Michigan State University Summer Course

International Business Litigation and Arbitration

Exam questions in 2012

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Note: The students should be given access to the text of the New York Convention.

X, a citizen of the country A, was working in A for Y, a company incorporated in the country B. Their employment contract contained a clause stating that it shall be governed by the law of B. It also contained a clause (hereafter “the arbitration agreement”) stating that all disputes arising in connection with the contract shall be resolved by arbitration in B. The arbitration agreement is valid under the law of B. Both A and B are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”). In these circumstances, answer the following questions, each of which is independent of one another.

(1) X was dismissed from the employment. He brought proceedings against Y before a court in A, applying for an interim measure ordering Y to provisionally retain X as its employee pending a final determination by arbitration. The law of A provides, “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure. The court shall exercise proper discretion to decide whether to grant the request.” Discuss whether the court should grant X’s application.

(2) X was dismissed from the employment. He brought proceedings against Y before a court in A, seeking a final judgment that the dismissal was null and void. Y filed a motion for the dismissal of the action, relying on the arbitration agreement. The law of B provides, “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall dismiss its proceedings unless it finds that the agreement is null and void.” The law of A provides, “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall dismiss its proceedings unless it finds that the agreement is *manifestly* null and void” (emphasis added). What would be the advantages and drawbacks of the law of A as compared with the law of B?

(3) X was dismissed from the employment. He filed an arbitration against Y pursuant to the arbitration agreement, claiming damages for wrongful dismissal. When the tribunal rendered an award allowing X’s claim, Y filed a motion with a court of B to set it aside. The court vacated the award on the ground that it was based on an erroneous interpretation of the law of B. Does X have any chance of being able to enforce the award in A?

(4) Y commenced an arbitration against X to claim damages, alleging that X had breached the employment contract by stealing Y’s trade secret. Y’s claim is arbitrable under the law of A whereas it is not arbitrable under the law of B. X argued before the tribunal that Y’s claim was not arbitrable and boycotted all the subsequent proceedings. There is no agreement between X and Y as to the procedure that the tribunal should follow in the event of either party’s boycott of the proceedings. Both the law of A and the law of B provide, “If, without showing sufficient cause, any party fails to appear at a hearing, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.” The tribunal delivered an award allowing Y’s claim. Y now asks a court in A to enforce the award. Before the court, X submits that the award is not enforceable because Y’s claim is not arbitrable and because the procedure followed by the tribunal was unlawful. Will X’s submissions be sustained?

(5) Y commenced an arbitration against X to claim damages, alleging that X had committed a tort by stealing Y’s trade secret. Y’s claim is covered by the arbitration agreement as interpreted by the law of A whereas it is not covered by the arbitration agreement as interpreted by the law of B. Dismissing X’s objection to its competence, the arbitral tribunal delivered an award allowing Y’s claim. Y now asks a court in A to enforce the award. Before the court, X submits that the award is not enforceable because it dealt with a dispute not falling within the arbitration agreement. Will X’s submission be sustained?