United Nations A/CN.9/SER.C/ABSTRACTS/61

General Assembly

Distr.: General
5 February 2007

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.07-80579 (E) 290307 300307

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.

Printed in Austria

CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 662: MAL 14 (1); 15; 29; 34 (2)(a)(iv)
Germany: Saarländisches Oberlandesgericht
4 Sch 2/02
29 October 2002
Published in German
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent and Marc-Oliver Heidkamp

[**Keywords**: arbitration clause; arbitral tribunal; arbitrator(s); arbitrator - appointment of; arbitrator - challenge of; arbitrators - mandate; award; award - setting aside; due process; notice; procedure]

In the case at hand the main issue was how an arbitral tribunal should proceed in the presence of an obstructing arbitrator.

The dispute arose out of an employment contract containing an arbitration clause. After the hearing, the arbitrator appointed by the claimant did not sign the hearing transcript, nor did he submit his vote on the award. The chairman had informed the parties in November 2001 about the party appointed arbitrator's refusal to cooperate and had then declared in a letter of 8 February 2002 the tribunal's intention to render the award without the participation of the arbitrator appointed by the claimant. The award rendered the following day decided against the claimant. The latter started annulment proceedings, raising inter alia procedural objections under section 1059 (2) No. (1)(d) ZPO (article 34 (2)(a)(iv) MAL).

The court set aside the award, holding that the tribunal had violated the notification requirement under section 1052 (2) ZPO (article 29 MAL). According to this provision, the tribunal must notify the parties in advance of its intention to make an award without the involvement of an obstructing arbitrator. The court held that this notification must be given to the parties in a timely way so as to provide them with the opportunity to attempt to persuade the arbitrator to cooperate or, alternatively, to terminate his or her mandate pursuant to section 1038 (1), 1039 ZPO (articles 14 (1) and 15 MAL). One day's notice was found to be too short. The notification to the parties on November 2001 was found to be of no relevance, since the tribunal did not therein indicate its intention to proceed without the obstructing arbitrator.

Furthermore, the court held that this procedural irregularity also had the potential of affecting the outcome of the arbitration proceedings. Even though the two remaining arbitrators agreed upon the result, it could not be excluded that the award could have been different if the arbitrator had participated in the vote or a substitute arbitrator had been appointed.

As to the grounds for challenging the president of the tribunal (i.e. the fact that his appointment had come as a surprise to the parties, who from the circumstances of the case had expected a different arbitrator to be appointed as president; the fact that shortly before the issuance of the award the appointed president had expressed the view that the award would most probably be in favour of the claimant, which turned out to not to be the case), the death of the latter had rendered them irrelevant.

Case 663: MAL 16 (1); 33 (3); 34 (3)
Germany: Oberlandesgericht Stuttgart
1 Sch 22/01
4 June 2002
Published in German
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent and Marc-Oliver Heidkamp

[**Keywords**: arbitral tribunal; award; award - recognition and enforcement; award - setting aside; jurisdiction]

The main issue in this case was whether an arbitral tribunal had the power to render a supplementary award fixing the costs due by the claimant, while the setting aside proceedings against the main award were still pending.

In the arbitration proceedings the tribunal had denied jurisdiction (article 16 (1) MAL) and had ordered the claimant in the arbitration proceedings to pay the costs. The claimant initiated setting aside proceedings against the award before the Higher Regional Court in Stuttgart, and appealed the decision of the latter to the German Supreme Court. The appeal was still pending when the arbitral tribunal issued an additional award, fixing the cost of the proceedings (article 33 (3) MAL). The respondent applied to have the award declared enforceable. The claimant objected that the tribunal had no power to render the supplementary award, since the requirements provided for by section 1057 ZPO for a proper decision on costs were not met, to the extent that the costs themselves were not definite and that a revision procedure of the final award was still pending before a state judge.

