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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). 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.2). CLOUT documents are available on the UNCITRAL website (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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) and the UNCITRAL Model Arbitration Law (MAL)

Case 1060: MAL 31(2), NYC V(1)(d), (1)(e), (2)(b);
Germany: Oberlandesgericht Celle, 8 Sch 6/05
6 October 2005
Original in German
Published in German: www.dis-arb.de (DIS — Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent and Björn Bachirt

[**Keywords**: *arbitration clause, settlement, procedural default, reasoned awards, award — recognition and enforcement, ordre public, public policy, validity*]

The decision, arising out of an application to have a Russian award declared enforceable in Germany, concerns the defences of an incorrect procedure and the violation of public policy.

The dispute arose out of a contract for the sale of aluminum bars. The contract contained a penalty clause according to which the buyer had to pay 0.1 per cent of the contractual value for each day of delay in payment with a cap at 10 per cent of the total contract value.

Moreover, the contract contained the following arbitration clause: "Any dispute or disagreement, arising out of or in connection with the contract, should be settled by negotiation. If the parties fail to reach a settlement, any dispute shall be settled by the International Commercial Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow. The award of the Arbitration Court shall be binding and final upon the parties."

After delivery of the aluminum bars the buyer refused to pay the purchase price, claiming lack of conformity. After having sent two reminders to the buyer, the seller commenced arbitration without further negotiations and claimed payment of the purchase price. The buyer offered to return the aluminum bars to the seller. As the seller did not react, the buyer sold the aluminum bars and offered to transfer the sum to the seller's account. The seller insisted upon its claim for the full contract price.

The arbitral tribunal ordered the buyer to pay the price and to pay a penalty for late payment. In addition, the buyer was ordered to compensate the seller for the costs of the arbitration.

The seller sought recognition and enforcement of the arbitral award in Germany. The buyer objected and raised three grounds for refusal. The Higher Regional Court of Celle rejected all of them and declared the award enforceable.

First, the buyer submitted that the arbitral proceedings were not in accordance with the parties' agreement (Art. V para. 1 lit. d NYC) as no true efforts for an amicable settlement were made. The court rejected the respondents view that the parties were obliged to enter into formal negotiations prior to the arbitration proceedings. The provision in paragraph 8 of the contract did not establish a formal "pre-arbitral procedure" but merely contained a non-binding recommendation for negotiation. In

addition, due to the seller's insistence on full payment it was unlikely that the parties could reach a settlement.

The court also rejected the buyer's second defence that the award had not become binding upon the parties (Art. V para. 1 lit. e) NYC). The validity of the arbitral award has to be determined under the arbitration law of the country, where the award was made. According to Art. 31 para. 4 international commercial arbitration law of the Russian Federation, the arbitral tribunal has to submit a signed copy of the arbitration award to each party (Art. 31 para 2 MAL). The arbitral tribunal fulfilled this formal requirement by submitting the arbitral award to the counsel who represented the respondent during the arbitral proceedings.

As a third defence the buyer alleged that recognition and enforcement of the award would be contrary to public policy (Art. V para. 2 lit. b) NYC). The buyer submitted that the contractual penalty in paragraph 4 only covered the primary payment obligation, not the obligation to transfer the proceeds of the sale of the goods. In addition, the buyer considered the effective interest rate of 36.5 per cent to be a violation of German public policy. The court refused to review the tribunal's finding and interpretation in relation to the penalty clause, as it lacked any power to review an arbitral award on the merits. According to the court, international public policy is only affected if the applicable foreign law contradicts the most basic notions and principles of German law. Thus, a mere disproportionate contractual penalty only affects public policy if it leads to an abuse of economic power or jeopardizes the economic existence of the person obliged to pay the penalty. This requirement was not met in the case at issue.

Case 1061: MAL 34(1)
Germany: Bundesgerichtshof, III ZB 53/03
27 May 2004
Original in German
Published in German: ZIP 2005, 46 with comment Kröll ZIP 2005, 13;
www.dis-arb.de (DIS — Online Database on Arbitration Law)
English Abstract in [2006] Int.A.L.R. N-7

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *arbitral awards, arbitral tribunal, award — setting aside*]

The decision rendered in proceedings to have an "award" set aside deals with the requirements a dispute resolution body has to meet in order to constitute an arbitral tribunal.

The applicant was a member of a dog breeding association. When the applicant was excluded due to unauthorized use of the association's letterhead, she initiated arbitral proceedings before the association's so-called arbitral tribunal. The tribunal rendered an award in favour of the association. The award was, however, set aside by order of the Higher Regional Court of Cologne according to section 1059 (2) Nr. 2 lit. b German CCP.[1] The Court found that the exclusion from the association violated public policy as it was contrary to the principle of reasonableness. The

[1] Code of Civil Procedure (Zivilprozessrechtsordnung, ZPO).

sanction ordered was completely out of proportion to the applicant's misconduct and by no means covered by the association's statute.

