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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

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). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL Secretariat on the Internet (http://www.uncitral.org).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 359: CISG 35; 38; 39; 45; 78
Germany: Oberlandesgericht Koblenz; 2 U 1556/98
18 November 1999
Original in German
Published in German in [2000] Oberlandesgerichtsreport Koblenz 281

A French seller, the plaintiff, sold fibreglass fabrics for filters to a German buyer, the defendant. One week after delivery the buyer handed the fabrics over to a third party for further treatment. Eighteen days later the buyer complained about the anomalous structure of the fabrics and refused to pay. The seller sued the buyer for the purchase price. The buyer claimed set-off because of the damage caused by the defective goods. The court of first instance applied German law and allowed the claim. The buyer appealed.

The appeal Court confirmed the judgement holding the CISG to be applicable.

It found that the buyer had lost its right to rely on a lack of conformity (article 35 CISG) by virtue of article 39 CISG. According to article 39 CISG the buyer loses the right to rely on a lack of conformity if he does not give notice within a reasonable period of time. According to article 38 CISG the buyer must examine the goods within as short a period as is practicable in the circumstances. After expiration of this period, the buyer loses the right to rely on a lack of conformity. The Court referred to its own decision of 11 September 1998 (see Case No. 285) to conclude that where defects are easy to discover, as in the case at hand, the examination period should not exceed a period of one week. Following this examination period, the buyer then normally has to give notice within a further two weeks. In this case, the buyer had to pass the fabrics to a third party for further treatment. This should have enabled the third party to examine the goods within the one week period. The buyer delayed however in handing the goods over to the third party without giving reasonable causes for the delay. Thus, giving notice on July 15, when the defendant had received the goods on June 20, was held to be too late.

As a result of the buyer's loss of right to rely on a lack of conformity, the buyer was unable to claim the remedies provided in article 45 CISG. Consequently, the Court dismissed the claim for set-off.

The Court granted interest under article 78 CISG and established the interest rate according to French law applicable pursuant to the rules of German private international law.

Case 360: CISG 1(1)(a); 7(2); 9(1); 31; 53; 66; 67; 78
Germany: Amtsgericht Duisburg; 49 C 502/00
13 April 2000
Original in German
Unpublished

This dispute concerned the requirements needed to establish a practice between the parties and the allocation of the burden of proof for an alleged agreement on the place of delivery.

The defendant, the owner of a pizzeria in Germany, ordered 90 stacks of pizza cartons from the plaintiff, an Italian manufacturer of pizza-cartons. The defendant paid the price in advance. When the cartons were delivered in July 1998, the defendant noticed they had been damaged by the carrier and notified the plaintiff. On two previous such occasions, the plaintiff had credited to the defendant the amount of the damages. On this occasion however, no amount was credited.

In October 1998, the defendant again ordered pizza cartons from the plaintiff, which arrived undamaged. The defendant refused to pay the price purporting to set-off the plaintiff's claim for the contract price of the October shipment against his alleged counterclaim arising from the faulty July shipment. He based this counterclaim on the practices that had been established between the parties. Alternatively, he asserted that as the parties had agreed upon Duisburg as the place of delivery, the risk of damage passed only at Duisburg, so that plaintiff remained responsible for the damage caused by the carrier.

The Court ordered the defendant to pay the price for the October shipment plus interest from November 1998.

As far as the question of set-off is concerned, which is not covered by the CISG, the Court applied Italian law, which was applicable under the German conflict-of-law rules.

The Court then dismissed the defendant's first argument, stating that the crediting of the amount of damages on two occasions did generally not suffice to establish a practice between the parties under article 9(1) CISG.

The defendant's second argument was also dismissed. The Court held that, under article 31, the buyer was under an obligation to prove an alleged agreement on the place of delivery. Since the defendant had failed to produce any evidence of such an agreement, the general rule set out in article 31(a) applied. Under article 31(a), the seller (plaintiff) was only obliged to hand over the goods to the carrier. According to article 67(1), the risk of damage passed to the buyer (defendant) at the time that the goods were handed over to the carrier. Therefore, the seller could not be held responsible for the subsequent damage caused by the carrier.