The court rejected the claimant's allegations. It held that the arbitral tribunal was competent to assess the costs to be paid, even if the motion to set aside the award on which the decision as to costs was based had not been decided yet. The allegation that the underlying main award was invalid could not be invoked as a defence in proceedings to have the supplementary award declared enforceable. Otherwise there would be the risk that grounds for setting aside an award on the merits be invoked even after the time limit of section 1059 (3) CCP (article 34 (3) MAL) had expired. In case the award on the merits was set aside afterwards, the declaration of enforceability of the supplementary award on costs was to be considered invalid as well, but meanwhile the court found it was reasonable to assume the validity of the main award containing the basis for the assessment of costs.

In addition, the Court noted that the absence of the specification of the place of arbitration in the supplementary award did not render it unenforceable, since such place could be established on the basis of the indication contained in the main award. The Court emphasized that the arbitral tribunal was not only competent (on the basis of section 1057 ZPO), but also required to decide on costs. As a matter of principle, the latter decision has to be rendered after arbitral proceedings have ended, but can also be contained in the award, if the amount to be paid can already be assessed at that time (section 1057 ZPO). A declaration of enforceability of the first award is not required for the issuance of the decision on costs.

Case 664: MAL 7; 31; 35 (2)
Germany: Oberlandesgericht Stuttgart
1 Sch 21/01
23 January 2002
Published in German: [2002] Justiz 410
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent and Marc-Oliver Heidkamp

[**Keywords**: arbitration agreement; award; award - recognition and enforcement; form of arbitration agreement; formal requirements]

The decision concerned the distinction between arbitration and expert determination.

The dispute arose out of a contested claim for services of a lawyer. The parties agreed to submit the dispute for a final decision to the lawyers' association. The agreement provided for exclusion of the ordinary court jurisdiction and recognition by both parties of the "Schiedsgutachten" (expert determination) as final and enforceable. In the decision the lawyers association spoke of an "expert opinion – arbitral award" (Schiedsgutachten mit „nachfolgendem Schiedsspruch"). The claimant applied to have this decision declared enforceable in accordance with section 1064 (1) ZPO (article 35 (2) MAL), but the respondent objected that the association had not dealt with the subject matter submitted to it..

The Higher Regional Court considered the decision to be an arbitral award in the sense of the German Arbitration Law, i.e. sections 1025 et seq. ZPO (articles 1 et seq. MAL), and declared it enforceable. The court pointed to the following indicia. The award complied with the formal and substantive requirements set forth by section 1054 ZPO (article 31 MAL). A statement of the operative provisions as required for judgements by section 313 ZPO, was not required for arbitral awards. The question whether the parties agreed on arbitral proceedings or on an expert opinion was to be decided not only on the basis of the wording chosen by them, but also considering the nature and effect of the lawyers' association decision. Unlike an expert opinion, an award cannot be scrutinized on the merits by state courts. In the case at hand, the fact that the parties had agreed upon that the "expert opinion" should be final, binding and enforceable and expressly excluded any revision on the merits by state courts, led to the conclusion that they had agreed for deferring their disputes to arbitration.

The court declared the award enforceable as no further defences had been invoked.

Case 665: MAL 12 (2)
Germany: Oberlandesgericht Naumburg
10 SchH 3/01
19 December 2001
Published in German: [2003] Neue Zeitschrift für Schiedsverfahren (German Arbitration Journal) 135
Commented on by Kröll, 17 (6) Mealey's IAR
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: arbitrator(s); arbitrators - challenge of; knowledge; settlement]

The case was concerned with the grounds and the procedure for challenging an arbitrator.

The claimant based its challenge of the sole arbitrator on various connections – none of which was considered to be sufficient by the court – between the sole arbitrator and the other party.

The court held that the relevant standard for the challenge – to be derived from section 1036 (2), first sentence, ZPO (article 12 (2), first sentence MAL) in conjunction with the chosen arbitration rules – was not whether the arbitrator was in fact not impartial, but whether there were sufficient objective grounds that, from the standpoint of the challenging party, raised a reasonable doubt as to the arbitrator's impartiality and independence. The court made clear that despite the importance of the principle that arbitrators should be impartial, a finding of reasonable doubt should not be assumed too easily, given the disruption caused by any challenge which might hamper the parties' right to arbitration.

