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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

INTRODUCTION

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V.01-87959 (E)

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

Case 394: CISG 1 (1) (b); 57 (1) (a)
Spain: Audiencia Provincial de Barcelona, Division 17, No. 28/1999
7 June 1999
Original in Spanish
Published in Spanish: [2000] Actualidad Civil, No. 5, 87; Jurisprudencia Española: http://www.uc3m.es/cisg/espana/htm

The matter at issue was concerned with the determining of the jurisdiction of the Spanish courts and the declaring of Spanish law as the law applicable in connection with a sale of textiles in which a Spanish manufacturer, plaintiff, was the seller and certain British importers, defendants, were the buyers. It had been agreed that payment for the purchased goods would take place at the seller's domicile, which does not appear to have happened. Since Spain is a party to the CISG and the United Kingdom is not, it had to be concluded that, in the event that Spanish law was applicable, the CISG would be the instrument governing the sale.

The Court considered that the essential service provided under the disputed contract was the supply of the purchased textiles by the seller, whose administrative headquarters are located in the city of Barcelona.

The law applicable is accordingly Spanish law and hence the CISG would apply, even though the United Kingdom is not a party to the Convention. That ruling was in accordance with article 1 (1) (b) CISG.

The jurisdiction of the Spanish courts is based on article 57 (1) (a) of the Convention, which states that, if no other place is specified, the price has to be paid "at the seller's place of business". Consequently, that is the place of performance of the contract and the place that determines which courts have jurisdiction to hear the seller's claim and settle the dispute.

Case 395: CISG 19, 74, 75, 77
Spain: Tribunal Supremo, First Division, No. 31/200
28 January 2000
Internationale Jute Maatschappij BV v. Marin Palomares SL
Original in Spanish
Published in Spanish: [2000] Aranzadi Repertorio de Jurisprudencia, 454

Commented on in Spanish: Blazquez, [2000] *Revista de Derecho Patrimonial* 203.

The matters at issue in this case are diverse and on all of them the ruling of the Supreme Court establishes case law.

In the first place, the ruling states that the contract of sale was completed by the exchange of faxes in early 1993 between the parties with regard to the subject matter of the contract—800,000 sacks of jute and the price payable for each of them (US$ 55.90 per 100 bags)—and to the conformity of the goods with the subject matter: "the literal terms of the faxes unequivocally indicate the acceptance of the offer by the buyer, defendant, thus given rise to a contractual agreement binding on the parties".

Moreover, any subsequent proposal made by the buyer to the seller to renegotiate the contract terms at which the agreement had been made—in the present case, the price—cannot be regarded as altering the conclusion of the contract, which had already occurred. It is precisely because it was subsequent to the unconditional acceptance of the offer—and to the delivery of a first consignment of the purchased sacks—that the proposal has to be regarded as a proposal of novation amending the contract with regard to the price. That proposal was not accepted by the seller and the buyer refused to pay.

In such circumstances, the seller arranged a substitute sale of the sacks to a third party at terms far lower than those agreed with the Spanish buyer, namely US$ 0.30 per sack, pursuant to article 75 of the Convention. Furthermore, the amount of the substitute sale was far below the renegotiation price offered by that

original buyer. Thereupon, the seller claimed from the Spanish buyer the difference between the original price agreed and the price of the substitute sale, in accordance with articles 74 and 75.

The Court held that the buyer was in breach of its obligation to mitigate the loss, as stipulated in article 77 of the Convention, and consequently made an appropriate reduction in the amount of damages claimed.

The decision of the Supreme Court is also based on the buyer's requirement that payment be arranged through "a letter of credit from a Dutch bank of recognized standing covering the purchase price offered". That requirement was shown to be contrary to the practice established by the parties since 1988, whereby payment for previous purchases had been effected "after receipt of the invoice".

