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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website (http://www.uncitral.org).

Issues 37 and 38 of CLOUT introduced several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are included, along with Internet addresses of translations in official United Nations language(s), where available in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

I. Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 557: MAL 7 (1); 8 (1); 11 (3); 11 (4); 11 (5)
Germany: Bayerisches Oberstes Landesgericht
4Z SchH 13/99
28 February 2000
Published in German: BetriebsBerater, Beilage 8 zu Heft 37/2000 (RPS), 15
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Comment by Kröll/Heidkamp, in: [2002] International Arbitration Law Review, N-41
Abstract prepared by Dr. Stefan Kröll and Marc-Oliver Heidkamp

[**keywords**: *appointment procedures; arbitral institutions; arbitration agreement; arbitration agreement—validity; arbitration clause; arbitrators—appointment of; courts; judicial assistance*]

This case concerns the effects of ambiguities in arbitration clauses. A construction contract contained an arbitration clause according to which "disputes are to be resolved by an arbitral tribunal of the chamber of handicrafts."[1] When a dispute arose between the parties of the contract, the claimant sought to commence two arbitral proceedings before the Munich Chamber of Handicrafts and the Chamber of Commerce of Schwaben respectively. Both Chambers decline to conduct arbitration proceedings. On the other hand, the respondent refused to appoint an arbitrator, and, pursuant to § 1032 German Code of Civil Procedure (hereinafter ZPO) based on article 8 (1) MAL, objected to the proceedings before a State Court given the existing arbitration clause. The claimant subsequently applied to the Bavarian Highest Regional Court, ex § 1035 ZPO consistent with article 11 MAL, for having an arbitral tribunal appointed by the Court or, alternatively, a declaration of inadmissibility of the arbitration.

The Court rejected the claimant's request to appoint an arbitration tribunal and declared the arbitration proceedings inadmissible. Since the arbitration clause did not specify which of the two chambers of handicraft was chosen, in fact, it was impossible to determine the competent tribunal. The Court thus declared the arbitration agreement void for uncertainty, irrespective of the fact that neither of the two chambers was actually engaged in arbitration or even willing to appoint an arbitrator.

Case 558 MAL 7 (1); 8
Germany: Bayerisches Oberstes Landesgericht
4Z SchH 6/01
25 October 2001
Published in German: [2002] Neue Juristische Wochenschrift—Rechtsprechungsreport 323
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll and Marc-Oliver Heidkamp

[**keywords**: *arbitration agreement; arbitration agreement—validity; arbitration clause; courts*]

[1] Original: "Bei Streitigkeiten entscheidet ein Schiedsgericht durch die Handwerkskammer."

The respondent in the arbitral proceedings was one of the founding partners of a Limited Partnership (hereinafter LP). According to a clause of a separate agreement, all disputes arising out of the LP as well as other agreements with new partners had to be referred to arbitration. When the respondent sold its shares in the LP to a third company, the claimant, one of the partners, considered this to be a violation of the non-competition clause of the LP agreement and commenced arbitration proceedings claiming damages. Before the arbitral tribunal was established, the respondent applied to the Bavarian Highest Regional Court for a declaration that the arbitration was inadmissible pursuant to § 1032 (2) of the German Code of Civil Procedure (hereinafter ZPO); after selling its shares in the LP, in fact, it was no longer bound by the arbitration agreement.

The Court rejected the application and concluded that the respondent was still bound by the arbitration agreement. The Court compared arbitration to non-competition agreements, and noted that neither one is time-bound nor is the relationship between the parties of a LP. In particular, the transfer of shares to a third party can lead to disputes concerning the relationship between the (former) partners, and is thus covered by the arbitration agreement.

Case 559: MAL 7 (1); 18; 36 (1) (a) (i); 36 (1) (a) (ii)
Germany: Oberlandesgericht Celle
8 Sch 3/01
2 October 2001 (affirmed by the Bundesgerichtshof, III ZB 6/02, 30 January 2003)
Published in German: DIS—Online Database on Arbitration Law—
http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll

[**keywords**: *arbitration agreement; arbitration agreemen—validity; arbitration clause; award—recognition and enforcement; due process; equal treatment; procedure; recognition—of award; severability*]

The parties of a production and delivery contract had agreed on dispute settlement by the "International Commercial Court of Arbitration of the Russian Chamber of Commerce or a specified International Court". An award having been rendered by an arbitral tribunal of the Russian Court of Arbitration, according to this clause, the claimant started an action for the award to be declared enforceable in Germany. The respondent, pursuant to article V (1) (a) of the New York Convention—consistent with article 36 (1) (a) (i) MAL—objected that the agreement was invalid. In its view it failed to clearly provide for arbitration as the exclusive dispute resolution mechanism and had anyway been terminated in conjunction with the main contract before the arbitral proceedings commenced. Furthermore the respondent alleged a violation of its right to be heard, since the arbitration tribunal had conducted the proceedings in Russian solely—language it was unable to understand—despite the fact that the contract itself was drafted in two languages. This was a violation of the principle of equal treatment of the parties embodied in § 1042 (1) of the German Code of Civil Procedure (hereinafter ZPO), based on article 18 MAL.