Applying this standard the court held that the arbitrator's financial participation in a public limited partnership established by the respondent's director did not justify a challenge. The limited partnership was purely motivated by economic purposes and used for investment projects without any personal relationship of the partners, as evidenced by the fact that the partners often changed. Furthermore, the respondent's director had no executive powers within the limited partnership. Moreover, the fact that the sole arbitrator and the respondent's managing director had previously acted as arbitrators together did not justify any doubts as to the sole arbitrator's independence.

The court also rejected the claimant's allegation that the failure of the arbitrator to disclose its relations to the parties, of itself, constituted a ground for challenge. It held that, although an infringement of the disclosure obligation might justify a challenge even in those cases where the non-disclosed fact would not of itself justify a challenge, this was not the case here. It found that, in the present case, the connections were so remote that they did not fall under the disclosure obligation. The court specified that the arbitrator's disclosure obligation only referred to such circumstances that he or she considered would give rise to reasonable doubts about his or her impartiality and independence.

As to the grounds raised only in the challenge proceedings, i.e. after the award had been rendered, the court considered them to be time barred. The court found that, once an award had been rendered, it is no longer possible to initiate challenge proceedings or to raise new grounds. The court based this finding on the

jurisprudence of the German Supreme Court, which ruled that in order to achieve legal certainty, the final settlement of a dispute was the latest possible time limit for challenging an arbitrator.

Case 666: MAL 35 (2)
Germany: Bundesgerichtshof
III ZB 68/02
25 September 2003
Published in German: SchiedsVZ 2003, 281 (note Kröll)
Published in English: Yearbook of International Commercial Arbitration 2004 (XXIX) 767
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: arbitration agreement; award; award - recognition and enforcement; courts; documents; formal requirements]

The case dealt with the formal requirements of an application to have a foreign arbitral award recognized and declared enforceable in Germany, and in particular with the relationship between the more lenient section 1064 (1) ZPO (article 35 (2) MAL) and article IV of the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'NYC').

An appeal was lodged against a decision of the Higher Regional Court of Hamburg, which had declared a Swedish award enforceable, notwithstanding the objections raised by the defendant that the documents submitted did not meet the requirements of article IV of the NYC. The claimant had in fact submitted translated copies of both the arbitration agreement and the award, certified by a Swedish honorary consul in Frankfurt. In the defendant's view, the certification of the copies by an honorary consul was not sufficient, since a certification by a regular consular officer was needed to fulfil the standards provided for by article IV of the NYC. The Higher Regional Court, relying on the more lenient provision of section 1064 (1) ZPO (article 35 (2) MAL), declared the award enforceable. It found that a certification given by an honorary consul also met the requirements of the law.

The Supreme Court held that the issue as to the existence of the formal requirements of an application to have a foreign award declared enforceable in Germany had to be decided according to section 1064 (1) ZPO (article 35 (2) MAL). The latter required the award to be produced either in original or in a certified copy. The certification, however, could be given even by the party's counsel in the proceedings.

The court based its argument on the most favourable provision clause contained in article VII NYC. According to the latter, an application for declaring an award enforceable could be based on national law, where more favourable. In that case, however, the reliance on the national law had to be in toto. Since, as a matter of principle, a state court can apply the rules of public international law – including article VII NYC – ex officio, a specific initiative of the party in this respect was not needed.

The appeal was rejected.

Case 667: MAL 32 (2); 34; 34 (2)(b)(ii)
Germany: Oberlandesgericht Köln
9 Sch 19/02
29 October 2002
Published in German
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: arbitral tribunal; award - setting aside; due process; ordre public; public policy]

The case concerned a decision on setting aside of an arbitral award for infringement of the right to be heard as part of the "ordre public".