Case 396: CISG 35 (2) (b)
Spain: Audiencia Provincial de Barcelona, Division 16
4 February 1997
Manipulados del Papel y Cartón SA v. Sugem Europa SL
Original in Spanish
Published in Spanish: Actualidad Civil 1997, 340

When the seller's technical team recommends to the buyer that it purchase a hot-melt product manufactured by it, i.e. a product specially designed to join paper and cardboard that is resistant to different atmospheric conditions, and it subsequently emerges that the performance characteristics of the sold product do not meet the expectations generated by the seller or the needs of the buyer, there is a breach of article 35 (2) (b) of the Convention: "the liability of the seller would be inescapable in the face of a genuine case of delivery of goods which do not conform with the contract".

Case 397: CISG 7, 30, 36 (2), 39(1), 44, 45, 46 (3), 50, 52, 54, 70, 71
Spain: Audiencia Provincial de Pamplona, Division 3
27 March 2000
EMC v. C de AB SL
Original in Spanish
Published in Spanish: [2000] Revista General de Derecho, pp. 12,536 ff.

The seller delivered to the buyer a minimum quantity of 184 items of equipment of North American manufacture designed for cooling and heating drinking water. The contract incorporated a five-year warranty clause.

Prior to the time of performance by the buyer of its obligation to pay for the delivered consignments of the purchased equipment, i.e. early January 1997, the equipment began to develop certain operational defects. The buyer did not pay the agreed price in accordance with articles 54 ff. and 71 of the Convention. The buyer also invoked articles 36, 44, 50 and 74 of the Convention. The buyer itself undertook the repair of the drinking water dispensers without informing the seller of the defects or faults in the appliances; only by fax did it communicate the defects in "a single" equipment item.

This lack of communication gave rise to the Court's rejection of the buyer's claim "since the buyer did not demand the enforcement of the manufacturer's warranty". Moreover, insofar as the buyer received the sold goods at the agreed place and had the possibility of examining them, "the buyer cannot exercise the rights arising under article 45 of the Convention".

Furthermore, the notification of defects in the purchased items—in effect, the lack of conformity of the goods—has to be made by the buyer to the seller within a reasonable time, in accordance with article 39(1). The Court ruled that the period between autumn 1997, without being more specific, and 11 May 1988 was not a

reasonable time. Even though not expressly stated by the Court, the unreasonableness of that period is based on its extreme length.

Case 398: CISG 1 (1) (a); 31; Brussels Convention, 5 (1)
France: Court of Appeal of Orleans; 00/02909
29 March 2001
Original in French
Published in French: http://witz.jura.uni-sb.de/CISG/decisions/290301.htm

The company T.C.E. Diffusion, established in France (La Bussière), entered into several successive sales contracts with the company Elettrotecnica RICCI, established in Italy (Ancona), relating to neon transformers. The buyer sued the seller in France before the Commercial Court of Montargis to obtain reimbursement of sums paid to the seller and the awarding of damages for commercial harm resulting from the loss of several customers.

The Montargis Commercial Court declared that it lacked jurisdiction; this was contested by the buyer, who consequently raised an objection. The Court of Appeal of Orleans was thus called upon to take a decision on the international jurisdiction of the court of first instance, possibly deriving from article 5 (1) of the Brussels Convention in the version resulting from the San Sebastián Convention. In this regard, the Court of Appeal found that "there is no global document indicating that the parties agreed on the place of performance of the seller's obligation to guarantee against hidden defects or, more generally, guarantee the conformity of the goods in the meaning of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, which, being in force both in France and in Italy, is applicable to the case". The appeal judges then noted that nearly all the invoices referred to sale "ex-works Ancona" and that only one invoice mentioned delivery "free destination La Bussière" (sale of 9 October 1998). They deduced that, except in the case of this last sale, "the obligation to deliver the goods, as defined in article 31 of the above-mentioned Vienna Convention, was discharged, in the case in point, by the delivery of the goods to the first carrier at Ancona for transport to the buyer, and that its performance therefore took place in that city, as is confirmed by the words 'ex-works Ancona' appearing on nearly all the invoices".