Case 361: CISG 61, 77
Germany: Oberlandesgericht Braunschweig; 2 U 27/99
28 October 1999
Original in German
Published in German: [2000] Transportrecht-Internationales Handelsrecht 4

The present decision dealt with questions of mitigation under article 77 as well as the place of performance for damages awarded under article 61 CISG.

A German seller (the plaintiff) sold to a Belgian buyer (the defendant) 12600 kg of deer meat. The contract stipulated that the meat be shipped to Antwerp. Shipment was to be made upon payment of the invoice. Shortly after formation of the contract the seller informed the buyer that part of the meat would arrive via plane at Brussels. The seller asked the buyer to accept the goods at Brussels and Antwerp and issued invoices for the two shipments. The buyer refused to take the goods at Brussels. The seller then offered to deliver all of the goods to Antwerp within the time limit of the contract and reiterated its demand for immediate payment. The buyer did not pay, arguing that the seller had refused to perform under the contract with regard to the place of performance. The seller then sued for damages for non-performance.

The first instance court (Landgericht Braunschweig, 03. February 1999, 9 O 332/97) ruled in favour of the plaintiff. On appeal, the Higher Regional Court upheld the decision.

It ruled that if the buyer is obliged under the contract to pay the price in advance, then the seller is under no obligation to offer to deliver the goods before having received the price.

The Court also found that article 77 in principle does not impose an obligation on the party seeking to rely on the breach of contract to mitigate losses arising from a failed contract of sale by means of a substitute purchase as long as the contract still exists.

Finally, the Court found that the place of performance for damages awarded under article 61 is the same as the place of performance concerning the primary obligation of the buyer under article 57.

Case 362: CISG 1(1)(a); 19(1), (2); 33(a), (c); 47(1); 49(1)(b); 74; 75
Germany: Oberlandesgericht Naumburg; 9 U 146/98
27 April 1999
Original in German
Published in German: [2000] Transportrecht-Internationales Handelsrecht 22

This decision dealt with the determination of a reasonable period of delivery under article 33(c) CISG. The defendant, a German car retailer, ordered a car from the plaintiff, a wholesaler having its place of business in Denmark. The order stipulated that the car be delivered by a specified date. The plaintiff accepted, adding its standard conditions in which it reserved a change of the date of delivery. When the car was not delivered by the date specified in defendant's offer, the defendant fixed an additional period of one week. The plaintiff did not reply. After the additional period had lapsed without result, the defendant declared the contract avoided. Consequently, when the car finally arrived seven weeks later, the defendant refused to pay. The plaintiff then sued for the difference between the contract price and the price obtained from the sale of the car to another buyer.

The Court dismissed the claim. It held that defendant had correctly avoided the contract under article 49(1)(b). It stated that the clause reserving a change of the delivery date in plaintiff's standard conditions did not constitute a material alteration under article 19(2) and had therefore become part of the contract. However, since the clause did not determine a period of delivery, it had to be interpreted according to article 33(c) CISG, which provides for delivery to be made within a reasonable time after the conclusion of the contract. Even though the date specified in the defendant's offer was not binding on the plaintiff, it could still serve as an indication of a reasonable time of delivery. When the plaintiff did not deliver by that date, defendant was entitled to fix an additional period of time under article 47(1) after which it could declare the contract avoided pursuant to article 49(1)(b). The Court stressed that it did not consider the question whether an additional period of one week was sufficient in the case at hand, because the fixing of too short a period only triggers a reasonable period, which would also have lapsed by the time defendant declared avoidance.

Case 363: CISG 6; 9; 57
Germany: Landgericht Bielefeld; 11 O 61/98
24 November 1998
Original in German
Unpublished

A German seller, the plaintiff, delivered hygienic products under an exclusive sales agreement to a Dutch buyer, the defendant. It was the parties' general practice that the seller bore the transaction costs. The buyer refused to pay the purchase price arguing that the seller violated the exclusive sales agreement. The seller sued the buyer for the purchase price. The buyer objected to the jurisdiction of the German court.

