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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). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and 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/clout/showSearchDocument.do>).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is 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 of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law 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. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 895: MAL 6; 11(3); 11(5); 12; 16

Uganda: Centre for Arbitration and Dispute Resolution (CADER)

No. 01/06

17 March 2006

Original in English

Note: unpublished

[Keywords: *appointment of arbitrator by tribunal, impartiality and independence of arbitrator, grounds for challenge of arbitrator*]

Pursuant to an arbitration clause contained in a dealership agreement which did not specify the number of arbitrators to preside over the dispute resolution, the applicant informed the respondent of its intention to commence arbitration proceedings, and to nominate an arbitrator. The respondent objected that the parties had agreed to resolve their disputes amicably before resorting to arbitration, and rejected the applicant's choice of arbitrator. About two months later, the applicant filed an application with the Centre for Arbitration and Dispute Resolution (CADER), the authority specified in section 68(a) of the Arbitration and Conciliation Act of Uganda (ACA) [equivalent to MAL 6], requesting the appointment of the arbitrator. The respondent raised a preliminary objection that the arbitration clause had not been complied with.

The appointing authority overruled the respondent's objection on the grounds that it had not been timely raised but noted that section 16 ACA [equivalent to MAL 16] would provide the respondent an opportunity to raise the objection again before the arbitrator.

The appointing authority affirmed its authority to appoint the arbitrator(s) in case of the parties' failure to come to an agreement on that matter, pursuant to section 11(3) ACA [equivalent to MAL 11(3)]. Since the parties had not specified any qualifications of the arbitrator, the appointing authority looked for those elements that would help to secure the appointment of an independent and impartial arbitrator, according to section 11(6) ACA [equivalent to MAL 11(5)]. Therefore it considered the subject matter of the dispute, certification of an arbitrator by CADER, and availability of an arbitrator to complete the dispute resolution within the statutory period, as well as principles of natural justice. Following these criteria, the court appointed an arbitrator subject to the parties' right to challenge under section 12 ACA [equivalent to MAL 12].

Case 896: MAL 6; 11(3)(b); 11(5), 12(1)

Uganda: Centre for Arbitration and Dispute Resolution (CADER)

No. 07/05

30 January 2006

Original in English

Note: unpublished

[Keywords: *appointment of arbitrator by tribunal, impartiality and independence of arbitrator*]

The applicant filed an application with CADER seeking the default appointment of an arbitrator in a dispute with the respondents. At the hearing the respondents

submitted that they had failed to respond to the summons because they could not afford the filing fees. CADER noted that the respondents had the opportunity to respond to the applicant's nomination and agree to it, or to agree to the appointment of an arbitrator prior to filing their response to the application. The applicant and respondents could also agree (in writing) to delegate the appointing process to a third party (institution or person) whose appointment would be final and binding on the parties. Under these options, the respondents would have pre-empted the exercise of a statutory appointment by CADER, if their major concern was the inability to pay the fees.

As to the appointment of the arbitrator, CADER noted that the case fell under section 11(3)(b) ACA [equivalent to MAL 11(3)(b)]: since the parties had failed to come to an agreement on the name of the arbitrator, CADER was entitled to appoint it. CADER further noted that the appointing authority must take into consideration the qualifications of the arbitrator agreed by the parties. Furthermore, provisions of the ACA on impartiality and independence of the arbitrator needs always to be followed (section 12(1) ACA) [equivalent to MAL 12(1)]. In the case at hand the parties had not agreed on any qualification, therefore CADER's choice of the arbitrator considered the nature of the case and the availability of the nominated arbitrator to expeditiously deal with it.

Case 897: MAL 6; 11(3); 12(1)

Uganda: Centre for Arbitration and Dispute Resolution (CADER)

No. 03/05

30 September 2005

Original in English

Note: unpublished

[Keywords: *appointment of arbitrator by tribunal, qualifications of arbitrator, impartiality and independence of arbitrator*]

The applicant filed an application with CADER seeking the appointment of their nominated arbitrator. The respondent filed an affidavit opposing the appointment and arguing that the applicant's choice was expensive and not impartial. They proposed other arbitrators. However since the respondents did not pay the filing fees despite several reminders from CADER, their submissions were not considered as part of the record. Moreover, the procedure followed was not correct.

CADER referred to section 11(3) ACA [equivalent to MAL 11(3)] to justify its being entitled to appoint the arbitrator due to the parties' failure to appoint one. It further referred to section 11(6) ACA [equivalent to MAL 11(5)] in its consideration of the criteria for appointing the arbitrator, i.e. the qualifications required by the parties' agreement and all other considerations that could secure the appointment of an independent and impartial arbitrator.