The applicant, a dog breeder, had initiated arbitration proceedings contesting its expulsion from a dog breeders association (hereinafter 'the defendant'). Upon revocation of the expulsion by the defendant the applicant declared the arbitral proceedings terminated and asked the tribunal to impose all the costs on the defendant. The association – after first agreeing on a termination – later contended that the arbitral proceedings could only be terminated by an order of the arbitral tribunal according to section 1056 (2) CCP (Art 32 (2) MAL) which should impose all the costs on the applicant. Before the applicant had replied to the defendant's last submission the tribunal agreed on the termination of the proceedings alleging the failure of the parties to pursue them any further. Furthermore, it ordered the applicant to pay all arbitration costs.

The applicant initiated setting aside proceedings against these decisions alleging that its right to be heard had been violated and the decision on costs to be ill-founded. The association challenged the admissibility – pursuant to Sec. 1056 (2) CCP – of setting aside proceedings in relation to the termination order and considered the decision on costs to be correct.

The court rejected such objections and set aside the tribunal's decision on costs, deeming that an infringement of public policy in the sense of Sec. 1059 (2) no. 2 lit. b CCP (article 34 (2)(b)(ii) MAL) had occurred in the case at hand. It held that the decision on costs – as provided for by section 1057 (1) CCP – was an arbitral award for the purpose of section 1059 CCP and, as such, it could be subject to set aside proceedings while the declaration of termination had no value of its own, given that the proceedings were terminated by an agreement of the parties.

After stating that a mere error in an award does not constitute a ground for setting it aside, the court concluded that the decision in the present case was arbitrary to such an extent that public policy could be deemed to have been violated. It was so clearly based on completely distorted facts that its enforcement would violate generally accepted fundamental judicial principles. One of the central elements of the tribunal's decision was an alleged failure of the claimant to pursue the arbitration proceedings. However, it was undisputed between the parties that the proceedings had been jointly terminated and that there had been no need for the claimant to take any further action.

Finally, the fact that the award showed that the tribunal had never taken into account a submission received by the applicant was deemed to constitute a violation of public policy, as the right to be heard had been seriously infringed.

Case 668: MAL 35 (1); 36 (1)(a)(i); 36 (1)(a)(iv)
Germany: Kammergericht Berlin
23/29 Sch 21/01
6 May 2002
Published in German
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: arbitration agreement; award; award - recognition and enforcement; award - setting aside; court; defence; jurisdiction; public policy]

The case concerned the interpretation of a time-limit provision to render an award and the effects of its expiry in the following proceedings to have the same award declared enforceable in another country.

The defendant objected to an application for an Austrian award to be declared enforceable in Germany (article 35 (1) MAL), alleging the infringement of a provision contained in the arbitration agreement according to which the award had to be rendered within six months after the appointment of the tribunal's chairman. The defendant submitted that the award had been rendered after that time and therefore that the tribunal no longer had jurisdiction (article V (1)(a) 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, hereinafter 'NYC' – article 36 (1)(a)(i) MAL). The defendant pointed also to the fact that the award was based on incorrect proceedings in the sense of article V (1)(d) NYC (article 36 (1)(a)(iv) MAL). The defendant added that the enforcement of the award should be denied as setting aside proceedings against it had been initiated in Austria.

The court rejected the defences submitted and declared the award enforceable. It held that the time-limit provision contained in the arbitration agreement was purely hortatory. In the court's view, the parties should have made every effort to enable the tribunal to render the award within six months after the designation of the chairman of the tribunal. The time-limit provision, however, was not mandatory, and the fact that it had not been observed in the case at hand could not lead to the conclusion that the tribunal, when rendering the award, lacked jurisdiction.

The court further held that the fact that setting aside proceedings were already pending in Vienna did not justify reliance on the defence provided for in article V (1)(d) NYC (article 36 (1)(a)(iv) MAL), since the latter required the actual annulment of the award. The court refused to apply article VI NYC to stay the enforcement proceedings while waiting for the decision of the Austrian court.