The Court held that it had no jurisdiction. Under article 5(1) of the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, jurisdiction is based on the place of performance of the contract. The Court found that the place of performance for payment was not the seller's place of business in Germany.

The place of performance for payment had to be determined by having recourse to the relevant provisions of the CISG that applied in the case at hand. Pursuant to article 57 CISG the place of performance for payment is the seller's place of business but only if the buyer is not bound to pay at any other particular place. Thus, priority has to be given to the place of payment agreed upon by the parties under article 6 CISG or the place of payment in conformity with the practices which the parties have established between themselves by virtue of article 9 CISG. According to the practices established between the parties, the seller had borne the transaction costs. Under CISG the law of the place of payment determines the bearing of costs. The Court concluded that if the seller usually had to bear the transaction costs, then the place of payment had to be the buyer's place of business.

Case 364: CISG 38; 39; 74
Germany: Landgericht Köln; 89 O 20/99
30 November 1999
Original in German
Unpublished

A German buyer, the defendant, ordered stones for facades from X, who agreed in the name of an Italian seller, the plaintiff. After delivery, the buyer gave notice of several defects in the stones to X. It asserted that the goods were not labelled as agreed, that borings that had been agreed had not been made or were incorrectly placed, that the sills and stones were not the agreed size and that the glue provided to mount the stones was defective. Consequently, it refused to pay the purchase price. The seller recognised only the missing borings and reduced the purchase price. It sued the buyer for the outstanding purchase price. The buyer contested that the purchase price was due, because the seller did not establish a final account.

The Court allowed the claim. It applied CISG, because the parties had their places of business in different Contracting States. As CISG does not require a specific form of account or invoice, no final account was required. Therefore the Court held the claim to be due.

The Court found that the buyer was not entitled to claim damages under article 74 et seq. CISG. The buyer failed to specify the nature of the lack of conformity. Concerning the labelling the buyer did not allege that it gave notice about specific unlabelled plates. The complaint that the stones were wrongly labelled in general was held to be insufficient. As to the sills, the buyer did not specify how many and which sills did not conform to the agreed size. Also the buyer did not assert that it gave notice about the quantity of stones diverging from the agreed size and in which manner they diverged. As to the defective glue, the buyer failed to allege the exact quantity of stones treated with the defective glue. Moreover, the buyer failed to examine the goods within as short a period as is practicable in the circumstances (article 38(1) CISG) and also failed to give notice within a reasonable period of time (article 39(1) CISG).

The Court held that the buyer had therefore failed to give a proper notice to X. In the Court's opinion, the CISG does not contain any rule about the addressee of the notice. Therefore it held that this question was governed by domestic law, more specifically German law. According to German law, as X had been the seller's agent, effect had to be given to the notice addressed to X.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 365: MAL 7
Canada: Saskatchewan Court of Queen's Bench (Wedge J.)
1 October 1996
Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd.
Original in English
Published in English: (1996), 149 Sask. R. 54, 5 C.P.C. (4th) 122, [1997] 1 W.W.R. 124, 28 B.L.R. (2d) 221 (Q.B.).

In 1992 the purchaser, Schiff Food Products Inc. («Schiff»), of New York, sent a written offer to purchase oregano to Naber Seed and Grain Co. Ltd. («Naber»), of Saskatchewan. While Naber never returned a signed copy of the offer, it responded to the offer for performance by submitting a sample and promising delivery. Eventually it became clear that delivery would not occur and Schiff sought to arbitrate the alleged breach of contract in New York before the American Spice Trade Association, in accordance with the arbitration provision printed on the offer that had been sent to Naber. Naber chose not to participate in the arbitration and an award was subsequently rendered against it. When Schiff tried to enforce the award in Saskatchewan, Naber objected on two grounds : that no contract bound the parties and that the arbitration agreement had not been agreed to in writing.

The Court allowed the application for enforcement. On the contractual issue, it found that Naber was bound as a result of its conduct: sending the sample and promising delivery. In respect of the agreement to

arbitrate, the Court interpreted article 7 of the Model Law, as incorporated in the International Commercial Arbitration Act, broadly. It noted that the article did not expressly require a signature and therefore the Court was able to find that the incorporation of the arbitral agreement in Schiff's standard form offer met the requirement of article 7 that the agreement be in writing.