Since no explicit qualifications had been mentioned in the parties' agreement, CADER considered the subject matter of the case as a factor in determining the arbitrator as well as the prospective arbitrator's impartiality and independence. CADER also noted that the arbitrators proposed by both parties were perceived as closely associated by the proposing party and thus not trusted by the counterpart. Therefore, it appointed a CADER-certified arbitrator, which had had a statutory duty under section 12(1) ACA [equivalent to MAL 12(1)] to disclose any

circumstances likely giving rise to justifiable doubts as to his impartiality or independence.

Case 898: MAL 6; 11(3); 12(1)

Uganda: Centre for Arbitration and Dispute Resolution (CADER)

No. 05/04

23 May 2005

Original in English

Note: unpublished

[Keywords: *appointment of arbitrator by parties, impartiality and independence of arbitrator, grounds for challenge of arbitrator*]

Pursuant to an arbitration clause which did not specify the number of arbitrators to preside over the arbitration proceedings, the applicant informed the respondent of its intent to nominate one arbitrator and to commence arbitration proceedings. The respondent rejected the applicant's choice, and proposed three alternative arbitrators. Eventually both parties agreed to request CADER to nominate a sole arbitrator.

However, although the applicant confirmed its acceptance of the arbitrator appointed by CADER, the respondent objected to the nomination. As a result, the applicant filed for the default appointment of the arbitrator CADER had nominated. However, before the scheduled hearing, the parties came to a written agreement on a different arbitrator for their dispute.

Noting that under the ACA the appointing authority could only appoint an arbitrator in case the parties failed to do so, CADER considered the parties' choice binding. It only stated that the arbitrator had a statutory duty under section 12(1) ACA [equivalent to MAL 12(1)] to disclose any circumstances likely giving rise to justifiable doubts as to his impartiality or independence.

Case 899: MAL 6; 11(3); 11(5); 12(1)

Uganda: Centre for Arbitration and Dispute Resolution (CADER)

No. 09/04

26 November 2004

Original in English

Note: unpublished

[Keywords: *appointment of arbitrator by tribunal, impartiality and independence of arbitrator, grounds for challenge of arbitrator*]

Following a dispute, the applicant informed the respondent of its intention to commence arbitration proceedings and nominated an arbitrator. As a matter of fact, the arbitration clause did not specify the number of arbitrators to preside over the proceedings. Since the respondent did not reply, the applicant filed an application with CADER seeking appointment of the nominated arbitrator. The day before the scheduled hearing, the respondent asked for a deferral until a later date, which CADER rejected.

The appointing authority referred to section 11(3) the ACA [equivalent to MAL 11(3)] to state its being entitled to appoint the arbitrator since the parties had failed to come to an agreement on that matter. In its decision, the appointing

authority applied section 11(6) ACA [equivalent to MAL 11(5)], which sets out the guidelines for appointing an arbitrator. In the case at hand, the parties had not specified any particular qualifications of the arbitrator. Therefore CADER considered that it was only bound to ensure that an independent and impartial arbitrator would be appointed. The applicant nominee's for arbitration was recognised as having those characteristics and it was thus appointed. The appointed arbitrator was however notified of the obligation to disclose any circumstances likely giving rise to justifiable doubts as to his impartiality or independence, according to section 12(1) ACA [equivalent to MAL 12(1)].

Case 900: MAL 6; 11(3)(b); 11(5); 12(1); 12(2)

Uganda: Centre for Arbitration and Dispute Resolution (CADER)

No. 10/04

15 July 2004

Original in English

Note: unpublished

[Keywords: *appointment of arbitrator by tribunal, impartiality and independence of arbitrator, grounds for challenge of arbitrator*]

Pursuant to a dispute resolution clause of a lease agreement, the applicant informed the respondent of its intention to commence arbitration proceedings, and to appoint an arbitrator. The respondent denied that there was a dispute between the parties, therefore there was no need for arbitration. Some time later, the applicant filed an application with CADER requesting it to appoint the nominated arbitrator as a sole arbitrator over the dispute.¹

CADER remarked that, according to section 11(3) ACA [equivalent to MAL 11(3)], it was entitled to appoint the arbitrator(s) to preside over the dispute since the parties had failed to come to an agreement. According to section 11(6) ACA [equivalent to MAL 11(5)], CADER was also bound to secure the appointment of an independent and impartial arbitrator. This was particularly important in light of section 12(2) ACA [equivalent to MAL 12(2)], which provided for challenging the arbitrators due to partiality or lack of independence. For this reason, since in the meantime, the arbitrator nominated by the applicant had been appointed executive director of CADER, "the rules of natural justice" precluded the appointment of the arbitrator indicated by the applicant. The applicant's second choice was appointed instead. In its decision, CADER remarked the statutory duty of the arbitrator, under section 12(1) ACA [equivalent to MAL 12(1)], to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

¹ Pursuant to Article 10(2) ACA, the default number of arbitrators in case of party disagreement is one [unlike MAL 10(2) (default being three arbitrators)].