Upon appeal the Federal Supreme Court set aside the lower court's order and declared the application to set aside the award inadmissible.

The Court emphasized that the application to set aside according to section 1059 CCP (Art. 34 MAL) required an arbitral award in the sense of sections 1025 ff CCP (i.e. a binding decision of an arbitral tribunal). The so-called arbitral tribunal in the case at hand, however, was a mere body of the association instead of an arbitral tribunal. As such, the decision was rather open to judicial review in accordance with the general rules of sections 253 ff CCP but may not be set aside pursuant to section 1059 CCP. The Court acknowledged that disputes regarding the membership in an association may be referred to an arbitral tribunal by virtue of the association's rules. A dispute resolution body, however, only constituted an arbitral tribunal in the sense of sections 1025 ff CCP if it was structurally unbiased, independent and appointed to resolve disputes under exclusion of state court jurisdiction. Arbitration was characterized as dispute resolution by a neutral third person.

The Court found that the association's tribunal did not meet this requirement for various reasons. First, according to the association's rules it was meant to decide on disputes between members of the association's bodies regarding their competences. This, however, was a mere administrative function rather than judicial dispute resolution. Furthermore, the association's rules did not guarantee a fair and unbiased trial for all parties. The tribunal's chairman had the power to decide on the procedure on his discretion and the parties should be heard in particular cases only. Moreover, the parties did not have equal influence on the constitution of the tribunal which was crucial to guarantee its impartiality. The members of the tribunal were appointed for a three year term by the association's general meeting. The right to vote in the general meeting, however, did not give the single member equal and sufficient influence on the constitution of the tribunal. Besides, the tribunal's decisions were to be enforced by the association's board of directors instead of a state controlled institution as in arbitration according to sections 1025 ff CCP.

Case 1062: MAL 12(2), 13
Germany: Oberlandesgericht Köln, 9 Sch (H) 22/03
2 April 2004
Original in German
Published in German: www.dis-arb.de (DIS — Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *arbitrators, arbitrators — challenge of, challenge, courts, judicial assistance*]

The decision on challenge of an arbitrator arose out of a case where a legal opinion expressed by an arbitrator in the arbitral proceedings may raise doubts as to his impartiality and independence.

The parties had entered into a construction contract providing for dispute settlement by arbitration pursuant to SGO-Bau, special arbitration rules used in the German construction industry. Disputes arose about claims for outstanding payments. The

applicant, being the defendant in the arbitral proceedings, denied the justification of these claims and raised counter-claims for delay and damages. Two separate arbitral proceedings between the parties were initiated for which the same tribunal was appointed. In the first arbitral proceedings, the tribunal heavily criticized the submission in relation to the amount of damages as being false and on the verge of procedural fraud, resulting in the challenge of the whole tribunal by the applicant in the second proceedings. Following the rejection of the challenge by the tribunal, the applicant therefore pursued his challenge before the Higher Regional Court of Cologne.

The Court found the application admissible, but rejected it as unfounded. The application was filed within the time limit set by Sec. 1037 (3) CCP. The Court, however, expressed doubts whether the grounds for challenge had been raised in time before the arbitral tribunal. While Sect. 1037 (2) CCP allows for a period of two weeks, the applicable SGO-Bau requires a party to raise grounds for challenge grounds to be raised without undue delay. The Court doubted whether the challenge, raised a period of 12 days after the hearing, still met this condition. The question was left open since the challenge was considered without merits anyway. According to Sec. 1036 (2) CCP, a challenge may only be granted if legitimate doubts regarding an arbitrator's independence and impartiality exist. The Court, held in this regard that the grounds for challenging an arbitrator resemble those for the challenge of a state court judge pursuant to Sec. 42 CCP (challenge of a state court judge), which requires the challenging party to establish at least a good case for the lack of confidence in the arbitrator's impartiality. As such, only grave violations of the objectivity requirement and inappropriate accusations may justify such an assumption of partiality and bias. The Court, however, found that such circumstances were not present in this case. An arbitral tribunal may express its legal opinion — even if unfavourable for a party — in clear terms, especially if this opinion is only preliminary. The Court felt that the statement of the chairman was clearly a borderline case and had to be evaluated in the perspective of the overall deliberations of the matter. The chairman doubted the correctness of auditing figures without blaming one of the parties directly for these shortcomings. This, the Court held, constituted an admissible and cautious evaluation of the matter. The Court emphasised that the application for challenge may not be used to scrutinize the tribunal's legal opinion unless there are pertinent grounds justifying the assertion that the tribunal has been other than impartial.