Case 366: MAL 35, 36
Canada: Ontario Court of Justice, General Division (Dilks J.)
21 January 1997
Europcar Italia S.p.A. v. Alba Tours International Inc.
Original in English
Published in English**:** [1997] O.J. No. 133, 23 O.T.C. 376 (Gen. Div.)

Europcar Italia S.p.A ('Europcar'), a major European motor vehicle rental agency, and Alba Tours International Inc. ('Alba'), a tour operator based in Toronto, entered into an agreement in Rome for car rental services. A dispute brought the parties to arbitration resulting in an award in favour of Europcar. Alba Tours asked the Italian courts to set aside the award on the ground that the arbitrator had made a serious error of fact which resulted in a loss of his jurisdiction. In the interim, Europcar sought enforcement of the arbitral award against Alba in Ontario.

The Court began by noting that, in accordance with article 35 of the MAL, it was obliged to recognize an arbitral award unless one of the grounds for refusal, listed in article 36, was available. Even then, it noted that a discretion remained to recognize the award under that provision on the basis that the word "may" is used in the preamble to article 36(2). The Court found that it is "therefore clear that even should one of the circumstances [set out in article 36(1)] exist, enforcement could still be ordered in the exercise of judicial discretion".

Alba objected to recognition on the basis of article 36(1)(a)(iii) and (v). Under the first provision, Alba argued that by misinterpreting the agreement, the arbitrator lost jurisdiction, and that accordingly his award contained decisions on matters beyond the scope of the submission to arbitration. The Court rejected this argument on two grounds: first, that this issue was already before the Italian courts and should therefore not be considered by the Ontario Court, and second, that in any event, the evidence did not indicate that any errors committed by the arbitrator substantially affected his conclusions. The Court also rejected the submission based on subparagraph. (v), holding that the conditions for its application had not been met.

The Court considered that the conditions for the application of article 36(2) had been met by Alba's appeal in Italy. The only issue was the exercise of the Court's discretion under article 36(2). In exercising its discretion, the Court considered the balance of convenience to the parties. It found that Alba Tours would suffer extreme prejudice if the award were enforced in Ontario only to be set aside later in Italy. The Court thus ordered an adjournment of the enforcement proceedings in Ontario, conditional upon Alba furnishing security pending a determination of the appeal in Italy.

Case 367: MAL 8, 16(3)
Canada: Ontario Superior Court of Justice (Stinson J.)
29 July 1999
NetSys Technology Group AB v. Open Text Corp.
Original in English
Published in English: [1999] O.J. No. 3134, 1 B.L.R. (3d) 307

NetSys is a Swedish corporation that provides internet-related services to customers in Scandinavia. Open Text is an Ontario corporation that develops, owns, licenses, and sells computer software products and programs for creating, hosting and using searchable indexes on the internet. At a meeting held in Switzerland in 1997, the parties entered into a series of written agreements. These included provisions for arbitration to resolve disputes relating to the construction, interpretation or application of the agreements. Arbitration was to take place at the Arbitration and Mediation Institute of Ontario, in accordance with its rules.

After the agreements broke down, NetSys began court proceedings in Ontario against Open Text who then instituted arbitral proceedings. NetSys objected that some of the matters brought to arbitration were not within the scope of the arbitration agreement, while Open Text sought a stay of all court proceedings.

In resisting the stay, NetSys argued that since Open Text was claiming that the agreements were null and void in the arbitration claim, it could not rely on article 8 of the MAL and force arbitration. The Court rejected this argument. It relied on article 16 of the MAL to conclude that the arbitrator was competent to determine the validity of the contract and that this competence was independent of the validity of the arbitration agreement which was contemplated in article 8. Since neither party was claiming that the arbitration agreement was invalid, referral to arbitration was not prohibited.

