United Nations A/CN.9/SER.C/ABSTRACTS/119

General Assembly

Distr.: General
29 June 2012
English
Original: English and Spanish

**United Nations Commission on International Trade Law**

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

# Contents



V.12-54658 (E) 160712 170712

## 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: (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.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. 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 Law on International Commercial Arbitration (MAL)

**Case 1155: MAL 34(2)(b)(ii)**
Mexico: Third Civil District Court in the Federal District
22 April 2010
Non-final decision
Original in Spanish
Unpublished

Abstract prepared by: Cecilia Flores Rueda and Florence Richard

[Keywords: *public policy; set aside; no review of the merits; ground of law and fact*]

A government entity entered into two agreements with a supplier. By virtue of the first agreement, the supplier produced electric energy for the government entity to purchase it. According to the second agreement, the government entity sold to the supplier the fuel for the production of the electric energy set forth in the first agreement. In case of defective quality of the delivered fuel, the supplier should give notice to the government entity, which should propose deductions adjusted to the fuel quality. Such deductions should be reflected by the supplier in the electric energy fees.

The dispute arose because the parties disagreed on the quality and price of the fuel and the subsequent transfer by the supplier of the discounts granted by the government entity.

In order to settle the dispute, the issue was referred to arbitration, where the government entity was condemned. Later on, the government entity sought to set aside the arbitral award for violating public policy, alleging that the supplier had lost its right to rely on the non-conformity of the fuel. The government entity further alleged the incongruence and lack of reasoning of the arbitral award.

The court rejected to set aside the award for various reasons. First, the argument on the supplier's loss of contractual right to rely on the non-conformity of the fuel (lapsing) was dismissed by the arbitral tribunal. Furthermore, the issue of the lapsing of the supplier's contractual right is an issue concerning the merits of the dispute, which the courts are not allowed to review, due to the fact that courts are not authorized to revise comprehensively the arbitral award. According to the adopted general system, if the award violates public policy, the courts shall refuse its enforcement; however, if the award only infringes private interests, the courts shall order its enforcement. In the present case, the court considered that the supplier's loss of contractual right did not have any consequence on the fundamental interests of the society; as a consequence, the request for setting aside of the arbitral award was rejected.

As to the question of incongruence and lack of reasoning of the arbitral award, the court emphasized that "reasoning consists in displaying the analysis of the circumstances of the case, in order to adapt the legal provision to the concrete case". In the present award, the arbitrators provided the motives and reasoning of the arbitral award as well as the legal grounds of their decision. As a consequence, the

court rejected the government entity's argument alleging the arbitral award's lack of reasoning and dismissed accordingly the request for setting aside the arbitral award.

**Case 1156: MAL 34**
Mexico: Third Civil District Court in the Federal District (amparo indirecto 770/2007)
26 October 2007
Original in Spanish
Abstract prepared by: Cecilia Flores Rueda and Florence Richard

[Keywords: *setting aside; merits of the dispute*]

Two companies entered into an agreement for the provision of services of locomotives' maintenance. A dispute arose between the parties on the interpretation, scope and juridical effects of the agreement. In order to settle the dispute, the parties referred it to arbitration. When the award was rendered, the losing party (hereinafter the party) sought to set aside the award.

The party alleged that the interpretation of the contract by the arbitral tribunal was incorrect and illegal. However, the court decided that according to Article 1457 Mexican Commerce Code (Article 34 MAL), the party's arguments referred to the merits of the dispute and not to the grounds to set aside awards. As a consequence, the request of setting aside the award was rejected.

Unsatisfied with this decision, the party initiated an amparo proceeding (constitutional guaranties trial) alleging the following arguments.

The party stated the irrelevance of Article 1457 Mexican Commerce Code, because the court first had to examine the merits of the arbitral award. Likewise, the party alleged that the arbitral award was incorrect and illegal. Regarding that matter, the court considered that the alleged arguments regarded the merits of the dispute and not the form of the arbitral award. As a consequence, the court dismissed these arguments because Article 1457 sets forth the grounds to set aside an award and do not contemplate the merits of the dispute. Indeed, the awards shall only be challenged for grounds set forth by law and not in the case of incorrect or illegal awards.

