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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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

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CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 653: MAL 11 (4)

Mexico, Thirteenth Civil Collegiate Court of the First Circuit, DC 827/2000-13
Bancomer, S.A. (successor and assignor of Almacenadora Bancomer, S.A. de C.V.) v. Samsung Telecommunications America, Inc.
25 January 2001
Original in Spanish
Unpublished
Abstract prepared by José María Abascal Zamora, National Correspondent, and Cecilia Flores Rueda

[**keywords**: *arbitration clause; public policy; arbitrator—appointment of; award*]

Bancomer S.A. lodged a procedure of *amparo* (i.e. *juicio de amparo*, a special remedy to protect individual constitutional rights) against a decision of a lower Court concerning the validity of an arbitration clause contained in a contract between its assignor and Samsung Telecommunications America, Inc. It alleged that the arbitration clause, which referred in general terms to the laws of the United Mexican States, violated public policy due to its legal uncertainty. It further alleged that when a party refused to appoint an arbitrator, the dispute could not be referred to arbitration.

The Court upheld the decision of the lower judge, stating that the arbitration clause, which explicitly referred to the laws of the United Mexican States, did not violate public policy. The Court further clarified that, in the event of a party's failure to appoint an arbitrator, the arbitrator shall be appointed in accordance with the provisions of article 1427, section IV, of the Commercial Code (consistent with art. 11 (4) MAL).

Case 654: MAL 8 (2); 11

Mexico: Eighth Civil District Court, Federal District, 168/99-single
Samsung Telecommunications America, Inc. v. Bancomer, S.A. (successor and assignor of Almacenadora Bancomer, S.A. de C.V.)
7 August 2001
Original in Spanish
Unpublished
Abstract prepared by José María Abascal Zamora, National Correspondent, and Cecilia Flores Rueda

[**keywords**: *arbitration clause; arbitration proceedings; arbitrator; jurisdiction*]

Samsung Telecommunications America, Inc. (hereinafter "the applicant") filed an application for the appointment of a replacement arbitrator, on the grounds that the court-appointed arbitrator for Bancomer S.A. (hereinafter "the respondent") had withdrawn and the respondent refused to appoint a replacement arbitrator.

At the Court's hearing, the respondent objected, among others, that the arbitration had not been consensually agreed upon: therefore the arbitration clause should be considered null and void: and there was a pending proceeding.

The Court rejected the respondent's allegations and appointed a replacement arbitrator, on the basis that the parties had agreed to refer their dispute to arbitration; that the question raised in front of the Court was the appointment of an arbitrator, not the validity of the arbitration clause; that an arbitral proceeding can be initiated even when an action is pending (art. 1424 of the Commercial Code, consistent with art. 8 MAL); and that, pursuant to article 1427 of the Commercial Code (corresponding to art. 11 MAL), the Court was required to appoint the replacement arbitrator, otherwise the parties would have not been able to settle their disputes in the forum agreed upon between them.

Case 655: MAL 34

Mexico: Seventh Civil Collegiate Court of the First Circuit, RC-1542/2001
Grupo Carce, S.A. de C.V. v. Pipetroniz, S.A. de C.V.
6 December 2001
Original in Spanish
Unpublished
Abstract prepared by José María Abascal Zamora, National Correspondent, and Cecilia Flores Rueda

[**keywords**: *arbitral tribunal; arbitrator; arbitral proceedings; award—setting aside; impartiality*]

Grupo Carce S.A. de C.V. (hereinafter "the appellant") lodged a procedure of *amparo* (i.e. *juicio de amparo*, a special remedy to protect individual constitutional rights) against a decision that overturned the setting aside of an arbitral award, issued to solve a dispute between the appellant and Pipetronix S.A. de C.V. (hereinafter "the respondent").

The Court upheld the decision of the lower Court, on the grounds that the setting aside proceedings must be limited to verifying the existence of one of the grounds provided for in article 1457 of the Commercial Code (corresponding to art. 34 MAL); that the respondent's allegation that the arbitrator lacked impartiality was already raised in the arbitral proceedings and decided by the institution in charge of administering the arbitration, and that, in any event, lack of impartiality of an arbitrator was not a ground covered by article 1457 of the Commercial Code. The Court further stated that an action to set aside an arbitral award was to be considered as a procedure to ascertain the existence and validity of the arbitral award itself, and not as a recourse against the award.