The Court of Appeal essentially confirmed the first-instance judgement. However, the Court of Appeal declared that the Montargis Commercial Court had jurisdiction to rule on the consequences of the sale dated 9 October 1998, subject to the right of the company T.C.E. Diffusion itself to refer the whole dispute to another court.

Case 399: CISG 1; 4; 100
France: Court of Appeal of Amiens; 99/02272
30 January 2001
Original in French
Published in French: http://witz.jura.uni-sb.de/CISG/decisions/300101.htm

During the summer of 1996, the company Vergers de Seru, fruit and vegetable wholesalers established in France, bought several tons of apples and pears from a producer established in Belgium. Several successive contracts were concluded for this purpose. When the buyer paid the invoices only partially on the grounds that the fruit delivered was not in conformity with the order, the seller sued the buyer for the payment of the remaining invoices before the Commercial Court of Saint Quentin in April 1998. Having before it a principal appeal lodged by the seller and a cross-appeal from the buyer, the Court of Appeal, in an interim decision, ruled on the applicable law. The seller invoked the applicability of Belgian law whereas the buyer argued for French law. In its decision, the Court noted that the contracts signed contained no provision indicating the applicable law. The appeal judges then referred to the CISG. They noted that the Convention "has the purpose of establishing uniform rules for sales of goods as between parties having their establishments in different countries", that it "governs the rights and obligations created by an international contract for the sale of goods between the seller and the buyer" and that it had been ratified both by France and by Belgium. However, the appeal judges did not mention the date of entry into force of CISG in Belgium (1 November 1997) or take into

account article 100 CISG, decisive in the case in point in view of the fact that the contracts were concluded before the entry into force of CISG in Belgium. The judges then noted that the documents communicated did not show that the parties intended to exclude application of the Vienna Convention, and accordingly invited the parties to make new submissions and to provide all factual and legal evidence relating to the applicability of the Vienna Convention to the present dispute and the resulting legal consequences.

The Court of Appeal is therefore due to take a second decision relating to the substance of the case.

Case 400: CISG 1 (1) (b); 10; 35; 39
France: Court of Appeal of Colmar; 200002525
24 October 2000
Original in French
Published in French: http://witz.jura.uni-sb.de/CISG/decisions/241000.htm

In February 1990, the company Pelliculest, established in France, gave Mr. Molinier, a representative, domiciled in France, of the company Morton International GmbH established in Germany, an order for 2,000 kilograms of glue for the manufacture of fancy packages for the company Socratem. In April 1990, the latter company discovered defects in the packages characterized by the partial unsticking of the cellulose acetate film, and retained a sum of 367,640.08 francs from the invoices due to Pelliculest.

On 8 June 1990, the insurer of Pelliculest informed the insurer of Morton International GmbH of the occurrence of the damage and invited the Pelliculest insurer to the private appraisal operations conducted to determine the causes of the "grave defects whose origin appears to lie in the quality of the glue delivered". Many meetings and discussions between the various parties ensued, mainly with the aim of arriving at a settlement. Meanwhile, the company Rhin et Moselle compensated Socratem with a payment of 1.7 million francs on 27 June 1991.

By an order issued on 8 December 1992, the interim relief judge of the Strasbourg Court of Major Jurisdiction, to which the case had been referred by Rhin et Moselle, appointed a judicial expert. The latter submitted a final report on 15 November 1993. On 13 January 1994, Rhin et Moselle, having entered into the rights of Socratem by subrogation, sued Morton International GmbH and its insurer in the Strasbourg Court of Major Jurisdiction for damages amounting to 1.7 million francs. On 9 June 1995, Pelliculest, meanwhile under liquidation, joined in the procedure and claimed the sum of 367,648.08 francs.

By a judgement on 28 March 1996, the Strasbourg Court of Major Jurisdiction found that French law was applicable and decided that the action was inadmissible because it had not been brought within the brief period allowed under article 1648 of the Civil Code.