The party also alleged that the arbitrator had decided over questions beyond its authority/jurisdiction, thus modifying the original terms of the agreement and stating a payment right in favour of a party and to the detriment of the other. The court dismissed this argument. The court noted that the arbitration tribunal had simply settled the dispute between the parties interpreting the agreement and determining that a party had the right to payment and the other the obligation to pay. This did not entail any modification of the agreement.

**Case 1157: MAL 34**
Spain: Madrid Provincial High Court, No. 512/2010
12 November 2010
Available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=5839943&links=&optimize=20110203&publicinterface=true
Original in Spanish

Abstract prepared by Maria del Pilar Perales Viscasillas, national correspondent

[Keywords: *arbitrability; arbitration clause; setting aside*]

The case concerned the partial annulment of an award made on 11 July 2009 under arbitration proceedings No. 15584/JRF before the International Chamber of Commerce of Paris on the basis of Arbitration Act No. 60/2003, 23 December 2003, article 41, paragraph 1(a) (art. 34 MAL). One party requested that the second part of the award should be annulled in view of the arbitral tribunal's lack of jurisdiction *ratione personae* in respect of some of the defendants and that those defendants should consequently be subject to the arbitral clause included in the contract (Arbitration Act, article 41, paragraph 1(a)). The opposing party considered that recourse to annulment should be refused, since it was not provided for under articles 40 and 41, paragraph 1(a), of the Arbitration Act. Moreover, the plea for annulment should be dismissed altogether and the validity of the partial ruling of the award *ratione personae* confirmed.

The Court considered, first, that there were no legal grounds for denying either the request for annulment or the annulment action, since no provision of the Arbitration Act conferred any powers on the Court to do so. A separate question was whether, if the annulment action as formulated was not covered by article 41, paragraph 1(a), of the Arbitration Act, that would inevitably entail the dismissal of the request, given that it was not based on any of the grounds set out in the exhaustive list appearing in article 41.

Secondly, the Court considered which of the grounds for annulment was relevant in the case before it. To that end, it considered the grounds set out in article 41, paragraph 1(a) and (d), of the Arbitration Act in the light of article 22 of the Act. The Court held that articles 22 and 41, paragraph 1, were inconsistent, which meant that those two provisions of the Act should be interpreted jointly in the light of Article 24, paragraph 1, of the Spanish Constitution. On that basis, the Court gave preference to article 41, paragraph 1(a), of the Act in the interests of consistency, although it considered subparagraph (d) more appropriate.

After considering the arguments of both parties, the arbitral award and the contract itself, the Court ruled that the defendants excluded from the arbitration — i.e. the guarantors in the sales contract — could not be considered to be parties to the contract or to have given their consent to the arbitration clause. The Court therefore dismissed the annulment action.

**Case 1158: MAL 4; 34**
Spain: Zaragoza Provincial High Court (Section 5), No. 50/2010
5 February 2010
Available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=5642069&links=&optimize=20100624&publicinterface=true
Original in Spanish

Abstract prepared by Maria del Pilar Perales Viscasillas, national correspondent

[Keywords: *procedure; procedural default; arbitrator; substantive law; procedure*]

The plaintiff applied for the annulment of an arbitral award made on 14 September 2009 under the rules of the Court of Arbitration of the Zaragoza Chamber of Commerce and Industry, on the basis of Arbitration Act No. 60/2003, 23 December 2003, article 41 paragraph 1(b) and (d) (art. 34 MAL), on the grounds that the arbitration procedure was not in conformity with the provisions of either article 32 or article 24 of the Act and, in addition, breached the principles of the right to trial and the adversary procedure required under Article 24 of the Spanish Constitution. The party contesting the validity of the award also considered that it had been denied the opportunity to submit two specific pieces of evidence, one a witness testimony and the other an expert testimony. This was detrimental to the defence, since the judge had ruled on the merits without having heard two pieces of evidence that he himself had admitted.