Case 656: 16 (3) MAL

Croatia: Constitutional Court; U-III-669-2003
27 October 2004
Original in Croatian
Published in Narodne novine, 157/04, 161/04, 164/04 (http://www.nn.hr); also available at: http://www.usud.hr
Abstract prepared by Alan Uzelac

[**keywords**: *arbitral tribunal; arbitration clause; award; jurisdiction*]

In an arbitration case between a Croatian company, the claimant, and an Italian company, the respondent, the arbitral tribunal of the Permanent Arbitration Court at the Croatian Chamber of Commerce (hereinafter "the PAC-CCC") issued, upon the respondent's request, a procedural order stating that it lacked jurisdiction (art. 16 (3) MAL). Prior to the arbitral tribunal's decision, the claimant initiated the proceedings before the Commercial Court in Zagreb, but the respondent pleaded lack of jurisdiction and invoked the arbitration clause. Upon his objection, the Commercial Court ruled that it did not have jurisdiction. The arbitration clause stated that disputes between the parties should be settled by an arbitral tribunal in Zagreb, Croatia, composed of three arbitrators appointed according to the rules of the International Chamber of Commerce under application of the substantive Croatian law. The arbitral tribunal found that this clause did not refer, either directly or indirectly, to the PAC-CCC, and that no reference to its rules could be found. Mention of the Rules of the International Chamber of Commerce in the clause most likely expressed the parties' intention to have future disputes adjudicated by an institutional arbitration of this organization. The tribunal also found that the statements of the parties in the proceedings before the commercial court were not relevant, as they did not positively prove the respondent's intention to amend the original arbitration clause.

The claimant initiated a constitutional complaint pursuant to article 29 of the Constitution, arguing that, due to the procedural order issued by the arbitral tribunal, his right to a legally established independent and impartial tribunal was violated, since he was now prevented to access any court or tribunal in Croatia. In its application, the claimant also complained about the lack of sufficient and appropriate grounds of the decision.

The Court majority granted the complaint and annulled the procedural order of the arbitral tribunal. The Court emphasized the importance of the reasons in decisions in which access to a court or arbitral tribunal is denied, in particular if no other legal remedy is available against such a decision. The judges further expressed the view that the previous case law of the Court, according to which no constitutional complaint against arbitral decisions was admissible, was to be abandoned. As a consequence of the arbitral order denying jurisdiction, no other court or tribunal in Croatia had jurisdiction to hear the case, and at the same time no other means of recourse against the order was available to the claimant. In such a situation, the order of the arbitral tribunal should have expressed all of the grounds to deny jurisdiction in order for the parties to identify who had jurisdiction over the case. The arbitral tribunal, in rendering its decision, should also have taken into account the intention of the parties and the trade usages. Therefore, the respondent argument

in the proceedings before the commercial court that "The Arbitration Court in Zagreb" had jurisdiction, had to be taken into account as an expression of his will.

Case 657: MAL 8 (1)

Croatia: High Commercial Court; Pž-7481/03
27 April 2004
Original in Croatian
Published (abstract) at http://www.vtsrh.hr (with comments in Lovrić, Ugovor o arbitraži u praksi trgovačkih sudova—Arbitration agreement in the case law of the commercial courts, Pravo u gospodarstvu, 2/2005, p. 41)
Abstract prepared by Alan Uzelac

[**keywords**: *arbitration agreement; arbitration clause; jurisdiction*]

In a proceeding before a commercial court, the court found, on its own motion, that an arbitration clause had been agreed upon by the parties and consequently declared its lack of jurisdiction and dismissed the action. The claimant appealed, and the High Commercial Court reversed the decision. It stated that, according to article 42 subs. 1 of the Law on Arbitration (relating to art. 8 (1) MAL), if the parties have agreed to submit a dispute to arbitration, the court before which the matter is brought may declare its lack of jurisdiction only if the respondent raises the objection and points to the existence of the arbitration agreement (or to the existence of an arbitration clause in a contract). This objection has to be raised no later than the preparatory hearing or, if no preparatory hearing is held, the main hearing before the end of the presentation of the statement of defence.

The commercial court, therefore, could neither declare its lack of jurisdiction, nor draw *ex officio* other consequences from article 42 abs. 1 of the Law on Arbitration (such as the annulment of all actions taken in the proceedings and the refusal to rule on the statement of claim). If the respondent fails to raise the objection to the jurisdiction of the tribunal before the end of the presentation of his statement of defence, this failure has to be treated as a concludent act by which the defendant has waived his right to have his rights and obligations determined before an arbitral tribunal.

Case 658: MAL 18

New Zealand: High Court (Commercial List) Auckland
Trustees of Rotoaria Forest Trust v. Attorney-General
30 November 1998
Published in English, [1999] 2 NZLR 452
Abstract prepared by Stephen Scalet

[**keywords**: *arbitral proceedings; arbitrators; award—setting aside*]

The plaintiff and the defendant had entered into a lease for a land to be used for forestry purposes. When the parties disagreed on the assessment of the land value the dispute was referred to arbitration. The plaintiff sought to set aside the award for breach of natural justice, alleging lack of opportunity to be heard as to the approach used by the arbitrators to measure the value of the land.