Case 1063: MAL 35(1), 36(1)(b)(ii), [NYC V(2)(b)]
Germany: Bayerisches Oberstes Landesgericht, 4Z Sch 17/03
20 November 2003
Original in German
Published in German: IHR 2004, 81; www.dis-arb.de (DIS — Online Database on Arbitration Law)
Published in English: Yearbook of Commercial Arbitration XXIX (2004) 771

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *arbitral awards, award, award — recognition and enforcement, enforcement, ordre public, public policy, recognition — of award*]

The decision concerns various aspects of the public policy defence in connection with the recognition and enforcement of a foreign award rendered contrary to an agreement by the parties who had settled the dispute out of court.

The dispute arose out of a sales contract between a Russian seller and a German buyer where the seller was claiming outstanding payments. The arbitral proceedings were initiated and soon after, the parties reached a settlement: the buyer was to pay a certain amount to the seller, at the receipt of which the seller would terminate the proceedings. Despite the buyer's payment, the seller did not terminate the proceedings as promised and obtained an award in his favour. The seller took proceedings to have the award declared enforceable in Germany. The defendant invoked the public policy defence to prevent the enforcement of the award.

The Court agreed with the defendant's objection and refused to declare the award enforceable in Germany on the basis of a violation of public policy (Sec. 1061 (1) CCP in connection with Art. V (2) lit. b NYC). The Court held that the standard for public policy was primarily provided by the lex fori. An award thus infringed the public policy if it violates a mandatory norm outside the parties' scope of action that regulates the basic principles of German state and economic life. The Court found the narrower concept of German international public policy to be applicable, which allowed greater deviations from these basic principles. Nevertheless, the Court considered the award to be contrary to public policy as it violated the most basic ideas of contractual good faith. Despite the settlement and the promise to inform the tribunal about it, the applicant had continued the proceedings and obtained an award, amounting to a serious abuse of the applicant's confidence in its contractual good faith. Thereby, the claimant violated the basic principles of fairness and confidence which are essential to international trade, and as such part of the international public policy. The defendant was not precluded from relying on the fact that the dispute had been settled before the award was rendered. The Court acknowledged the Supreme Court's finding that a party was precluded from invoking defences which it failed to put forward in time in legal remedies available in the award's country of origin. The Court held, however, that this position could not be extended to the denial of enforcement according to Art V (2) lit. b NYC.

Case 1064: MAL [16], 35(1)
Germany: Hanseatisches Oberlandesgericht in Bremen, 2 Sch 4/01
10 January 2002
Original in German
Published in German: www.dis-arb.de (DIS — Online Database on Arbitration Law)

Abstract prepared by Stefan Kröll, National Correspondent

[**Keywords**: *arbitration agreement*]

The dispute arising out of a challenge of a preliminary ruling in which the arbitral tribunal confirmed its jurisdiction concerns the conclusion of a formally valid arbitration agreement on the basis of a trade usage. It deals with the inclusion of an arbitration clause contained in the bill of lading into the main contract of carriage.

The claimant in the arbitral proceedings is the owner of a vessel that transported hazardous goods from Germany to Brazil. The goods, which had been sold by the respondent to a Brazilian party, caught on fire on board and caused damage to the ship. The claimant sought compensation for the loss suffered based on the respondent's alleged non-compliance with packaging requirements.

The parties disagreed on whether a valid contract of carriage had ever been concluded between them and whether the arbitration clause contained in the bill of lading was included into the contract. The arbitral tribunal affirmed its jurisdiction in a preliminary ruling pursuant to Sec. 1040 (3) CCP against which the applicant (the respondent in the arbitral proceedings) initiated setting aside proceedings in the courts.

The respondent alleged that the document exchanged between his forwarding agent and the claimant's port agent was a mere cargo notification whereas the contract of carriage was concluded with the Brazilian buyer. In addition, the arbitration clause contained in the bill of lading had not been validly agreed upon by the respondent as the formal requirements set forth in Sec. 1031 (2) CCP[2] were not met by the exchange of a bill of lading. The claimant, however, asserted that the bill of lading was, at least in copy forwarded to the claimant who did not object. According to the trade usage in the shipping business, the general terms and conditions contained in the bill of lading are included into the contract of carriage if a party does not object to them.

The Court rejected the application to set aside the preliminary ruling. The Court acknowledged the power of the arbitral tribunal to rule on its own jurisdiction by virtue of its *Kompetenz-Kompetenz* but emphasized that the decision on jurisdiction is subject to full scrutiny by the state courts.