Both the plaintiffs appealed the judgement. The defendants lodged a cross-appeal. The Court of Appeal allowed the claim of Rhin et Moselle and ordered Morton International GmbH and its insurer to pay Rhin et Moselle the sum of 1.7 million francs in reparation of the damage caused by the seller, with interest at the (French) statutory rate as from 13 January 1994. On the other hand, the Court of Appeal dismissed Pelliculest's claim.

The Court of Appeal declared the Vienna Convention applicable to the claim and referred in this regard to article 1 (1) (b) and article 10 CISG. The Court stressed that, even assuming that the representative of Morton International GmbH based in France had the responsibility of managing one of the seller's establishments, the establishment having the closest relationship in the meaning of article 10 CISG was that situated in Bremen, Germany, since the order of confirmations emanating from the seller, the invoices and the deliveries of goods came from the head office of the company in Germany. As the contract had been concluded in February 1990, before the date of entry into force of the Vienna Convention in Germany, the Court made use of article 1 (1) (b) and applied the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods. It ignored article 12 of the general conditions of sale referring to the applicability of German law, on the grounds that the requirement for legibility of the general conditions was not satisfied. As the order had been received in the country of the buyer, French law was applicable (Hague Convention, art. 3 (2)) and, in consequence, the

Vienna Convention (art. 1 (1) (b)).

The Court of Appeal noted that the unsticking became apparent in April 1990 and that the letter from the insurer of the buyer informing the seller's insurer of the damage dated from 8 June 1990, and concluded that it was therefore "indisputable that the insurer of the buyer informed the seller of the damage within a reasonable time as provided for in article 39 of the applicable Convention".

The Court then considered whether the legal action brought against the seller on 13 January 1994 had been brought in time. The Court also applied the Vienna Convention on this point and found that "the time that elapsed between the reporting of the damage and the initiation of court action by Rhin et Moselle seems reasonable", taking into account, in particular, the efforts made in the direction of an out-of-court settlement. On the other hand, the action brought by Pelliculest, which had been initiated only on 15 June 1995, was found inadmissible in view of the absence of any reminder letter or communication in any form during the intervening period. The Court concluded that the period that had elapsed since the reporting of the damage could not be considered of reasonable duration.

The Court then took into account the damage assessment report, from which it emerged that the glue was unsuitable for the use for which it was intended: the products at issue were designed specifically for the lamination of cardboard and were unsuitable for photogravure-printed substrates. The Court noted that Morton International GmbH had been fully informed of the use for which the glue delivered was intended and had even undertaken prior tests. The technical instructions made no mention of the particular incompatibility in question. The seller, as a professional, and considering that the technique of stamping on fancy packages made of film-coated board is relatively common, should have been aware of this incompatibility, and should have informed the customer of the need for caution in the utilization of the glue; this was not done. In this part of the judgement, the Court does not refer to any provision of the Vienna Convention.

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

Case 401: Art. IV NYC; Art. 35 II amended
Germany: Highest Regional Court of Bavaria; 4Z Sch 5/00
11 August 2000
Original in German
Published in: Betriebs-Berater, Beilage 12 zu Heft 50/2000 (RPS-2/2000), p. 10 (with commentary Lachmann, p. 8); BayOblGZ Nr. 52/2000; DIS – Online Database on Arbitration Law – http:// www.dis-arb.de.

The decision dealt with the formal requirements for an application to have a foreign award declared enforceable in Germany.