The Zaragoza Provincial High Court began by reviewing the general doctrine concerning the annulment of awards, noting that annulment was granted only in the case of non-observance of the formalities or basic principles of the arbitration process, meaning a breach of the essential principles of the right to a trial, the adversary procedure or the equality of the parties (or the principles relating to a decision contrary to public order, which did not apply here). It thus considered whether the "procedural" errors were such as to have resulted in the deprivation of the complainant's essential rights.

To that end, the Court assessed the conduct of the arbitrator in the course of the arbitral proceedings. One of the pieces of evidence had not been heard owing to the non-appearance of the witness and the second because the parties had agreed that the outside expert testimony had not been acceptable to one of the parties. Faced with this situation, the arbitrator had handed down a decision, dated 29 May 2009, based on article 42, paragraph 2, of the rules of the Court of Arbitration, extending the proceedings for two months to enable the expert testimony to be heard. If there was no report by a deadline fixed at 15 July 2009, the evidentiary period would be considered concluded and the arbitrator would proceed to make an award; which he did.

The Court held that the arbitrator's decision had not been questioned and that the company that now sought the annulment of the arbitral award had not contested it. The Court considered, in that connection, that article 6 of the Arbitration Act (art. 4 MAL) was directly modelled on the UNCITRAL Model Law and obliged parties to arbitration to lodge any claim of a violation of substantive rules in a direct and timely manner, as set out in the explanatory introduction to the Arbitration Act. It should therefore be considered that the failure to lodge such a claim amounted to a tacit waiver of the option of recourse.

In addition, however, the Court noted the following facts: that authority for administering the arbitration process lay with the arbitrators (Arbitration Act arts. 14, para. 2; 24; 25, para. 2; 30 and 32), as far as observance of the principles of equality, trial and the adversary procedure were concerned; that decisions on evidence were up to the arbitrators (Arbitration Act, art. 25, para. 2); and that the party concerned about the expert evidence that had not been heard had not availed itself of the right set out in the Arbitration Act to apply for judicial assistance in getting the evidence heard (art. 33).

**Case 1159: MAL 3**[1]
Spain: Madrid Provincial High Court (Section 9), No. 310/2006
6 October 2006
Available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=668997&links=&optimize=20061123&publicinterface=true
Original in Spanish

Abstract prepared by Maria del Pilar Perales Viscasillas, national correspondent

[Keywords: *notification*]

Appeal proceedings were brought against an order of the Madrid Court of First Instance of 12 January 2006 setting aside an arbitral award. The Madrid Provincial High Court also set aside the award, on the grounds that there had not been proper notification of the award owing to a lack of the necessary diligence to ensure that the notification had been received by the addressee. A registered fax had been sent to the domicile specified in the contract in which an arbitration clause had been agreed, but the postal service had left notification saying "Undelivered, house closed, notice mailed". The Court ruled that there had been no other attempt at notification of the award, particularly in view of the fact that, 12 days before the alleged notification of the award, the addressee had registered another domicile.

**Case 1160: MAL 3; 31(4)**[2]
Spain: Madrid Provincial High Court (Section 20), No. 248/2006
29 September 2006
Available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1074049&links=&optimize=20051222&publicinterface=true
Original in Spanish

Abstract prepared by Maria del Pilar Perales Viscasillas, national correspondent

[Keywords: *notification; formal requirements*]

A request for the enforcement of an arbitral award was set aside, on the grounds that there was no proof of the notification of the award to one of the parties, a requirement that was automatically subject to consideration by a court. The judge ruled that the attempt to send notification by registered post was acceptable only as a back-up measure, where an attempt had previously been made to provide notification in person or by electronic or telematic means, and where, following a

[1] Article 5, Arbitration Act 60/2003, 23 December 2003.
[2] Articles 5 and 37.7, Arbitration Act 60/2003, 23 December 2003.

reasonable enquiry, the addressee's domicile, habitual place of residence or place of business could not be established. The judge therefore held that sending notification of an award directly by registered post did not amount to a valid notification. He said that this interpretation was supported by the fact that, in the case in question, the consumer contract — promoting mobile telephone terminals for private customers — contained a printed arbitral agreement and identified an arbitration centre different from the residence of the consumer. He also stated that, if it had not been a question of the notification of an award, notification by registered post with return receipt requested could be effective, for example in the case of the notification of a debit balance where a particular domicile had been designated in the contract and a change of address had not been documented or communicated in accordance with the agreement.