On the question of the scope of the arbitration clause, the Court considered whether it should remit the issue to the arbitral tribunal as provided by article 16(3) of the MAL. In concluding that it should, the Court noted that the adoption of the MAL in Ontario signalled a significant trend to circumscribe judicial intervention in arbitral proceedings. The Court thus ordered a stay of judicial proceedings to remain in force until the final disposition of the jurisdictional issue by the arbitral tribunal, whether as a preliminary decision or in the final award.

Case 368: MAL 7(1), 8(1)
Canada: Ontario Court, General Division (Hockin J.)
9 August 1993
Campbell et al. v. Murphy
Original in English
Published in English: (1993), 15 O.R. (3d) 444, 12 C.L.R. (2d) 10, O.J. no. 1905

Campbell and Murphy entered into a written agreement whereby Murphy agreed to build a house for Campbell in Antigua. The agreement included an arbitration clause. The house was not completed and Campbell sued Murphy for damages for breach of contract. After the statement of claim was issued, Murphy gave notice of his desire to arbitrate and moved for an order staying the action. Campbell objected to the stay on the grounds that the arbitration clause was optional. He also argued that the Court had first to determine whether the contract subsisted before referring the parties to arbitration.

A stay was granted. In accordance with article 7, the arbitration clause was found to be a valid and mandatory arbitration clause as it used the expression «shall...be referred to arbitration». The second argument was also rejected on the basis that the claimed repudiation of a contract did not retroactively nullify the contract or the arbitration agreement contained therein and therefore article 8 compelled a referral to arbitration.

Case 369: MAL 2(2), 16, 35
Canada: Ontario Court, General Division (White J.)
30 January 1992
Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.
Original in English
Published in English**:** (1992), 7 O.R. (3d) 779, 4 B.L.R. (2d) 108, 40 C.P.R. (3d) 451, [1992] C.C.L. 8978, O.J. no. 198 (Gen. Div.), affirmed (1995), 60 C.P.R. (3d) 417, 22 O.R. (3d) 576, O.J. no. 971 (Ont. C.A.)

Kanto, a manufacturer of industrial heat treatment furnaces having its principal place of business in Japan, and Can Eng, a corporation having its principal place of business in Ontario, executed a licence co-operation agreement in 1987 under which Can Eng was given the right to manufacture certain products in Ontario and Kanto would provide technical assistance. The agreement provided that all disputes were to be settled by arbitration in Tokyo in accordance with the rules of the Japan Commercial Arbitration Association. Alleging in 1990 that Can Eng had failed to pay royalties, Kanto initiated arbitration proceedings in which Can Eng did not participate. An award was rendered in Kanto's favour and Kanto sought to enforce it against Can Eng in Ontario. Can Eng resisted enforcement on two grounds. First, that there had been a fundamental breach of the licensing agreement which put the dispute outside the jurisdiction of the arbitrator, and, secondly, that to

recognize the foreign arbitral award would be contrary to public policy in Ontario in that a foreign corporation without assets in Ontario would be entitled to enforce the Japanese award in Ontario, leaving the Ontario corporation with no recourse with respect to its substantial damages occasioned by Kanto's fundamental breach. Can Eng argued further that Kanto had not filed a duly certified copy of the award with the Court, as required by article 35(2) of the MAL.

The defendant's arguments were rejected. The arbitration agreement in this case fell within the class of arbitration agreements governed by the International Commercial Arbitration Act. The fact that the agreement was executed prior to the coming into force of the Act was irrelevant having regard to section 2(2) of the Act. Can Eng's argument that there had been a fundamental breach should have been raised in a timely manner before the arbitration tribunal, as it fell within the arbitrator's jurisdiction (article 16 MAL). The Court reviewed the meaning of "duly certified" used in article 35(2) and concluded that while the initial documents submitted by the applicant did not meet that standard, subsequently filed documents did comply with the requirements of article 35. The award was enforced.

Case 370: MAL 8
Zimbabwe: High Court (Judge Smith); Judgement No. HH 144-2000
24 and 31 May 2000
Bitumat Ltd. v. Multicom Ltd.
Original in English
Unpublished

The plaintiff sued the defendant in the High Court for money owed in respect of the sale and delivery of goods and the hire of a slurry machine. Defendant filed a special plea that the Court proceedings should be stayed, claiming that the parties had entered into an agreement under which disputes were required to be referred to arbitration.