The case arose out of a construction contract between a Russian and a German party. The Russian Claimant, who had obtained an arbitral award in Russia, was seeking enforcement of that award before the competent state court in Germany. Respondent argued that the award was not enforceable since Claimant had neither presented an original arbitration agreement nor a duly certified copy thereof as required by article IV (1) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

The Court recognized the arbitral award as binding and declared it enforceable. The Court held that pursuant to section 1061 (1) German Code of Civil Procedure, recognition and enforcement of foreign arbitral awards should be granted in accordance with the New York Convention. Contrary to Respondent's assertion, the requirements for recognition and enforcement as stated in article IV (1) of the Convention, i.e., the presentation of the award and the arbitration agreement (both either as the original or as a duly certified copy thereof), are not intended to provide the exclusive standards for enforceability. Article VII (1) of the New York Convention provides that its provisions should not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. According to section 1064 (1) German Code of Civil Procedure the application for a declaration of enforceability of an arbitral award merely requires the presentation of the

award or a certified copy thereof. Thus, recognition and enforcement of the award was not precluded by the New York Convention but admissible under the more favourable domestic law.

Case 402: Art. V (1) (b) NYC; Art. 36 (1) (b) MAL.
Germany: Highest Regional Court of Bavaria; 4Z Sch 50/99
16 March 2000
Original in German
Published in: Betriebs-Betrater, Beilage 12 zu Heft 2000 (RPS-2/2000), p. 15; NJW-RR 2001, p. 431;
DIS – Online Database on Arbitration Law – http:// www.dis-arb.de.

The decision, arising out of an action to have a foreign award declared enforceable, concerns the question of whether the Respondent was duly informed about the arbitration, or whether his due process rights were violated.

The dispute arose out of a sales contract between a Russian seller (Claimant) and a German buyer (Respondent) which provided for arbitration before the Court of Arbitration of the Chamber of Commerce of the Russian Federation. Since the buyer withheld part of the purchase price, invoking a set-off with a claim for damages, the seller initiated an arbitration proceeding. The buyer did not attend the oral hearing and a decision in favour of Claimant was rendered by default.

Claimant sought enforcement of that award in Germany under the bilateral Agreement on Trade and Maritime Shipping between Germany and Russia of 1958. According to this Agreement, recognition and enforcement of an arbitral award may only be refused if the award is either not considered final in the country where it was rendered or violates public policy in the country where enforcement is sought. Respondent requested that enforcement be denied because he was not duly summoned to the arbitration proceeding.

The Court decided that the award which was final and enforceable in Russia should not be recognized in Germany as the arbitral proceeding violated the principle of due process. The right to be heard is fundamental to public policy and, as recognized by article V (1) (b) New York Convention, encompasses the right to be informed and to be summoned to a hearing in due time. Since Claimant did not contest Respondent's allegation that he never received a notice of arbitration, and on the basis of the evidence, the Court concluded that Respondent's right to be heard was violated. The Russian court never demanded any evidence that Claimant actually received a notice of arbitration because, according to article 3 (1) of the Russian Law on International Arbitration, the dispatch of the notice was considered sufficient. Under German law, however, the legal fiction of receipt is not sufficient for valid notice. Moreover, the Court stated that a duly dispatched notice should have resulted in a successful delivery as Respondent did not change its place of business. Finally, the Court held that Respondent was not restricted to legal remedies against the award in the country where it was rendered. Since Claimant availed itself of enforcement procedures in Germany, Respondent must not be deprived of its remedies under the same law.

Case 403: Art. 16 (1) MAL
Germany: Highest Regional Court of Bavaria; 4Z SchH 6/99
15 December 1999
Original in German
Published in: DIS – Online Database on Arbitration Law – http:// www.dis-arb.de; commentary Rabe,
EWiR 2000, p. 359.

The decision, arising out of an action to have the composition of the tribunal corrected by a court, concerns the issue of the court's competence to review the jurisdiction of the arbitral tribunal.

According to section 1034 (2) German Code of Civil Procedure, if an arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal, placing the other party at a disadvantage, that other party may request a court to appoint the arbitrators in deviation from the agreed nomination procedure. In the case at issue, claimant, the Bavarian Football Association, had brought a claim for

damages before its own court of arbitration against two of its senior representatives for breach of their fiduciary duties, resulting in significant financial damages to claimant. Respondents had challenged the composition of the arbitral tribunal because, according to the arbitration rules of the Bavarian Football Association, the tribunal was appointed by a committee of that association. However, they had not challenged the jurisdiction of the arbitral tribunal pursuant to section 1040 (2) German Code of Civil Procedure (adapted from article 16 (2) MAL).