**Case 1161: MAL 11(5)**
Spain: Madrid Commercial Court No. 1
5 July 2006
Original in Spanish

Abstract prepared by Maria del Pilar Perales Viscasillas, national correspondent

[Keywords: *appointment of arbitrators; arbitration agreement; appointment procedures; institutional arbitration*]

An application was made to the competent court — the Madrid Commercial Court — to appoint an arbitrator to resolve a corporate dispute. This was opposed by one of the parties, on the grounds that no arbitral agreement existed. Article 15, paragraph 5, of the Arbitration Act No. 60/2003, 23 December 2003 (Art. 11 (5) MAL), which states that a court could dismiss a request for the appointment of an arbitrator only when it deems, from the documents submitted, that no arbitral agreement exists, should therefore apply. The arbitral agreement forming part of the company statutes provided that "any question that may arise among the partners or between the partners and the company shall be submitted to arbitration in equity". The party that opposed the appointment of an arbitrator claimed that the arbitral agreement was void, since it permitted arbitrators to resolve legal questions through equity. The Court, citing the consolidated doctrine of Spanish case law, under which company arbitration in equity was permissible, said that equity was not the same as discretion, nor did it imply that a dispute could not be settled in accordance with the law: it simply meant that the criteria to be used by the arbitrator to decide the dispute could be applied more flexibly. The Court therefore concluded that "a disputed question of a purely legal nature and arbitration in equity are not mutually exclusive terms, the inclusion of which in the contract could invalidate the arbitral agreement".

Appeal proceedings were lodged against the Order (dated 17 April 2006).

In order to decide whether to allow appeal proceedings, the Court considered the scope of article 15, paragraph 5, of the Act and, more specifically, the meaning of the phrase concerning the existence of an arbitral agreement. On the basis of the explanatory introduction to the Act, the judge held that only exceptionally, in the event of the non-existence of an agreement, could a judge refuse a request for the appointment of arbitrators, namely where, prima facie, it could be deemed that in

reality no arbitration agreement existed, in which case the judge was required to carry out an assessment of the criteria for the validity of an agreement. Secondly, the Court considered what the point at issue was in the Order of 17 April 2006. It concluded that the submission to arbitration in equity related not to the existence of an agreement but to its scope. For that reason, the Order must be taken to be excluded from the remedy of appeal.

**Case 1162: MAL 3(1)(a)**
Spain: Madrid Provincial High Court (Section 11), No. 219/2005
27 October 2005
Available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1074049&links=&optimize=20051222&publicinterface=true
Original in Spanish

Abstract prepared by María del Pilar Perales Viscasillas, nacional correspondent

[Keywords: *notification; writings-receipt*]

After Constitutional Court Order No. 301/2005 of 5 July 2005 had declared inadmissible proceedings for action of unconstitutionality submitted by the Madrid Provincial High Court, the latter dismissed appeal proceedings against an order refusing enforcement of an arbitral award. The Provincial High Court considered that the award could not be enforced, because the notification of the award had not complied with article 5(a) of the Arbitration Act (Art. 3 (1)(a) MAL), which provided that "if none of these can be found after making a reasonable enquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it".

The Court said that the notification had not at any time reached the addressee and thereby failed to comply with the rule that a "reasonable enquiry" should be made to check on the addressee's whereabouts. The reason for this was that, in the case under consideration, there had been two notifications of the award delivered by the post office that had failed to comply with the requirement. One of them, sent by post with return receipt requested, read "Returned-deceased" and the other, also sent by post with return receipt request, had a handwritten notice saying "Absent". Such attempts to notify the addressee did not, in the Court's opinion, conform to the requirement of "reasonable enquiry", particularly since the addressee had not been advised that it could pick up the communication at the post office. The Court therefore considered that a further attempt at notification ought to have been made so that there could be proof of delivery.