In considering the question of breach of natural justice, the court noted that article 18 of the Arbitration Act (based on art. 18 MAL) provides that parties shall

be treated with equality and that each party shall have the opportunity to present its case. The court qualified the plaintiff's denial of justice allegation as a challenge to the conduct of the arbitral proceedings. The court stated that the plaintiff, alleging surprise, must show: (a) that a reasonable litigant in the plaintiff's position would not have foreseen a reasoning on the part of the arbitral tribunal of the type laid down in the award and, (b) that with adequate notice it might have been possible to convince the arbitral tribunal to reach a different result. The court observed that, once a party could show "significant surprise", it is reasonable to assume that, lacking any evidence to the contrary, some procedural prejudice had actually occurred.

In the case concerned, the court took into account the length of the arbitration proceedings and the evidence submitted. It concluded that the award issued by the arbitral tribunal was a reasonably foreseeable outcome with sufficient evidentiary support. The court found that the plaintiff had enough opportunities to submit additional evidence and allegation, but decided not to do so. Accordingly, the court dismissed the application to set aside the award.

Case 659: MAL 4; 24 (1); 35 (1); 36 (1) (a) (iv)

Germany: Oberlandesgericht Naumburg
10 Sch 8/01
21 February 2002
Published in German: [2003] Neue Juristische Wochenschrift—Rechtsprechungsreport 71
DIS – Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Stefan Kröll, National Correspondent

[**keywords**: *arbitral proceedings; arbitral tribunal; award—enforcement of; court; due process; hearings; waiver*]

The decision, consequent to an action to have a domestic award declared enforceable (art. 35 (1) MAL), deals with the issue whether a defence alleging procedural irregularities is covered by section 1027 of the German code of civil procedure (hereinafter "ZPO"), corresponding to article 4 MAL.

The case concerned the payment of outstanding fees allegedly due to the claimant as a result of the consultancy services he provided to the respondent's law firm. During the arbitral proceedings, the claimant requested an oral hearing. The arbitrator, however, informed the parties that he would decide the case on the basis of documents only and set a time limit of three weeks for the respondent to reply to the request. After the deadline expired without the respondent providing any submission, the arbitrator rendered an award in favour of the claimant.

In the proceedings to have the award declared enforceable, the respondent raised the defence of procedural irregularities, referring to the grounds of article 1059 (2) Nr. 1 lit. d) ZPO (art. 36 (1) (a) (iv) MAL) and alleging the refusal of the arbitral tribunal to hold an oral hearing. The court found that, according to article 1027 ZPO (art. 4 MAL), the respondent was precluded from relying on this procedural irregularity, since he did not object immediately when the arbitrator announced his intention not to hold an oral hearing.

The court held that the refusal of an oral hearing did not constitute a violation of the right to be heard. The principle of oral hearing contained in article 128 ZPO did not apply in arbitral proceedings to the same extent as in court proceedings. Thus, in arbitral proceedings the right of the parties to be heard is respected if the parties have at least the possibility to file a statement of defence. The peculiar manner in which the right of defence is exercised (i.e. in an oral hearing instead of written submissions) cannot be unilaterally decided by a party (art. 24 (1) MAL).

Case 660: MAL 7 (1); 8 (1)

Germany: Oberlandesgericht Köln
18 U 83/00
9 November 2000
Published in German: [2001] Reports of the OLG Köln (OLGR) 227
DIS—Online Database on Arbitration Law—http://www.dis-arb.de
Abstract prepared by Stefan Kröll, National Correspondent, and Marc-Oliver Heidkamp

[**keywords**: *arbitration agreement; arbitration clause; court(s); jurisdiction*]

The issue raised in the case was whether the existence of an arbitration clause could constitute a defence in special summary proceedings, where the parties may only rely on documentary evidence.

The dispute arose out of a loan contract entered into between a limited partnership and one of its partners, which contained an arbitration clause. Since the partner had failed to pay the agreed interest on the loan, the limited partnership decided to terminate the loan and required its payment. The partnership brought its claim in special summary proceedings, where only documents were admitted as evidence. The respondent objected to the jurisdiction of the state court, referring to the arbitration agreement and to the contract, which had been produced as evidence. The arbitration agreement referred all disputes arising out of the partnership agreement to arbitration. The lower court, however, held that that dispute would not fall within the jurisdiction of the arbitral tribunal.

On appeal, the Higher Regional Court reversed the lower court's decision. The court held that the reference to disputes arising out of the partnership agreement was not limited to disputes concerning the agreement itself, but extended to all disputes related to the partnership.