The Court dismissed respondent's motion for the appointment of the arbitral tribunal by the Court. It held that the judicial challenge of the composition of an arbitral tribunal is only admissible if the dispute before the arbitral tribunal falls within the scope of the arbitration clause. The Court recognized the arbitral tribunal's authority to rule on its own jurisdiction. However, it refused judicial assistance to arbitral proceedings that obviously did not fall within the terms of the submission to arbitration. The Court found that the applicable provision of the association's arbitration rules did not cover civil liabilities between the association and its representatives but only disputes deriving from membership status. Therefore, since the tribunal's jurisdiction did not cover the subject-matter, it was not necessary for the Court to order a new composition of the arbitral tribunal.

Case 404: Art. 8 (1) MAL
Germany: Federal Supreme Court; III ZR 33/00
14 September 2000
Original in German
Published in: Betriebs-Berater 2000, p. 2330; Betriebs-Berater, Beilage 6 zu Heft 31, p. 12 (with commentary Risse, p. 11); DIS – Online Database on Arbitration Law – http:// www.dis-arb.de.

The case concerns the "inoperability" of an arbitration agreement due to the lack of sufficient funds and questions whether it is possible for a party to rely on this defence.

The two German parties had entered into a contract for the installation of bathroom appliances and a separate arbitration agreement. During the course of the execution of the contract a dispute as to provisional payments arose which Defendant wanted to have resolved by the state courts. Plaintiff rejected that request and insisted on the existence of the arbitration agreement. No arbitration proceedings were, however, started by Defendant for cost reasons. A year later Plaintiff informed Defendant that he terminated the arbitration agreement for the lack of sufficient funds and sued Defendant for damages for breach of contract in the state courts.

The Trial Court and the Court of Appeals had rejected the action as inadmissible and referred the parties to arbitration in accordance with section 1032 (1) German Code of Civil Procedure (adapted from article 8 (1) MAL). The Federal Supreme Court reversed the decision.

The Court held that the arbitration agreement did not debar Plaintiff from bringing an action before a state court because the arbitration agreement had proven impracticable under the circumstances. According to section 1032 (1) German Code of Civil Procedure, a court is not required to dismiss a claim brought before it, if "the arbitration agreement is null and void, inoperative or incapable of being performed." The Court found that under the circumstances the arbitration agreement was incapable of being performed because Plaintiff was unable to afford the costs of arbitration. The only option for Plaintiff to pursue his claim was in state court, by means of legal aid for which he had qualified. Defendant had not been willing to advance the costs of arbitration. Furthermore, Plaintiff was not estopped from relying on the "incapable of being performed" exception because of his own previous reliance on the arbitration agreement as the use of a procedural means of defence is not in violation of good faith. Unlike Plaintiff, Defendant had not brought an action before a state court. As compared to the otherwise inevitable loss of Plaintiff's right to due process of law, legal proceedings did not constitute undue hardship to Defendant.

Finally, the Court stated that termination of the arbitration agreement is no longer required under the revised version of section 1032 to trigger the aforementioned exception. The right to legal process is not excluded merely because Plaintiff has caused his inability to pay his arbitration expenses. It would be excluded

only if Plaintiff had caused the inability in bad faith.

Case 405: Art.7 MAL
Germany: Oberlandesgericht Hamm; 8 SchH 1/98
10 February 1999
Original in German
Published in: Betriebs-Berater, Beilage 11 zu Heft 38 (RPS), p. 10; DIS – Online Database on Arbitration Law – http:// www.dis-arb.de.

The decision concerned the formal validity and the binding effect of an arbitration clause contained in the statute of an association.

The Claimant is a member of the Respondent, an association for the breeding of thoroughbred dogs. Respondent's rules provide that all disputes are to be settled by arbitration. Claimant initiated an action for damages against Respondent in state court. Respondent requested that the case be dismissed based on the existence of a valid arbitration agreement. Claimant applied for a declaratory judgment stating that the arbitration agreement was invalid.

