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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: (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 1431: MAL 5

Nigeria: Court of Appeal, Abuja Judicial Division
No. CA/A/628/2011
Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation and Oando, 125 & 134 Limited
25 February 2014
Original in English
Unpublished

Abstract prepared by Afolabi Euba and Hamid Abdulkareem

[**Keywords**: *judicial intervention; jurisdiction*]

The parties had entered into a contract which provided for dispute settlement by arbitration. Two of the parties had issued an arbitration notice. Shortly after a partial award was rendered the third party which took part in the proceedings, sought an injunction to prevent the completion of the arbitration. The injunction was granted by the Federal High Court.

The Appeal court ("the court") interpreted Section 34 of the Nigerian Arbitration and Conciliation Act (equivalent to Article 5 MAL) which provides that "a Court shall not intervene in any matter governed by this Act except where so provided in this Act" as meaning that there should be no interference by a domestic court in an arbitration except in the specific instances provided for in the Act. The court held that a significant feature of arbitration is that parties are bound by "*the independent umpires whom they trust to settle their matters*". Thus, it implied that the parties would readily accept the arbitral tribunal's decisions.

The court rejected the argument that the Nigerian Constitution vests the courts with inherent powers that would enable a court to interfere in arbitration proceedings even outside the specific instances permitted in the Act. There could be no legal justification for (and it would be inequitable to maintain) an injunction when one party willingly surrendered itself to arbitration and had already pursued the legal avenue available by challenging the partial award in court, prior to the enforcement of the final award. The Federal High Court had wrongly exercised jurisdiction and the injunction was discharged.

Case 1432: MAL 8(1)
Denmark: Supreme Court (Højesteret)
H.D. 22 juni 2012 i sag 210/2011 (1. afd.)
Dregg v. Chr. Jensen Shipping A/S
22 June 2012
Original in Danish
Published in Danish: Ugeskrift for Retsvæsen 2012 p. 3001 et seq.

Abstract prepared by Joseph Lookofsky, national correspondent

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

In October 2007, "CJ", a company engaged in shipping activity in Denmark, entered into a Standard Liner Agency Agreement ("the Agency Agreement") with "D", an Icelandic ship owner.

CJ's obligations under the Agency Agreement included the usual tasks of a shipping agency, such as customs clearance, purchases, communication, etc. CJ was to be paid an agency fee of 7,500 DKR for each call made in a Danish port by a certain vessel subject to the Agreement. The Agreement, which was subject to termination upon 6-month notice, also contained the following applicable law and jurisdiction clause:

> "7.00 Jurisdiction. This Agency Agreement is governed by English Law and any claim or dispute arising hereunder during its performance or in connection herewith shall be submitted to arbitration in Copenhagen in accordance with the rules of the Copenhagen Maritime Arbitrators Association in force and effective at the time of arbitration".

In December 2009, D notified CJ that the Agency Agreement was terminated and, about a week later, D informed CJ of its decision to use another agent in Denmark.

Claiming that the termination was unjustified, CJ initiated court proceedings against D in the Danish Maritime and Commercial Court, demanding the payment by D of the agency fee which CJ alleged to be applicable under the Agency Agreement with respect to a freight contract between CJ and a third party. D argued, however, that the court should dismiss the claim and refer the parties to arbitration in accordance with the provisions of the Agency Agreement.

During the court proceedings, it was agreed that no association such as the "Copenhagen Maritime Arbitrators Association" ever existed in Denmark.

As regards the jurisdictional issue, the Maritime and Commercial Court noted that, pursuant to the Agency Agreement, CJ and D had agreed on arbitration but also that there was no association called the Copenhagen Maritime Arbitrators Association in Denmark. The Court declared that it was unable to "fill in" the terms of the Agency Agreement on this point as no Danish organization could provide assistance specifically regarding arbitration in the maritime domain. Referring to § 8(1) of the Danish Arbitration Act [which corresponds to Article 8(1) MAL], the Court held that the rules of the arbitration proceedings to be applied could not be determined with the necessary clarity and that arbitration proceedings could therefore not proceed. On this basis, the Court declared itself competent to decide on the merits of the case.

Upon appeal of this decision, the Supreme Court of Denmark (*Højesteret*) upheld the decision of the Maritime and Commercial Court.