The plaintiff argued that correspondence between the parties showed that the defendant had agreed to have the matter dealt with in Court.

The Court held that where parties have entered into an agreement which contains an arbitration clause which is intended to be widely cast, as was the position in the present case, the Court "should not be astute in trying to reduce the ambit of the arbitration clause". In addition, the Court held that, whilst it was true that parties to an arbitration agreement could abandon it and proceed to Court, the decision to do so must be clearly evidenced. In the present case, the correspondence was not sufficiently explicit to show such an agreement. Accordingly, the special plea was upheld and the Court referred the parties to arbitration according to MAL article 8.

Case 371: MAL 36(1)(a)(ii), 36(1)(a)(iv), 36(1)(b)(ii)
Germany: Hanseatisches Oberlandesgericht Bremen, (2) Sch 4/99
30 September 1999
Original in German
Unpublished

The decision concerned the recognition and enforcement of a foreign award in Germany.

Both parties are shareholders of a Turkish company incorporated in Istanbul. Section 18 of their shareholders' agreement contains an arbitration clause. On May 26, 1994, the applicant brought a dispute before the Istanbul Chamber of Commerce, which rendered an award on August 15, 1994. Before that date, on July 21, 1994, the respondent had already applied to an Istanbul court of first instance for a declaration on the inadmissibility of arbitration. The application was dismissed on November 18, 1996, by the Court of second instance. The respondent also made an application for the setting aside of the award before a Turkish court on the grounds that the arbitral tribunal had decided the case without waiting for the court to rule on the admissibility of arbitration. This application was successful and the award was set aside by the Court of Second

Instance on February 6, 1995. The applicant then filed the dispute for arbitration a second time at the Istanbul Chamber of Commerce. The newly composed tribunal ruled in favour of applicant on May 26, 1998, without ordering an oral hearing. A motion for the setting aside of this second award was dismissed by the Court of Second Instance on February 2, 1999. The respondent tried to resist the recognition and a declaration of enforceability of the award in the German Court relying on various grounds.

In respect of section 1061(1) of the German Code of Civil Procedure, the equivalent of article 36(1)(a)(ii) MAL, the Court stated that the tribunal's denial of a motion to take evidence could not constitute a violation of the right to present one's case. While it could amount to a denial of the right to audience under article 36(1)(b)(ii) MAL, this was not the case here, since it was not possible to determine whether the evidence could have caused the case to be decided differently.

The Court further held that the Turkish court had rendered a non-appealable decision on the arbitrability of the dispute at hand. Under section 328(1) of the German Code of Civil Procedure, the German court was bound to recognize this decision without further review, unless one of the exceptions under section 328(1) was met, which was not the case here.

The Court also held that the fact that no oral hearing had been ordered by the arbitral tribunal did not in itself constitute a violation of article 36(1)(a)(iv) MAL.

The Court found that German ordre public is only violated if the foreign decision is the result of a procedure which differs from the fundamental principles of German procedural law in such a way that under the German legal system it cannot be considered the result of a fair and constitutional procedure, because it contains substantial errors touching upon the very foundations of public and economic life.

The Court stated that while a misapplication of the law of limitation was in general a severe defect of an award and could lead to an infringement of the substantive German ordre public, this was not the case here. It also stressed that while it is usually not possible to review an arbitral award on the merits, it is possible to do so if the substantive ordre public is concerned.

Case 372: MAL 36(1)(a)(v)
Germany; Oberlandesgericht Rostock, 1 Sch 3/99
28 October 1999
Original in German
Unpublished

This decision dealt with the recognition and enforcement of awards set aside in their country of origin. The applicant, a Russian company, entered into a contract with the respondent for the repair of a ship. The contract contained an arbitration clause, which provided for arbitration before the "Arbitration Commission of the City of Moscow". When the respondent did not pay, the applicant filed a request for arbitration before the Arbitral Commission for Shipping Matters in Moscow. The Commission declared itself to be competent, arguing that, even though it had not been explicitly named in the arbitration agreement, there was no other arbitral commission for shipping law in Moscow. The Commission rendered an award in favour of the applicant, which was later set aside by the competent court in Moscow, holding that the arbitration agreement was not sufficiently certain regarding the arbitral institution. This decision was affirmed by the Highest Russian Court in Civil Matters. However, the Vice-President of the Highest Court of the Russian Federation challenged this decision, demanding a reappraisal of the case.