The Oberlandesgericht Hamm dismissed the claim and held that the arbitration clause is binding upon Claimant. Irrespective of whether Claimant read the clause, took notice of it or even obtained a copy of the rules, Claimant did consent to them when it became a member. The rules govern the relationship between the association and its members. The Court stated that it is a characteristic of such rules that they apply equally to all the members, regardless of the knowledge which the members actually have of them. An additional individual agreement is not necessary in order to establish the rights and obligations regulated in the constitution of the Association.

The Court also rejected Claimants objection that the clause did not fulfil the necessary form requirements. It held that since the arbitration clause was contained in the rules of the association it did not have to meet the form requirements of § 1031 Abs. 5 ZPO for contractually agreed arbitration agreements, but rather, was governed by § 1066 ZPO. It stated that in the absence of an explicit statutory provision, and in view of the special interest of such an association to uniformly regulate its legal relationships with its members, the legislator could not have intended to heighten the formal requirements for this specific way of establishing an arbitration agreement.

Case 406: Art. 7 MAL
Germany: Bundesgerichtshof; II ZR 373/98
3 April 2000
Original in German
Published in: BGHZ 144, p. 146; NJW 2000, p. 1713; DB 2000, p. 1166; DIS – Online Database on Arbitration Law – http:// www.dis-arb.de; commentary Ebbing, NZG 2000, p. 898; commentary Goette, DStR 2000, p. 938; commentary Haar, SpuRt 2000, p. 139; commentary Prinz von Sachsen Gessaghe,
LM GG Art. 2 Nr. 74 (9/2000);

The decision by the Federal Supreme Court concerns the binding effect that an arbitration clause in the statute of an association can have on members that have not consented to it. Although the ruling is based on provisions of the German Code of Civil Procedure in force before the adaptation of the UNCITRAL Model Law (MAL), the decision is also relevant to cases decided pursuant to the MAL.

The plaintiff is a member of the registered association for the breeding of German Shepherd dogs. The Association, the defendant in these proceedings, introduced an arbitration clause into its rules through a majority vote by its members without Plaintiff's assent.

When a penalty was imposed on the Plaintiff by the Association, the Plaintiff filed a claim in the

Regional Court (LG Augsburg). The Court declined jurisdiction because of the arbitration clause contained in the rules. On appeal, the Higher Regional Court of Munich affirmed the decision (OLG München, 30 U 709/97; 09. February 1999). The Federal Supreme Court reversed and remanded the case to the Higher Regional Court.

The Supreme Court stated that the provisions of the Civil Code of Procedure in force before the adaptation of the MAL applied, since the arbitration clause had been included into the statute when these provisions were still in force.

The Court held that while an arbitration clause could generally be introduced into the rules of an association under § 1048 (now § 1066) of the German Code of Civil Procedure, this did not necessarily mean that a member of the Association would automatically be subject to the clause if it was later added without its assent. The Court stressed that the rights to be judged by one's lawful judge and to have recourse to state courts were constitutional rights. These constitutional rights could only be waived by a conscious decision based on the free will of the concerned party. The members who had assented to the arbitration clause had made this conscious decision. However, the dissenting members had not. A waiver of the mentioned constitutional rights could only be construed if a member still chose to remain a member of the Association even though it had the possibility of resigning its membership. The Court, however, emphasized that such a construction could not be contemplated in the case of an association whose members were not in a position to decide about their membership free from economic, social or other constraints. Since it was not possible to breed German Shepherd dogs outside the Defendant's Association, the factual consequences of resigning its membership would have been unbearable for the Plaintiff. Accordingly, the fact that the Plaintiff had remained a member of the Defendant's Association could not be construed as a waiver of its right to have recourse to state courts.