The Higher Regional Court, upheld by the German Supreme Court, deemed the arbitration agreement valid and its wording unequivocal, and declared the award enforceable. In the Court's view, the agreement did not provide for an alternative competence of another tribunal, but rather gave the parties the right to choose one or

the other. Both the Higher Regional Court and the Supreme Court found that such an option is admissible and does not render the arbitration clause ambiguous and invalid. In the absence of any further indication the claimant had the right to choose between the two ideally competent tribunals. Furthermore, in light of the doctrine of separability set forth in § 1040 ZPO, the arbitral tribunal's competence was not affected by the termination of the contract.

With respect to the alleged violation of the right to be heard, the Higher Regional Court held that the defendant had been given sufficient possibility to raise defences before the arbitral tribunal. Lacking any specific agreement of the parties to the contrary, it was self-evident that the Russian Court of Arbitration would conduct the arbitral proceedings in Russian. The Higher Regional Court emphasized that it was the defendant's obligation to obtain assistance from an interpreter in order to fully participate in the proceedings.

Case 560: MAL 16 (1); 16 (3); 34 (1); 34 (2) (a) (i); 34 (2) (a) (iii)
Germany: Bundesgerichtshof
III ZB 44/01
6 June 2002
Published in German: [2002] Neue Juristische Wochenschrift 3031; [2003] Neue Zeitschrift für Schiedsverfahren (German Arbitration Journal) 39
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll

[**keywords**: *arbitral awards; award; award—setting aside; competence; kompetenz-kompetenz*]

A dispute arose between the Saudi Arabian and the German party to a consultancy contract, which provided for arbitration in Germany. Upon challenge by the respondent, the arbitration tribunal declared not to have any jurisdiction as in its views the respondent had validly terminated the arbitration agreement. The claimant applied to the Stuttgart Higher Regional Court to have this decision set aside or, in the alternative, for a declaration that the tribunal had jurisdiction. The Court considered the application to be admissible but unfounded, since none of the enumerated grounds for the setting aside request were fulfilled. This was regardless of the fact that the tribunal's decision could be considered wrong.

The Supreme Court confirmed the decision. The Court held that the arbitration tribunal's decision was an award in the sense of § 1059 (1) of the German Code of Civil Procedure (hereinafter ZPO), consistent with article 34 (1) MAL, against which an action for setting aside was admissible. According to the kompetenz-kompetenz principle, the tribunal had jurisdiction to render such an award, which was binding on the parties and ended the arbitral proceedings. The Supreme Court held, however, that the application was not founded since none of the grounds for setting aside listed in § 1059 ZPO were fulfilled. According to the Court, § 1059 Abs. 2 Nr. 1 (a), based on article 34 (2) (a) (i) MAL, is only applicable to cases where there is no valid arbitration agreement, not to cases where the tribunal erroneously considers not to have jurisdiction. For the same reason the Supreme Court did not consider § 1059 Abs. 2 Nr. 1 c), based on article 34 (2) (a) (iii) MAL, applicable to the case. In its views, this provision only applies when the award deals with disputes not contemplated by the arbitration agreement, or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond

the scope of submission to arbitration. The Supreme Court deemed however that the party could still bring its claims to court, on one hand, and that the arbitration tribunal could still render a decision on the costs of the proceedings, on the other.

Case 561: MAL 7 (1); 8 (1)
Germany: Bundesgerichtshof
XII ZR 42/98
3 May 2000
Published in German: [2000] Neue Juristische Wochenschrift 2346; [2000] BetriebsBerater 1544
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Prof. Dr. Norbert Horn and Marc-Oliver Heidkamp

[**keywords**: *arbitration agreement; arbitration agreement—validity; arbitration clause; courts*]

The defendant bought a commercial building which was under lease to an association. As provided for by § 571 of the German Civil Code, the defendant, as new owner of the building, *ipso jure* became a party to the existing lease and was assigned the bank guaranty for the lease, that the tenant had provided to the previous owner.