Finally, the decision of the tribunal that the defendant had to pay the costs of the proceedings, including the specified costs of the arbitral proceedings, did not constitute a decision of the tribunal 'on its own affairs' contrary to public policy. It only concerned the distribution of costs between the parties. The application to enforce the award was thus granted.

Case 669: MAL 35 (1); 36 (1)(a)(iii); 36 (1)(b)(ii)
Germany: Oberlandesgericht Karlsruhe
9 Sch 1/02
29 November 2002
Original in German
Published in German
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: arbitration agreement; arbitration clause; arbitral tribunal; award; award - recognition and enforcement; due process; ordre pubic, public policy]

The decision arose out of an action to have an award, rendered in Romania, declared enforceable in Germany (article 35 (1) MAL).

The Court of Appeal held that article V (1)(c) of the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'NYC') (article 36 (1)(a)(iii) MAL) did not bar enforcement since, contrary to the defendant's allegation, the dispute was covered by an arbitration clause. Although the claimant did not actually sign the arbitration agreement, it could rely on the latter since it was the legal successor of the original party to the arbitration agreement.

Also the defence of violation of public policy, referred to in article V (2)(b) NYC (article 36 (1)(b)(ii) MAL), due to the alleged breach of the right to be heard, was rejected. The defendant claimed that it was not given an opportunity to be heard by the arbitral tribunal when the award was amended. The court acknowledged that German procedural law required that a party be heard also in respect of amendments. The court however did not agree that a violation of public policy could be invoked when the infringement of the right to be heard related to procedures aimed at merely correcting obvious spelling mistakes and other formal deficiencies. Furthermore, in the court's view, a violation of the right to be heard could only be relied upon where the respective party proved that its submissions would have actually influenced the outcome of the proceedings.

General reservations about the quality of the Romanian jurisprudence, on the contrary, could not prevent the recognition and enforcement of the award, at least unless specific and detailed allegations were produced. Moreover, it was irrelevant to ascertain whether the contested claim also existed under German law.

Finally, the court held that service of the award or declaration of enforceability in the country where the award was rendered was not a requirement for the recognition and enforcement in accordance with section 1061 ZPO.

Case 670: MAL 7; 35 (1); 35 (2)
Germany: Oberlandesgericht Köln
9 Sch 16/02
22 July 2002
Published in German
DIS – Online Database on Arbitration Law – http://www.dis-arb.de
Abstract prepared by Dr. Stefan Kröll, National Correspondent

[**Keywords**: arbitration agreement; award - recognition and enforcement; documents; form of arbitration agreement; formal requirements]

The case concerned the formal requirements of an application to have a foreign arbitral award declared enforceable in Germany.

In proceedings to have a Belgian award declared enforceable in Germany, the Higher Regional Court in Cologne ordered the applicant to furnish proof of the existence of a valid arbitration agreement as provided under article II 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter 'NYC') (article 7 MAL), by submitting the arbitration agreement in the form required by article IV (1)(b) and IV (2) NYC (article 35 (1) and (2) MAL). The applicant produced an invoice that contained a reference to arbitration on the front page and specified the rules on the back of the invoice in the form of standard conditions. The applicant further contended that all its invoices contained such provisions.

The court rejected the application pursuant to sections 1061, 1063, 1064 (3) ZPO, read in connection with articles II and IV NYC (articles 7 and 35 MAL), arguing that in the case at hand a valid arbitration agreement was missing.

The court held, on the one hand, that a party that relied on the exchange of documents for the conclusion of a valid arbitration agreement was not required to produce all the documents exchanged by both parties. On the other hand, the applicant had to produce all the letters and telegrams – as referred to in article II (2) NYC – received by the respondent. The mere submission of the party's own documents was deemed not to be sufficient to prove the conclusion of a valid arbitration agreement by way of the exchange of documents.

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arbitral tribunal

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Case 667: MAL 32 (2); 34 (2)(b)(ii) - *Germany: Oberlandesgericht Köln, 9 Sch 19/02 (29 October 2002)*

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