The Court held first that the parties, represented by their agents, validly entered into a contract of carriage. While this contract did not contain an arbitration clause itself

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[2] § 1031 (2) is a relaxation of the "in-writing" requirement of § 1031 (1) (= Art. 7 (1) MAL) which has no equivalent in the MAL. It provides:

"The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and — if no objection was raised in good time — the contents of such document are considered to be part of the contract in accordance with common usage."

the arbitration clause in the bill of lading was validly included into it. According to the prevailing trade usage in the general cargo business, the content of the bill of lading, including its arbitration clause, becomes part of the main contract by way of uncontested acceptance if the bill of lading is validly served on a party and the party does not object in time. As under the relevant trade usage, silence is generally deemed as acceptance of the content of a bill of lading. It is irrelevant for the conclusion of a valid arbitration agreement under Sec. 1031 (2) CCP whether or not the parties ever discussed the inclusion of an arbitration clause and whether or not the bill of lading was meant to be a confirmation letter.

Case 1065: MAL 7, 8, NYC II
Federal Court of Australia
APC Logistics Pty Ltd v CJ Nutracon Pty Ltd [2007] FCA 136
16 February 2007
Original in English
Published in www.austlii.edu.au/au/cases/cth/FCA/2007/136.html

Abstract prepared by Bruno Zeller, National Correspondent, and Kristy Haining

These proceedings concerned the transportation of machinery and equipment from the US to Queensland. The issue to be determined was whether or not the parties had reached an agreement to arbitrate. There was extensive correspondence between all the parties considering whether mediation and then arbitration would be the dispute resolution methods used between the parties.

After citing the Full Federal Court's decision in *Pan Australian Shipping Pty Ltd v The Ship Comandate (No 2)* [2006] FCA 1112 with respect to the in-writing requirement for a valid arbitration agreement, the judge stated that a distinction may be seen to be drawn between the requirements of the common law as to the coming into effect of agreements and the requirements at the international level for enforcement of agreements. The latter require recognition of the agreement. It may be however that in some cases the exchange of correspondence may be relied upon both for the conclusion of a binding agreement having been reached by the parties and their overt acceptance of that conclusion.

It was held that there was no consensus on the correspondence between the parties to enter into an agreement to arbitrate. One of the parties, in their correspondence made it clear that in order for an agreement to arbitrate to be completed, there would be a formal agreement written and signed by the parties. Since this was not done, the judge found that there was no agreement to arbitrate between the parties.

Case 1066: MAL 8, NYC II
Federal Court of Australia
Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102
15 August 2005
Original in English
Published in www.austlii.edu.au/au/cases/cth/FCA/2005/1102.html

Abstract prepared by Bruno Zeller, national correspondent, and Kristy Haining

The applicant and first respondent entered into a contract for the purchase and sale of copra which contained an arbitration agreement. The applicant sought an order that the first respondent be restrained from invoking or taking any steps under the arbitration agreement.

The Court granted a stay of proceedings on issues to be determined by arbitration. The respondent attempted to argue that, due to its period of deregistration from the Cook Island company register, the contract, and subsequently arbitration agreement, ceased to exist and therefore there was no basis for a stay to be granted. It was held by Allsop J that to allow the respondent to avoid the stay provisions in this manner would not be consistent with the aims of the NY Convention.

However, in ordering the stay, the judge placed a condition that the arbitration not take place until the issue of whether a substantive contract actually exists be determined by the Federal Court. This was made in order to avoid inconsistent findings between arbitration and the court on the issue of whether a substantive contract (and arbitration agreement) were ever concluded.

Case 1067: NYC VI
New South Wales Supreme Court
Hallen v Angeldal [1999] NSWSC 552
10 June 1999
Original in English
Published in www.austlii.edu.au/au/cases/nsw/NSWSC/1999/552.html

Abstract prepared by Bruno Zeller, National Correspondent, and Kristy Haining

Prior to 19 February 1993, the plaintiffs and the defendants each owned four shares in a registered proprietary company in Australia that sold medical products. On 19 February 1993 the parties entered into a written agreement, in Swedish, whereby the plaintiffs agreed to transfer their shares to the defendants in consideration of a payment to be made by the defendants to the plaintiffs. A further express term was that should any dispute arise with regard to the validity, interpretation or suitability of the agreement, that would be decided by arbitration in Stockholm, Sweden, in accordance with the applicable law. A dispute arose and an award was rendered on 10 July 1996.

The plaintiffs sought to enforce the award in Australia and the defendants applied for an adjournment (or a stay, in the alternative) of the enforcement proceedings until the final determination of the Swedish court proceedings initiated by the defendants.

The defendants' application was dismissed, pursuant to article VI of the NY Convention that provides a court with the power to stay enforcement proceedings.

The Court determined that in order for a stay or adjournment of enforcement proceedings to be granted, a defendant must show that it has some reasonably arguable grounds which afford some prospects of success in the other proceedings. The defendant's could not satisfy that threshold test in the circumstances.