New York Convention of 1958: Spanish Judicial Interpretation of Article IV.1(b)

1. Introduction[i]

For more than a decade Spain has been recognized as a "pro-arbitration" country. Its law on arbitration is amongst the world's most progressive, based on the UNCITRAL Model law on International Commercial Arbitration. Further, its judicial implementation of international treaties regarding the recognition of foreign awards has generally been favorable to recognition. Nonetheless, in a country which is highly reliant on legal formalities, with particular emphasis on the notarial system, certain articles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter, "New York Convention") have at times raised issues, amongst them the interpretation of Article IV.1(b) regarding documentation to be submitted to prove the existence of the arbitral agreement.

Spanish jurisprudence on this question has at times been inconsistent, due in part to the lack of "stare decisis" of Spain's civil law system, but also due to the fact that seemingly haphazard legislation has caused great variation in the courts which are competent to determine recognition of foreign awards. Competent courts have run the gamut from the Supreme Court to the those of first instance at various points in time.[ii]

This article address a single defense, certification (or "authentication" as described below) of the arbitral agreement, raised by the Spanish company, INCEI S.A. ("INCEISA"), which sought to block recognition in Spain of a foreign arbitral award, rendered in Hong Kong, in favor of Yingli Green Energy Holding, Ltd. ("Yingli").[iii] This defense was based on paragraph (b) of Article IV.1 of the New York Convention which states, in its English text:

> "*1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time for the application supply:*
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> *(a) The duly authenticated original award or a duly certified copy thereof;*
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> *(b) The original agreement referred to in article II or a duly certified copy thereof.*" [Emphasis added]

The Spanish text instead of speaking of a "duly certified copy thereof" speaks of "authenticity" ("…una copia que reúna las condiciones requeridas para su autenticidad.") a term which in Spanish can raise even more questions than its English counterpart, as it can have two meanings in Spain. The first, which is more akin to its English counterpart, "certification", means notarization establishing that the copy is equivalent to the original

and, in the international context, accompanied with the Hague Convention Apostille[iv]. However, another interpretation, which derives directly from article 326 of the Spanish Civil Procedure law, means establishing that a copy is an accurate reproduction of the original by means of sufficient corroboratory evidence.[v] In the case commented on, INCEISA argued that authentication (and from heron I will use the English equivalent of the Spanish "autenticidad") should be interpreted in its strictest sense, that Yingli had to submit a copy of the original arbitration agreement verified before a notary with the Apostille attached, while Yingli argued that it was sufficient within the meaning of article 326 of the Spanish Civil Procedure Code to submit sufficient corroborating evidence of the agreement's existence

2. The proceedings

In anticipation of a favorable ICC arbitral award to be rendered in Hong Kong, Yingli obtained the interim seizure of INCEISA assets in 2011 and, after winning its arbitration by default, presented a petition for recognition in 2012 pursuant to the New York Convention. The petition was first presented to the "Tribunal Superior de Justicia" as per the current Spanish law on arbitration[vi], but this court, in a questionable decision, declined, without prejudice, in view of the Spanish-Chinese judicial assistance treaty of 1992. As a result, Yingli was forced to bring its case before a court of first instance in the relatively remote Spanish region of Navarra and, while the court of first instance did recognize the foreign award, it did so without following the correct procedure under Spanish law. INCEISA brought an appeal before the "Audiencia Provincial de Navarra" ("Court" or "Court of Appeals").

While INCEISA raised numerous arguments against recognition, the one which gave the court most pause was that Yingli had failed to present an original of the arbitration agreement or a duly authenticated copy pursuant to the terms of article IV.1(b) of the New York Convention. The document submitted in evidence by Yingli was, in fact, a photocopy of the faxed and signed commercial agreement in which the arbitration clause had been included. Again, INCEISA insisted that "authentication" under the New York Convention had to be interpreted in its strictest sense, that the copy submitted to the court had to be verified as identical to the original before a public official, such as a notary and accompanied with a Hague Convention "Apostille".