While that motion was still pending, the applicant moved for a declaration of recognition and enforceability of the award in Germany before the Higher Regional Court of Rostock.

The German Court denied a declaration of recognition and enforceability under section 1061(1) of the German Code of Civil Procedure (the equivalent of article 36(1)(a)(v) MAL) in conjunction with article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Under article V(1)(e) of the New York Convention, recognition and enforcement of the award may be refused if the award has

been set aside by a competent authority of the country in which it was made. Under German Law, an award can only be declared enforceable if it has become binding under the law of the country in which it was made. This is the case if there is no domestic remedy against it.

If, on the contrary, the award has been set aside, it is no longer binding, even if the setting aside is only a provisionally enforceable decision. In this case, the award cannot be recognized under German Law. Therefore, it was immaterial that the Vice-President of the Highest Court of the Russian Federation had challenged the setting aside of the award, because the mere motion for a reappraisal did not suffice to render the award binding again.

Case 373: MAL 16(3)
Germany: Kammergericht Berlin; 28 Sch 17/99
15 October 1999
Original in German
Published in German: [2000/2] Recht und Praxis der Schiedsgerichtsbarkeit 13

This decision arose out of an action to set aside an award for lack of jurisdiction and dealt with the interpretation of an arbitration clause referring to a non-existing arbitral institution.

The parties entered into a contract providing for arbitration under the rules of the "German Central Chamber of Commerce". Since no such organisation or rules exist the claimant started arbitration proceedings under the rules of the Deutsches Institut für Schiedsgerichtsbarkeit. Upon the respondent's plea that the arbitral tribunal lacked jurisdiction, the tribunal rendered a partial award on jurisdiction according to section 1040(3) German Code of Civil Procedure (adapted from article 16(3) MAL). That award in favour of jurisdiction was challenged by the respondent pursuant to section 1040(3)(2) German Code of Civil Procedure before the Kammergericht Berlin.

The Court held that the parties entered into a valid arbitration agreement despite the referral to a non-existing arbitration institution since it was possible to determine through interpretation a particular arbitration institution. The Court stated that arbitration clauses are to be construed in accordance with the general principles of interpretation applicable under the law of the contract. A broad interpretation should be applied, if necessary, to meet the parties' intentions. In the case at issue, the parties had agreed that their contract should be governed by German law and that any dispute should be settled by an arbitration institution seated in Germany. Furthermore, the reference to the "German Central Chamber of Commerce" indicated that the parties wanted to submit their case to the arbitration institution authorized or recommended by the institution which the parties described as the German Central Chamber of Commerce. In light of these circumstances, there was only one arbitration institution which the parties could have meant; *i.e.* the Deutsches Institut für Schiedsgerichtsbarkeit. Therefore, respondent's application was to be dismissed.

Case 374: MAL 34, 20, 31(3)
Germany: Oberlandesgericht Düsseldorf; 6 Sch 2/99
23 March 2000
Original in German
Unpublished
Commented on in German: Kröll, [2000] Entscheidungen zum Wirtschaftsrecht 795

This decision, rendered in an action to set aside an award, dealt with the question of the nationality of the award which is relevant in determining the jurisdiction of the court.

In a dispute about the value of a share in a partnership sold by one party to another, the parties finally agreed on a binding determination of the value by an expert acting as a sole arbitrator. Though the parties exchanged several drafts of an arbitration agreement, no formal agreement was ever signed. After an unsuccessful settlement attempt in Düsseldorf, the arbitrator undertook an audit of the partnerships at their places of business in Zurich, Switzerland. Further negotiations took place for more than two years. Finally, upon

motion of the claimant, the arbitrator rendered an arbitral award at his home in Düsseldorf which mentioned his address. The respondent filed an application for setting aside the award before the Higher Regional Court in Düsseldorf.