Case 1433: MAL 34(2)(b)(ii)
New Zealand: The High Court of New Zealand, Auckland Registry
CIV-2011-404-1289; CIV-2011-404-2012; CIV-2011-404-6843
Ironsands Investments Ltd v. Toward Industries Ltd
8 June 2012
Published in English: [2012] NZHC 1277

Abstract prepared by Daniel Kalderimis, national correspondent

[**Keywords**: *arbitral awards; public policy; award-setting aside*]

This case concerned an application to oppose an application to set aside two arbitral awards based on public policy grounds pursuant to Article 34(2)(b)(ii) of the First Schedule to the Arbitration Act 1996 (the *Act*), which is equivalent to Article 34(2)(b)(ii) MAL.

C.K.I. Ltd and its subsidiary I.I. Ltd (together *CKI*) entered into an agreement to buy shares in NZS Ltd (NZS). The contract required CKI to use all reasonable endeavours to obtain the consent of the New Zealand Overseas Investment Office (*OIO*) to purchase the shares. CKI failed to acquire consent from the OIO. NZS subsequently asserted that CKI had breached the contract by failing to use all reasonable endeavours to obtain OIO consent. The parties agreed to arbitrate the dispute.

Following the arbitration, CKI sought to have two arbitral awards, an award on liability and a subsequent award on the quantum, set aside by the New Zealand High Court, alleging a violation of public policy.

The First Schedule of the Act is based upon the MAL and generally follows its numbering. As a New Zealand innovation, Article 34(6) of the First Schedule provides, without limiting the generality of Article 34(2)(b)(ii) MAL, that an award is in conflict with the public policy of New Zealand if the making of the award was induced or affected by fraud or corruption, or if a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of an award.

As regards the award on liability, CKI alleged that NZS had failed to disclose documents which were supposedly relevant to the award and that this failure resulted in "(equitable) fraud and corruption (of process)". The Court dismissed this claim, holding that, for the purposes of Article 34(6)(a) of the First Schedule, the concept of "fraud" does not incorporate equitable or constructive fraud, but requires actual dishonesty; and the concept of "corruption" does not extend to alleged corruption of process, but requires the perversion of personal rather than procedural integrity.

As regards the award on quantum, CKI alleged that the arbitrator's assessment of losses suffered by NZS was made in the absence of probative evidence which was contrary to natural justice. The Court held that according to Article 19(2) of the First Schedule, it is a matter for the arbitrator to determine the weight to be given to any piece of evidence. In any event, even if the findings were not supported by

evidence, this could not amount to a violation of natural justice as there is no absolute rule requiring an arbitrator's findings to be based on probative evidence. In reaching this conclusion the Court referred to cl 5(10) of the Second Schedule to the Act, which is a set of optional non-MAL rules. The effect of that provision is expressly to prohibit any appeal on the ground that the award was not supported by sufficient or substantial evidence. The Court considered that (although the Second Schedule did not apply to the arbitration at issue) it would be strange in principle if appeals expressly prohibited by cl 5(10) could be raised through a set-aside application on the grounds that a breach of natural justice had occurred.[1]

Case 1434: MAL 8(1)
Kenya: High Court (Milimani Commercial Courts)
No. 461 of 2008
Governors Balloon Safaris Ltd v. Skyship Company Ltd and County Council of Trans Mara
11 September 2008
Original in English
Published in Kenya Law Reports: www.kenyalaw.org

Abstract prepared by Paul Ngotho

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

The plaintiff entered into a contract with a local authority whereby it was agreed that the plaintiff had the exclusive right to operate a passenger hot air balloon service within a certain area of the Masai Mara Reserve. Under the agreement, which included an arbitration clause, the local authority covenanted not to permit the establishment of new hot air ballooning bases with a 15 kilometres radius of the plaintiff's camp.

Claiming that the local authority was in breach of contract for granting license to a new hot air balloon service based within the 15 kilometres radius of the plaintiff's camp, the plaintiff sued jointly and severally the local authority (hereinafter the second defendant) as well as the company in charge of the new service (hereinafter the first defendant) for inducing the second defendant to breach the contract.

The second defendant applied for a stay of the proceedings pending arbitration. The plaintiff objected on the grounds that the litigation involved a third party, which could not be severed from the dispute, and that a stay would lead to two parallel proceedings, which would bring judicial procedure into disrepute.

The court considered the ruling of Justice McNair, J. in *Halifax Overseas Freighters Ltd vs. Ramo Export*, a case where an arbitration clause was included in the charter party, but not in the bills of lading. When one of the parties applied for a stay in the proceedings, relying on the arbitration clause, the stay was rejected on the grounds that "... our whole judicial procedure would be brought into disrepute ... there is a serious possibility of getting conflicting questions of fact decided by two different

[1] The decision usefully confirms that art 34(2)(b)(ii) does not, due to art 34(6), establish a lower threshold for setting aside awards on grounds of public policy. In so doing, it adopts a different approach to that suggested in an earlier High Court decision in the same case (CIV-2010-404-004879, 8 July 2011, Courtney J).

tribunals". The court also cited Lord Pearson, L.J., in the same case, according to which "there is a conflict between two well established principles; (i.e. first) parties should normally be held to their contractual agreements (and second) a multiplicity of proceedings is highly undesirable and would increase costs".