Case 901: MAL 35(1)

Germany: Bayerisches Oberstes Landesgericht

4 Z Sch 10/03

28 May 2003

Published in German: <http://www.dis-arb.de> (DIS – Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords:** *arbitral awards, award, courts, enforcement*]

The parties to the arbitration were all members of a partnership active in the building industry. Arbitral proceedings commenced when a dispute over the defendant's right to participate in the partnership's management arose. The arbitral tribunal, sitting in Bavaria, issued an award declaring that the defendant's right had expired. The claimant then applied to the state courts to have the award declared enforceable. The application was contested by the defendant inter alia because of the claimant's lack of interest in the declaration of enforceability of a merely declaratory award.

The Court declared the award enforceable. It held that the claimant had a legitimate interest in the declaration of enforceability. Pursuant to Sec. 1059(3), fourth sentence CCP the declaration of enforceability excludes any further action for setting aside and therefore increases the award's finality.

Case 902: MAL 12(2)

Germany: Landgericht München II

2 OH 1728/01

27 June 2002

Published in German: <http://www.dis-arb.de> (DIS – Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent and Marc-Oliver Heidkamp

[**Keywords:** *arbitrators, arbitrators – challenge of, challenge*]

The decision was related to a challenge of an arbitrator. The main issue was whether publications by an arbitrator which are related to the ongoing arbitration represent a sufficient element to doubt of the impartiality of the arbitrator.

The dispute concerned the take over of a medical office and was to be settled by arbitration. The defendant challenged one of the arbitrators when it became aware of an article published by the arbitrator in a professional magazine. The article dealt with the pending arbitral proceedings in detail and expressed the arbitrator's opinion on the case and on the defendant though the parties were not named. It was written in an ironic style and contained disparaging expressions concerning the defendant.

The Court held that the challenge was founded. While the public presentation of the case, without disclosing its details, may not justify the presumption of the arbitrator's partiality, the way the case was described could raise doubts with an objective party about the arbitrator's impartiality. The Court held that descriptions and exaggerations, even when obviously used as a stylistic means, may be considered by a party as inappropriate and disparaging and therefore a challenge on account of the presumed partiality was founded.

Case 903: MAL 7(1); 8(1)

Germany: Oberlandesgericht Stuttgart

12 U 158/2000

6 March 2001

Published in German: <http://www.dis-arb.de> (DIS – Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords:** *arbitration agreement; claims; courts; validity*]

The decision, resulting from a challenge of a state court's jurisdiction, concerns the interpretation of an arbitration agreement.

The claimant, a German city, entered into a contract with a building company for the first slot of a public building project. In a separate annex the parties agreed that all disputes should be exclusively settled by arbitration. In a letter that followed the agreement on the same day, similar works for the second slot were also awarded to the defendant. Later on, the claimant gave several orders for additional works in connection with the building project all of which included extensive references to the first contract.

When a dispute arose about overpayments, the city filed a motion at the Regional Court of Tübingen for repayment. The Court rejecting the defendant's challenge of its jurisdiction granted the claimed payments. It held that the scope of the arbitration agreement was limited to the first contract whereas the separate letter concerning the second slot and all the orders that followed led to legally distinct contracts which were not covered by the arbitration agreement which was only related to the first contract.

Upon appeal, the Higher Regional Court of Stuttgart overruled the first instance court's decision and held that the arbitration agreement constituted a legal valid objection to the state court's jurisdiction. Thus it rejected the claim and referred the parties to arbitration.

In interpreting the arbitration agreement of the first contract the Court held that it covered all disputes between the parties arising from the project, including those relating to the second slot and the additional orders. While the arbitration agreement was a contract on a matter of procedure, its interpretation was governed by Secs. 133 and 157 Civil Code, the general rules on contract interpretation. The Court held that it was generally the will of the parties to an arbitration agreement to have all disputes arising in connection with the implementation of a contract uniformly and extensively settled by the arbitral tribunal. Thus, in the interests of the parties, disputes related to the additional orders were subject to the arbitration agreement as well. An allocation of the pending litigation partly to the arbitral tribunal and partly to the state courts was not appropriate. Furthermore, the parties' reference to the first contract in all the subsequent orders represented an extension of the former and thus justified an extensive interpretation of the arbitration agreement.