When the association became insolvent and failed to pay the rent, the defendant resorted to the guaranty and received the outstanding payment from the bank. At the same time, a new tenant settled part of the outstanding rent as well. Thus, the defendant ended up receiving more than it was entitled to. Subsequently it transferred part of this surplus to the former owner of the building that was also claiming outstanding payments from the association. Only a modest part of the surplus was left to the bankruptcy administrator of the association. The administrator, however, claimed the payment of the whole surplus and applied to the State Court for relief. The defendant invoked the arbitration agreement contained in the lease agreement between the former owner and the association. The State Court upheld its defence, and so did the Supreme Court.

In particular, the Supreme Court recognized that an arbitration agreement is transferred to a legal successor. This is not contrary to § 571 of the German Civil Code, according to which a new tenancy agreement arises between the buyer of a building and the tenant, though with the same content of the former agreement between the seller and the tenant. According to the Supreme Court, therefore, the arbitration agreement became part of the new contract between the defendant and the association. Pursuant to § 1032 (1) of the German Code of Civil Procedure, based on article 8 (1) MAL, the Court thus dismissed the case and referred the parties to arbitration.

Case 562: MAL 16 (2); 34 (2) (a) (i); 34 (2) (a) (ii)
Germany: Hanseatisches Oberlandesgericht (Hamburg)
6 Sch 4/01
8 November 2001
Published in German: DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll and Marc-Oliver Heidkamp

[**keywords**: *arbitral awards; arbitral proceedings; arbitration agreement; arbitration agreement—validity; arbitration clause; award; award—setting aside; due process; jurisdiction; notice; waiver*]

The key issues of the case are if an arbitration agreement can be extended to a parent company acting as guarantor of its subsidiary and when the right to be heard can be considered violated.

The subsidiary of a parent company was bound by a sales contract that contained an arbitration clause. Following disagreement with the counterpart about the termination of the contract, the parent company declared that it would fulfill the contract in lieu of its subsidiary and would pay upon receiving the relevant documents. When no payment was made, the counterpart initiated arbitration proceedings. As the arbitrators appointed by the parties could not reach an agreement on a chairman, the latter was appointed by the Chamber of Commerce in Hamburg. The parent company was not informed about this appointment. Without any further involvement of the parties, the tribunal rendered an award in favor of the claimant of the arbitration proceedings.

Subsequently, the parent company, applied to the Hamburg Higher Regional Court for the award to be set aside pursuant to § 1059 (2) Nr. 1 (a) and (b) of the German Code of Civil Procedure (hereinafter ZPO), based on article 34 (2) (a) (i) and (ii) MAL. The Court held that the claimant, acting as a guarantor, was not bound by its subsidiary's agreement to arbitration, which was only valid between the original parties of the sales contract and their legal successors. As a matter of fact, this agreement could not bind the guarantor, since it was legally distinct from the main duties of the contract. Accordingly, the Court deemed that the deadline provided for in § 1040 (2) ZPO, based on article 16 (2) MAL, did not apply in this case, since the claimant had not been properly informed about the commencement of the arbitral proceedings. Therefore the Court allowed the claimant to challenge the jurisdiction of the arbitral tribunal in court proceedings.

Furthermore, the Court held that the claimant's right to be heard in accordance with the law had been infringed, as it was only informed about the constitution of a two-member tribunal, but not of a chairman being appointed. The three-member tribunal actually rendered the award. Consequently, the Court stated that the provision set forth in § 1059 (2) Nr. 1 (b) ZPO to set aside the award applied as well.

Case 563: MAL 6; 11 (3) (a); 11 (4) (a); 11 (5)
Germany: Bayerisches Oberstes Landesgericht
4Z SchH 9/01
16 January 2002
Published in German: [2002] Neue Juristische Wochenschrift—Rechtsprechungsreport 933
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll

[**keywords**: *appointment procedures; arbitrators—appointment of; courts; judicial assistance; jurisdiction*]

The dispute arose out of a construction contract providing for dispute settlement by a three-member arbitral tribunal. The arbitration agreement provided that each party was to appoint one arbitrator, with the chairman to be appointed by the President of the competent Regional Court. According to the arbitration agreement, §§ 1034 to 1066 of the German Code of Civil Procedure (hereinafter ZPO) should apply. When a dispute arose, the claimant initiated arbitral proceedings and appointed its arbitrator. Upon the respondent's failure to comply with the request to appoint its arbitrator, the claimant sought to have the arbitrator appointed by the Highest Regional Court, pursuant to § 1035 (4) ZPO, based on article 11 (4) MAL. Before the Court could decide on the application, the respondent nominated an arbitrator.