The Court, referring to the recurrent jurisprudence of the German Supreme Court, held that the existence of an arbitration clause had to be invoked in the preliminary summary proceedings. Though the existence of an arbitration agreement cannot be raised as a defence in those special proceedings to get payment under a bill of exchange, this approach cannot be extended to other forms of summary proceedings, like the one considered by the court. It would be contrary to the parties' intention to force them to defend their case first in summary proceedings in the courts and only afterwards in the main proceedings before an arbitral tribunal. The court therefore dismissed the action and referred the parties to arbitration according to article 8 (1) MAL.

Case 661: MLEC 6; 7 (1) (a)

Singapore: High Court—Suit No. 594 of 2003
SM Integrated Transware Pte Ltd. v. Schenker Singapore (Pte) Ltd.
30 March 2005
Published in English: [2005] SGHC 58
Abstract prepared by Charles Lim, National Correspondent, with the assistance of Joyce Chao, Kessler Soh and Andrew Abraham

In this landmark decision, the Singapore High Court confirmed that a lease agreement concluded by an exchange of e-mails was to be considered binding between the parties.

Between October 2002 and February 2003, SMI (hereinafter "the plaintiff") was in negotiation with Schenker (hereinafter "the defendant") for the lease of a warehouse from the plaintiff. Throughout the negotiations and their subsequent dealings, both parties contacted each other by telephone and e-mail. They also had personal meetings. However, no correspondence in the form of letters was exchanged between them.

By February 2003, the parties had agreed on the essential terms of the lease. The terms of the agreement were contained (as the court found) in a draft Logistics Service Agreement ("LSA"), sent by e-mail by the plaintiff to the defendant in January 2003, and which the defendant accepted by e-mail in February of the same year. The lease was supposed to commence on 1 March 2003 and to last two years. A few days later, the defendant sought to repudiate the lease agreement when it was informed that one of its own clients would not be proceeding with a major logistics project. The plaintiff sought compensation from the defendant but, as no agreement on compensation was reached, the plaintiff sued the defendant in damages for breach of contract.

The defendant argued that there was no legally enforceable contract. In its view, the e-mail correspondence and the draft LSA did not comply with the conditions provided for in the Civil Law Act (Cap. 43) ("CLA"), requiring, for a lease of land to be enforceable, some written memorandum or note evidencing the terms of the agreement and the signature of the document by the person against whom the contract was to be enforced (section 6 (d) of the CLA[1]).

The judge, however, found that section 4 of the Electronic Transactions Act (Cap. 88) ("ETA")—ruling out the application of the Act in respect of certain transactions for the disposition of immovable property—was not to be interpreted in the sense that electronic communications could not satisfy the requirements of section 6 of the CLA. Everything depended on the correct construction of the latter provision. The judge found that the plaintiff's e-mail of January 2003 with its attachment, the draft LSA, and the defendant's e-mail reply accepting the terms of the draft LSA, amounted altogether to a memorandum in the meaning of article 6 of the CLA, as they contained the essential terms of the lease. In addition, also the writing requirement set forth in article 6 of the CLA was met. The expression "in writing"—according to the Interpretation Act—included, apart from printing, lithography, typewriting and photography, also any "other modes of representing or reproducing words or figures in visible form". The plaintiff's argument, which the

[1] Section 6 (d) of the CLA is a modern re-enactment of the UK Statute of Frauds 1677 (c 3).

judge found to be persuasive, was that although e-mails are files of binary information when transmitted or stored, they are in visible form when displayed on the screen of a computer monitor. The screen display would then satisfy the requirement of "writing" (art. 6 (1) MLEC). Furthermore, the sender or the recipient may also print out the message and any attachment related thereof. The judge, therefore, held that the e-mail correspondence, which constituted the memorandum of the contract, was to be considered "in writing".

Finally the judge observed that, under the common law, the concept of "signature" had been very loosely interpreted. The common law does not require handwritten signatures for the purpose of satisfying the signature requirements of section 6 (d) of the CLA. A typewritten or printed form of a signature are sufficient. The judge was of the view that there is no real distinction to be drawn between a typewritten form and a signature that has been typed onto an e-mail and forwarded with the e-mail to the intended recipient of that message. In the specific case, the judge also held that the signature requirement was met even though the sender's name was not typed into the e-mail, but only appeared in a line reading "From: [sender's name]…", as long as the sender knew that his name appeared at the head of every message next to his e-mail address so clearly that there could be no doubt that he was intended to be identified as the sender of the message (art. 7 (1) (a) MLEC).

Accordingly, the court held that there was a concluded lease between the plaintiff and the defendant, and awarded damages and costs to the plaintiff.

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III. *Cases by keyword*

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