In Yingli's initial petition, in addition to the copy of the mentioned fax, YINGLI submitted i) a video recording from the protective measures proceedings in which opposing counsel indicated that its client had signed the commercial agreement containing the arbitration clause, ii) documents clearly indicating that INCEISA had partially fulfilled the terms of the commercial agreement in which the arbitration clause was included and iii) the arbitration award in which the arbitrator, as finder of fact, had concluded that the agreement to arbitrate existed and was valid. Notwithstanding the evidence submitted by Yingli, in the face of conflicting jurisprudence and the seemingly straightforward language of article IV.1(b), the court hesitated and even went so far as

to grant Yingli, *ex oficio*, the extraordinary opportunity to rectify and submit an original or authenticated copy of the agreement. In somewhat confusing language, the court failed to specify what the nature of the authentication might be.

Given the concern raised by the court's request and the fact that Yingli had neither an original or a notarized and apostilled copy of the arbitration agreement, it submitted further arguments and corroboratory evidence, that:

> i) the photocopy and all previously submitted corroboratory evidence did in fact authenticate the agreement within the broader meaning of this term under article 326 of the Spanish Code Civil Procedure.
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> ii) the insistence on interpreting authentication in its strictest sense would frustrate the real intention of the New York Convention which is to require the parties to simply demonstrate the existence of the agreement. Further, the New York Convention needs to be interpreted in the context of modern international commerce with its reliance on the use of PDF files, faxes and e-mail where mention of "originals" or "certified copies" is often senseless.
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> iii) foreign case law, which constitutes precedent for the Spanish courts given that the New York Convention is an international treaty to which Spain is a party, supports a liberal interpretation of authentication and international organizations such as UNCITRAL further support this approach.
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> iv) even if the court did interpret article IV.1(b) of the New York Convention in its strictest sense, article VII of the Convention ("more-favorable-right" provision) required the court to resort to the domestic Spanish Law on Arbitration which is more liberal and only requires a demonstration of a written agreement, but did not require an original or certified copy.[vii]

3. The Sentence

The court addressed all of the defenses raided by INCEISA, some of them quite summarily given their lack of merit, others in greater depth. What is interesting to note is that the court dedicated nearly one third of its decision to the issue raised under article IV.1(b) of the New York Convention and the formal requirements needed to demonstrate the existence of the arbitral agreement. Clearly this fact, as well as its rather exceptional request to the petitioner at the last minute to submit an original or certified copy, suggested that the court had to struggle with the issue in the face of conflicting jurisprudence and seemingly straightforward language of the Convention.

The court carefully examined the judicial precedents put forth by INCEISA in support of strict authentication, in particular one case in which the Supreme Court indicated that "…the documents submitted are simple copies that do not comply with the requirement

of article IV.1(b)."[viii] and managed to distinguish it from the case at hand. While the court noted that there were "…at least two precedents in which the Supreme Court has recognized a foreign award notwithstanding the failure to submit … a duly authenticated copy", in both these cases the defendant had participated in the arbitrations, and the Spanish Supreme Court had relied on a theory of estoppel to recognize the awards. In the current case, INCEISA had not participated in the arbitration and, although the court did cite the fact that opposing counsel had recognized its client's signing of the agreement, the defendant could in no way be viewed as submitting to the arbitrator's jurisdiction.

The court then moved on to distinguish the case put forth by INCEISA on a facts-and-circumstances basis, concluding that although the Supreme Court had rejected recognition where original or strictly authenticated copies were not presented, it did so because the petitioner had also failed to provide any other supporting evidence, and this was not the situation in the present case. In the present case, there was ample evidence demonstrating that the commercial agreement with its arbitration agreement had been entered into, evidence which clearly would have been sufficient to "authenticate" the copy of the arbitral agreement as this term is understood per article 326 of the Spanish Code of Civil Procedure.