The court thus found that there were special circumstances for refusing a stay and that "it is in the interest of justice and judicial process that the suit should be heard as a whole and that the court has the discretion to stay proceedings in spite of the provisions in s.6. (1)(a) and (b) of the Arbitration Act (equivalent to Article 8 (1) MAL).

The application for stay was thus rejected.

Case 1435: MAL 8(1)
Kenya: High Court
No. 1281 of 2006
Alfred Wekesa Sambu and others v. Mohammed Hatity and others
16 May 2007
Original in English
Published in Kenya Law Reports: www.kenyalaw.org

Abstract prepared by Paul Ngotho

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

The plaintiffs were aggrieved by a decision of the National Executive Council of Kenya Football Federation (KFF) to remove them from the various offices and applied to court for orders to declare the decision null and void, alleging that the meeting at which such decision had been made was "illegal".

The court, after noting a self-contradictory affidavit by one of the plaintiffs that "the existence of an Arbitration Clause should not and does not oust the jurisdiction of the courts but should be invoked as dispute resolution mechanisms", found that members of KFF were bound by a provision in the federation's constitution to refer such disputes to arbitration under the Arbitration Act, Cap 49 of the Laws of Kenya. Furthermore, KFF, as a member of FIFA, was under the obligation to ensure that such disputes were resolved by arbitration.

The court remarked that "where members of an organisation have chosen … to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process". The court further stated that "the courts should encourage, as far as possible, settlement of disputes outside of the court process". Accordingly, the judge, invoking s. 6(1) of the Arbitration Act (equivalent to Article 8(1) MAL), stayed all court proceedings and referred the parties to arbitration.

Case 1436: MAL 6; 34(2); 34(3)
Ukraine: Supreme Court of Ukraine
No. 12178 kc 04
Trade House "TNK-Ukraine"LLC v. SRL TAT Gazgrup
21 February 2007
Original in Ukrainian

Abstract prepared by Anna Stepanowa

[**Keywords**: *courts; judicial intervention; arbitral proceedings; notice*]

On 13 January 2003, the International Commercial Arbitration Court (the "ICAC") at the Ukrainian Chamber of Commerce and Industry rendered an award (the "ICAC Award") in favour of "TNK-Ukraine" LLC (applicant). Under the ICAC Award, SRL "TAT-Gazgrup" (respondent), a Moldovan company, was required to pay a penalty amounting to 27,775 US dollars and all arbitration costs.

The applicant brought enforcement proceedings in Moldova (Commercial Chamber of Appeal, Chisinau), which were dismissed on the grounds of a defect related to the provision of notice of the arbitration to the respondent. On 12 May 2004, the Kyiv Court of Appeal (the "Court of Appeal") refused to renew the procedural term for filing an application on cancellation of the ICAC Award as the applicant had failed to file its appeal within 3 months as required (www.kluwerarbitration.com/document.aspx?id=ipn91020&query=content%3A-match17%23match17). The applicant petitioned the Supreme Court of Ukraine (the "Supreme Court") with a view to renewing the procedural term for filing an application to cancel the ICAC Award. In support of its claim, the applicant argued that ICAC had failed to notify the respondent in a timely manner about the arbitration. The respondent only became aware of the arbitration on 6 January 2004 during the Moldovan court proceedings.

In its decision of 21 February 2007, the Supreme Court granted the applicant's petition, overturning the decision of the Court of Appeal. The Supreme Court concluded that the Court of Appeal had failed to correctly apply the relevant legal provisions and had failed to properly examine the circumstances of the case, and it had, thus, incorrectly applied the proper procedure. In addition, the Court of Appeal had failed to note that the improper notification of respondent was only revealed on 6 January 2004. Hence, the Supreme Court cancelled the decision of the Kyiv Court of Appeal of 12 May 2004 and submitted the case to the local court to renew the term for filing the application on cancellation of the ICAC Award.

Case 1437: MAL 8(1)
Kenya: High Court (Milimani Commercial Courts)
No. 382 of 2006
Hon. M. M. Galgalo and others v. Hon. Musikali Kombo and others
29 September 2006
Original in English
Published in Kenya Law Reports: www.kenyalaw.org

Abstract prepared by Paul Ngotho

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

In the course of judicial proceedings between members of a political party, the defendants brought a motion to stay the proceedings and to refer the dispute to arbitration. As a matter of fact, the political party's constitution required that disputes within the organization be referred to arbitration by a single arbitrator from a panel of arbitrators established by the party's National Executive Council.