In its decision, the Court declined jurisdiction to rule on the validity of the award. Though the decision was primarily based on the former German law, the Court dealt also with the question under the new law, based on the MAL. According to section 1025(1) of the German Code of Civil Procedure, the provisions on arbitration only apply if the place of arbitration is situated in Germany. This rule also applies to the proceedings for setting aside an award pursuant to section 1059 (adapted from article 34 MAL). The Court found that the place of arbitration was neither agreed upon by the parties, nor was it determined by the arbitrator in accordance with section 1043 (article 20 MAL), as required by section 1054(3) (article 31(3) MAL). The award merely stated the arbitrator's address. Under these circumstances, the Court defined the place of arbitration to be the actual, effective place of arbitration. Only if no particular place could be determined, could the place of the last oral hearing be considered to be the place of arbitration.

In the case at issue, all relevant actions – the auditing and the subsequent negotiations with both parties – took place in Zurich. Therefore, and regardless of where the award itself was issued, the effective place of arbitration was not situated in Germany.

Case 375: MAL 34(2)(a)(iv); 34 (2)(b)(ii)
Germany: Bayerisches Oberstes Landesgericht; 4 Z Sch 23/99
15 December 1999
Original in German
Unpublished

This decision concerned an application for the setting aside of an arbitral award.

Both parties are manufacturers and distributors of car door locks. On March 9, 1993, the parties entered into a license agreement concerning the manufacture and distribution of car door locks. The defendant is the producer of the A-lock, for which it holds a patent under Italian law. The applicant is the producer of the B-lock. A dispute arose between the parties concerning the question whether the B-lock was covered by the defendant's patent for the A-lock and whether any royalties were due. On June 27, 1996, the parties agreed to submit the dispute to ICC arbitration. The arbitral tribunal ruled in favour of the patent holder (*i.e*. the defendant).

The applicant applied to the Higher Regional Court for the setting aside of this award. It argued that the arbitral tribunal did not possess the required knowledge of Italian patent law and had therefore been under a duty to call for a neutral expert opinion. Even though the applicant had offered such an opinion, the tribunal had neither ordered one nor given any reasons for its decision. This, in the applicant's view, constituted a violation of the applicant's right to be heard, leading to a ground for the setting aside of the award under section 1059(2) Nr. 1(d) (arbitral procedure) as well as section 1059(2) Nr. 2(b) (ordre public) of the German Code of Civil Procedure (article 34(2)(a)(iv) MAL and article 34(2)(b)(ii) MAL).

Under German law, courts do not have the power to review an arbitral award on the merits. The Court therefore could not review whether the tribunal had applied Italian patent law correctly. It could only review whether any mistake had been made in the process of establishing the principles of Italian law. However, it was clear from the facts that the tribunal had established the principles in accordance with an earlier expert opinion submitted by the applicant. Thus, even in the unlikely case of a mistake, such a mistake could not have led to a different award, and could therefore not justify the setting aside of the award.

Secondly, it was apparent from the award itself that the tribunal had considered a certain technical aspect raised by the applicant, but come to the conclusion that it was not relevant under Italian law. Again, the Court emphasized that it could not review the application of Italian law.

The Court found that the fact that the tribunal had not given reasons for its decision not to obtain an

independent expert opinion did not violate the applicant's right to be heard. In the absence of any indication to the contrary, it has to be assumed that the tribunal has complied with its duty to hear all submissions by the parties. A violation of the right to be heard can only be assumed under special circumstances.

The applicant's second argument concerning section 1059(2) Nr.2(b) was also dismissed. Even though an infringement of the applicant's right to be heard could generally constitute a violation of the German ordre public, there was no indication of such an infringement in the present circumstances.

III. ADDITIONAL INFORMATION

Corrigenda

Document A/CN.9/SER.C/ABSTRACTS/32 (English text only)

Case 348

Caption and fourth paragraph: the reference to CISG article "81(1)(1)" *should read* "81(1)";

Paragraph four: the reference to CISG article "81(3)"*should read* "83(3)"

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