The Court held that the respondent's designation was late so that, under § 1035 (4) ZPO, the right to appoint the arbitrator had been transferred to the Court. The Court rejected the view that the parties' right to appoint an arbitrator would only cease when the Court's decision gained res judicata effect, since the ratio of the one-month time limit set forth in § 1035 (3) ZPO was to prevent dilatory tactics. The principle of legal certainty thus allowed the Court to appoint arbitrators after the deadline had expired. However, the Court held that the parties could still reach an agreement so that the defaulting party could still appoint its nominee.

Furthermore, the Court decided that it could minimize interference with the parties' autonomy if it appointed the arbitrator nominated by the defaulting party. Therefore, as the claimant did not raise any objections, the Court appointed the respondent's nominee as arbitrator.

Case 564: MAL 12; 13
Germany: Oberlandesgericht Dresden
11 Sch 2/01
22 February 2001
Published in German: BetriebsBerater, Beilage 6 zu Heft 31/2001, 18
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll and Marc-Oliver Heidkamp

[**keywords**: *appointment procedures; arbitrators—appointment of; arbitrators—challenge of; challenge; courts; judicial assistance*]

The dispute arose out of a sales contract for agricultural products which provided for arbitration under the Rules of the Commodity Exchange for Central Germany. The rules were ambiguous as to who (the CEO of the Commodity Exchange or each party) had the right to appoint the members of the tribunal.

Having the CEO appoint the tribunal, the claimant applied to the Higher Regional Court in Dresden to have the proceedings declared inadmissible, pursuant to § 1032 (2) of the German Code of Civil Procedure (hereinafter ZPO), since his nominee had not been appointed. The claimant further requested the Court to appoint his nominee.

The Court rejected both applications. As to the first one, the Court held that in light of § 1032 (1) ZPO, based on article 8 (1) MAL, an allegation that the arbitration agreement was null and void, inoperative or incapable of being performed was required to declare the proceedings inadmissible. Since no such claims had been made, the action was unsuccessful. Furthermore, the Court found that, absent any provision in the arbitration rules of the Commodity Exchange, challenge procedures were governed by § § 1036 and 1037 ZPO, based on articles 12 and 13 MAL. These provisions require that the arbitral tribunal as well as the challenged arbitrator be given the possibility to comment on the grounds for challenge relied upon by the party. As this had not been the case yet, the Higher Regional Court considered that the application to appoint an arbitrator had been filed before the claimant was entitled to do so.

Case 565: MAL 17
Germany: Oberlandesgericht Frankfurt
24 Sch 1/01
5 April 2001
Published in German: [2001] Neue Juristische Wochenschrift—Rechtsprechungsreport 1078
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Marc-Oliver Heidkamp

[**keywords**: *arbitral tribunal; interim measures; protective orders*]

The claimant, a professional track and field athlete, had been suspended by the International Association of Athletics Federations (IAAF) for negligent use of stimulant drugs. Following the suspension, the German Track and Field Federation (DLV—hereinafter the respondent), rejected his application to participate in a German championship tournament. The ensuing dispute concerning this decision led to a temporary injunction by a DLV arbitral tribunal ordering the respondent to authorize the claimant to take part in the tournament. Upon the claimant's request, the Higher Regional Court of Hamburg declared this order enforceable in expedited proceedings, according to § 1063 (3) and § 1041 (2) of the German Code of Civil Procedure (hereinafter ZPO). The claimant participated in the tournament and declared the dispute settled afterwards. The respondent opposed this declaration and asked the Court to reject the claimant's application to declare the tribunal's temporary injunction enforceable.

The Court defined the prerequisites under which a State Court can declare interim measures of protection, rendered by an arbitral tribunal in accordance with § 1041 (1) ZPO, enforceable.

First, the measures must be classified as interim measures or securing possible claims. In this particular case, the arbitral tribunal defined the measures as interim measures and the Court, as it is common practice of German Courts, found itself not entitled to evaluate the substance of the tribunal's decision. Even though the claim

was fulfilled by the interim measure this did not preclude defining the measure as interim or protective. The claimant's right could only be protected by way of permission to participate in the tournament.

Secondly, the interim measures of protection had to be rendered by an arbitral tribunal. The Court defined an arbitral tribunal as a separate body from the State Court system, empowered by the parties to settle a civil law dispute concerning pecuniary claims with a binding and final decision.