Case 407:
Germany: Bundesgerichtshof; III ZB 55/99
2 November 2000
Original in German
Published in: WM 2001, p. 104; DIS – Online Database on Arbitration Law – http:// www.dis-arb.de; commentary Kröll WuB 2001, p. 321.

The decision of the Federal Supreme Court of Germany (Bundesgerichtshof) concerns the question on which grounds a declaration of enforceability of an award on agreed terms may be refused.

The case arose out of a contract for the sale of shares by the Applicant to the Respondent. When a dispute arose, the parties started arbitration proceedings which resulted in a settlement recorded in the form of an arbitral award on agreed terms pursuant to section 1053 (1) of the German Code of Civil Procedure (ZPO) (adapted from Art. 30 MAL). In this settlement, the parties agreed that the Applicant would transfer all of its remaining shares to the Respondent. The price had been determined on the basis of a balance sheet audit. The Applicant transferred the shares and the Respondent paid two thirds of the agreed price. When the remaining third was not paid, the Applicant moved for a declaration of enforceability before the competent Higher Regional Court. In defence, the Respondent submitted that the balance sheets presented by the Applicant had been falsified.

The Higher Regional Court ruled that a damages claim based on the falsification of the balance sheets did not justify interference with a valid award and declared the award enforceable. On appeal, the Federal Supreme Court reversed and remanded the case to the Higher Regional Court for further trial.

The Federal Supreme Court held that grounds for the setting aside of the award under section 1059 (2) ZPO, which would lead to a denial of a declaration of enforceability under section 1060 (2) ZPO, could not be ruled out on the basis of the facts established by the Higher Regional Court.

The Court found itself barred from considering whether an avoidance of the settlement might justify a refusal of enforcement under section 1059 (2) (1) (b) ZPO [ML. Art. 36 (1) (a) (iv)] since that ground was not properly invoked by Respondent. It furthermore held that the enforcement of the award could also not be resisted on the basis of section 1059 (2) No.2 lit.b, ZPO, a violation of the ordre public. Under German law a violation of the ordre public is assumed if one of the grounds which justify a reopening of a case under section

580 ZPO exists. Criminal acts, as alleged by Respondent, only justify a reopening of a case according to section 581 ZPO if they already resulted in a conviction which was not the case.

The Court held, however, that in analogy to the provisions of section 1059 of the Code of Civil Procedure, an award may also be set aside if it is based on a wilful and intentional violation of public policy pursuant to section 826 of the German Civil Code. According to the submissions by the Respondent, this was the case here. Therefore, the Supreme Court remanded the case to the Higher Regional Court for further trial in order to ascertain the relevant facts.

Case 408: Art. 1(2), 20, 34 MAL
Germany: Higher Regional Court Düsseldorf; 6 Sch 2/99
23 March 2000
Original in German
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The decision, arising out of an action to set aside an award, concerns the determination the place of arbitration. Although the award made reference to the sole arbitrator's domicile in Düsseldorf, the Court declined its jurisdiction because it concluded the award was a foreign arbitral award.

The parties disputed the value of two business partnerships after the withdrawal by one of the parties. In the course of the negotiations over the value of the two partnerships, the parties agreed on a particular expert to conduct an appraisal. Both parties declared in separate written statements that they would accept the decision by the expert, acting as a single 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.

The Respondent filed an application to set aside the award before the Court where the award was executed.

The Court declined its own jurisdiction to rule on the validity of the award. It held that the arbitral award at issue was not a German domestic arbitral award but a foreign arbitral award.

The Court based its decision on the German arbitration law that was in effect until December 1997, since the new provisions, adapted from the MAL, became effective after the arbitration proceedings had commenced. Applying the standard of the previous law, the Court considered that the award was foreign because, according to the draft arbitration agreements exchanged by the parties, both parties intended the dispute to be decided under "Chapter 12 of the Swiss Federal Statute on Private International Law".

Moreover, the Court also held that it lacked jurisdiction under the current arbitration law. According to section 1025 (1) 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, the place of the last oral hearing was considered 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.

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