Finally, the Court was led to adopt a broader substance-over-form analysis used in a number of earlier Supreme Court decisions. The Court cited a number of cases indicated by Yingli in its pleadings to demonstrate this approach and the critical importance of determining the "effective will" of the parties as opposed to relying on formal requirements. In particular, below is a translation of the relevant section of Supreme Court case ATS July 31, 2000 (RJ 2000\6875) cited by the Court:

> *"Fourth. It is opportune, regarding this point, to remember that this chamber, at the moment of examining compliance with the recognition requirement established in the aforementioned art. IV.1º b) of this treaty, and with the objective of verifying the effective submission, with the petition, of the original or certified copy of the [arbitral] agreement as provided for in art. II, has considered the objective and logical meaning behind this article, which seeks to provide to the court the required written evidence… of the effective will of the parties [to arbitrate]…<u>which effective will, if not evident in a document signed by the parties, can be found amongst all of the communications and acts carried out between them in the business relationship</u>. "* [Emphasis added]

While not specifically resorting to the foreign jurisprudence cited by the petitioner (although it did refer to UNCITRAL recommendations), the court adopted the broadest criterion established by the Spanish Supreme Court to very much bring its analysis into alignment with the more pro-recognition approach of the courts of other signatories of the New York Convention, essentially recognizing that a literal interpretation of article IV.1(b) is anomalous in today's world of international commerce.

Having adopted the "effective will" analysis, the court went on to examine all the evidence submitted. This evidence made patently clear that, although Yingli was not able to provide an original or certified copy of the arbitration agreement, the parties had intended to subject their disputes to arbitration. In particular, the court based its decision on the copies of the agreement submitted, the video tapes from opposing counsel from the protective measures proceedings, and its deference to the determination of the arbitrator as finder of fact.

4. Conclusion

In a well argued decision, the Court of Appeals has further reinforced the notion that the Spanish judiciary is in fact pro-recognition under international treaties. The court was careful not to fall into the trap of excessive formality or literal interpretations of a treaty which is now almost 60 years old. While much of the New York Convention has no difficulty in adapting to the times, other parts, such as article IV.1(b) rely on progressive and contextual judicial interpretation to keep the treaty effective. While there continue to be pockets of overly literal judicial interpretation of article IV.1(b) in Spain, this decision has clearly bolstered the preferred path.

Madrid, February 10, 2015
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[i] The author of this article, Steven Plehn, represented Yingli during all of the proceedings, including precautionary measures, petition at first instance and defense on appeal.

[ii] Apart from differing courts, such recognition proceedings were at times subject to appeal and at other times not. International treaties further complicate this situation as occurred in this commented case, requiring arbitral awards from different countries to take different routes through the judicial system.

[iii] Auto de la Audiencia Provincial de Navarra (Sección Tercera) nº 198/2014 de 18 noviembre 2014.

[iv] Per the author's conversations with officials at the Spanish Ministry of Foreign Affairs

[v] Articulo 326. Fuerza probatoria de los documentos privados.

> *1. Los documentos privados harán prueba plena en el proceso, en los términos del artículo 319, cuando su autenticidad no sea impugnada por la parte a quien perjudiquen.*
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> *2. Cuando se impugnare la autenticidad de un documento privado, el que lo haya presentado podrá pedir el cotejo pericial de letras o proponer cualquier otro medio de prueba que resulte útil y pertinente al efecto.*

Si del cotejo o de otro medio de prueba se desprendiere la autenticidad del documento, se procederá conforme a lo previsto en el apartado tercero del artículo 320. Cuando no se pudiere deducir su

autenticidad o no se hubiere propuesto prueba alguna, el tribunal lo valorará conforme a las reglas de la sana crítica.

[vi] Ley 60/2003, de 23 de diciembre de Arbitraje.

[vii] Id. Article 9.3

[viii] Auto Tribunal Supremo de 1 de abril de 2003 (JUR 2003, 118425)