimant was not seeking to "enforce" them per se, but only to use them as evidence. The question, then, was not whether the Foreign Arbitral Awards could be enforced under the Convention, but whether they could be used as evidence in court proceedings in Israel absent formal recognition.

In answering this question, the Supreme Court distinguished between foreign arbitral awards and foreign court decisions. It explained that in terms of recognition and enforcement, foreign court decisions present particular challenges as compared to domestic court decisions; by contrast, foreign arbitral awards are not fundamentally different from domestic arbitral awards in that regard. The similarity between domestic and foreign arbitral awards in terms of recognition and enforcement is consistent with the underlying thrust of the Convention, that is, to place foreign arbitral awards on par with domestic arbitration awards. Therefore, the Supreme Court turned to Israel's Arbitration Law, 1968, which provides that unless a contrary intention appears from the arbitration agreement, the arbitration award binds the parties and their successors as *res judicata*. Applying this provision to foreign arbitral awards, it ruled that such awards could be used as evidence. However, the court cautioned against submissions of foreign arbitral awards as evidence in order to circumvent the recognition process, when the circumstances warrant that award should be refused recognition in accordance with Article V of the Convention.

The Supreme Court also rejected the defendant's claims based on Article V NYC, stating that the Foreign Arbitral Awards had been rendered by an internationally recognized arbitration body and that there was no evidence of procedural irregularities in the arbitration proceedings.

Case 1330: NYC V

Ukraine: Supreme Court, case no. 6-11986cb09,

Stoninton Ltd v. OJSC Primorecs

21 October 2009

Abstract prepared by Yaroslav Petrov

In May 2008 the claimant requested the Ukrainian courts to enforce an arbitral award rendered by the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, in favour of the claimant stating the defendant's failure to meet contractual obligations.

The lower court as well as the appeal court of Crimea refused the enforcement of the award holding that the this latter was beyond the scope of the arbitration agreement.

The decision was appealed before the Supreme Court of Ukraine. The Supreme Court disagreed with the lower courts' rulings finding that the defendant complaints challenged the award on the merits and therefore should have been dismissed. The Supreme Court confirmed that courts should not review arbitral awards on the merits and should only consider the procedural grounds embedded in Article V NYC. The case was remitted to the appropriate lower court for reconsideration.