In this specific case, the respondent's procedural terms, agreed upon by both parties, stated that the tribunal's decision would be binding and final, regardless of the fact that the tribunal was a body of the Federation itself. Recourse to the State Court system was explicitly ruled out. Furthermore, the respondent had consented that any award rendered by the arbitral tribunal could be declared enforceable by State Courts in accordance with the provisions of the ZPO concerning arbitration. Thus, the DLV tribunal was to be considered an arbitral tribunal.

Finally, the principle of good faith, which is also applicable in proceedings according to 1041 (2) ZPO, would have been violated if the respondent, at a later time, had claimed that the tribunal was not an arbitral tribunal in the sense of 1041 (1) ZPO. At the same time the Court deemed that the claimant, by obeying the procedural terms set up by the respondent, had refrained from pursuing its rights before State Courts.

Index to this issue

I. Cases by jurisdiction

Germany

II. Cases by text and article

UNCITRAL Model Arbitration Law (MAL)

MAL 6

MAL 7 (1)

MAL 8

Case 558: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 6/01 (25 October 2001)*

MAL 8 (1)

Case 557: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 13/99 (28 February 2000)*

Case 561: *Germany: Bundesgerichtshof; XII ZR 42/98 (3 May 2000)*

MAL 11 (3)

Case 557: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 13/99 (28 February 2000)*

MAL 11 (3) (a)

Case 563: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 9/01 (16January 2002)*

MAL 11 (4)

Case 557: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 13/99 (28 February 2000)*

MAL 11 (4) (a)

Case 563: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 9/01 (16January 2002)*

MAL 11 (5)

Case 563: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 9/01 (16 January 2002)*

Case 557: *Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 13/99 (28 February 2000)*

MAL 12

Case 564: *Germany: Oberlandesgericht Dresden; 11 Sch 2/01 (22 February 2001)*

MAL 13

Case 564: *Germany: Oberlandesgericht Dresden; 11 Sch 2/01 (22 February 2001)*

MAL 16 (1)

Case 560: *Germany: Bundesgerichtshof; III ZB 44/01 (6 June 2002)*

MAL 16 (2)

Case 562: *Germany: Hanseatisches Oberlandesgericht (Hamburg); 6 Sch 4/01 (8 November 2001)*

MAL 16 (3)

Case 560: *Germany: Bundesgerichtshof; III ZB 44/01 (6 June 2002)*

MAL 17

Case 565: *Germany: Oberlandesgericht Frankfurt; 24 Sch 1/01 (5 April 2001)*

MAL 18

Case 559: *Germany: Oberlandesgericht Celle;8 Sch 3/01 (2 October 2001) (affirmed by the Bundesgerichtshof, III ZB 6/02, 30 January 2003)*

MAL 34 (1)

Case 560: *Germany: Bundesgerichtshof; III ZB 44/01 (6 June 2002)*

MAL 34 (2) (a) (i)

Case 560: *Germany: Bundesgerichtshof; III ZB 44/01 (6 June 2002)*

Case 562: *Germany: Hanseatisches Oberlandesgericht (Hamburg); 6 Sch 4/01 (8 November 2001)*

MAL 34 (2) (a) (ii)

Case 562: *Germany: Hanseatisches Oberlandesgericht (Hamburg); 6 Sch 4/01 (8 November 2001)*

MAL 34 (2) (a) (iii)

Case 560: *Germany: Bundesgerichtshof; III ZB 44/01 (6 June 2002)*

MAL 36 (1) (a) (i)

Case 559: *Germany: Oberlandesgericht Celle; 8 Sch 3/01 (2 October 2001) (affirmed by the Bundesgerichtshof, III ZB 6/02, 30 January 2003)*

MAL 36 (1) (a) (ii)

Case 559: *Germany: Oberlandesgericht Celle; 8 Sch 3/01 (2 October 2001) (affirmed by the Bundesgerichtshof, III ZB 6/02, 30 January 2003)*

III. Cases by keyword

UNCITRAL Model Arbitration Law (MAL)

appointment procedures

Case 557: MAL 7 (1); 8 (1); 11 (3); 11 (4); 11 (5)—*Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 13/99 (28 February 2000)*

Case 563: MAL 6; 11 (3) (a); 11 (4) (a); 11 (5)—*Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 9/01 (16 January 2002)*

Case 564: MAL 12; 13—*Germany: Oberlandesgericht Dresden; 11 Sch 2/01 (22 February 2001)*

arbitral awards

Case 560: MAL 16 (1); 16 (3); 34 (1); 34 (2) (a) (i); 34 (2) (a) (iii)—*Germany: Bundesgerichtshof; III ZB 44/01 (6 June 2002)*