The plaintiff argued that the arbitration clause was "inoperative and incapable of being performed" due to the fact that a panel of arbitrators had never been appointed.

The court took the view that it was the joint responsibility of both parties to put in place the mechanism necessary for arbitration. No evidence had been produced in court to show that the plaintiff had called upon the defendant to facilitate the appointment of a panel and that this had been refused. According to the court there was a valid and operative arbitration agreement, which could be performed and for this reason the court granted a stay.

Case 1438: MAL 8(1)
Kenya: High Court (Milimani Commercial Courts)
No. 59 of 2005
Mugoya Construction & Engineering Ltd v. National Social Security Fund and another
27 July 2005
Original in English
Published in Kenya Law Reports: www.kenyalaw.org

Abstract prepared by Paul Ngotho

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

The plaintiff was hired by the first defendant to build some housing units in a given time frame.

Claiming that the first defendant had failed to make payments at the agreed times, thus causing breaches and disruption in the project implementation, the plaintiff filed a suit. The first defendant objected to have overpaid for the work and blamed the plaintiff for the delays in completion of the project and for failing to perform diligently, which resulted in the first defendant terminating the contract and repossessing the property. The contract between the plaintiff and the second defendant including an arbitration agreement, the latter filed an application to stay the proceedings.

The arbitration clause stated the arbitrator would be appointed "by the Chairman or Vice Chairman of the East African Institute of Architects who will, when appropriate, delegate such appointment to be made by the Chairman or Vice Chairman of the local (National) society of Architects". The plaintiff opposed that the East African Institute of Architects did not exist, and probably never existed. The court referred to evidence showing the contrary and further noted that if by any chance the organization did not exist, then the parties would "have freedom to resort to *the relevant provisions* of the Arbitration Act 1995".

The plaintiff also claimed that in order for the court to exercise its discretion to grant a stay, the court needed to ascertain whether the defendant was willing to refer the matter to arbitration (suggesting that the defendant was not genuinely inclined to do so). The court did not find any ground to substantiate this argument, since the first defendant was the party having applied for arbitration. Moreover, the court, drawing a distinction between s.6(1) in Arbitration Act (repealed) Cap 49 and s.6.(1) (equivalent to Article 8(1) MAL), held that the former provision gave court discretion as to whether to grant a stay or not while the latter one did not. The court was under a mandatory duty to refer the dispute to arbitration: therefore it granted the stay and referred the dispute to arbitration.

Case 1439: MAL 8(1)
Hong Kong: Construction and Arbitration Proceedings
HCCT 83/2002
Pacific Crown Engineering Ltd v. Hyundai Engineering & Construction Co Ltd
23 April 2003
Original in English
Unreported

Abstract prepared by Gary Soo

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

There was a dispute between the parties over a lump sum construction contract. There were various letters and exchanges between the parties. The defendant said the formal contract containing an arbitration clause was sent over to the plaintiff. The plaintiff said it had never received the letter enclosing the contract. The formal contract was however not signed while the parties proceeded with the works. When a dispute arose, the plaintiff commenced court proceedings. Two issues arose from the case, namely whether it was for the court or the arbitrator to decide the existence of an arbitration clause and what was the proper test to be applied in determining that issue.

In granting the stay pursuant to Article 8(1) MAL, the court distinguished the present situation with that in the early English authorities when there was still discretion of the court in granting the stay. The court held that it was for the defendant to demonstrate to the court that there was a good prima facie case, or a plainly arguable case, that an arbitration agreement existed and bound the parties. As to the approach, the court held further that it should look first at the evidence in support of the defendant's contention to see if the evidence was, cumulatively, cogent and arguable and not dubious or fanciful.

Case 1440: MAL [7(1)]; 7(2); 34(2)(a)(ii); 34(2)(a)(iii); 34(2)(a)(iv); 35(2); 36(1)(a)(ii); 36(1)(a)(iii); 36(1)(a)(iv)
Hong Kong: Supreme Court of Hong Kong, High Court
2 HKC 373 [1995]
Jiangxi Provincial Metal and Minerals Import & Export Corp v. Sulanser Company Limited
6 April 1995
Original in English

[**Keywords**: *arbitration agreement; form of arbitration agreement; writing; arbitral awards; enforcement; award-setting aside*]

The parties entered into an agreement for the sale and purchase of cement. The document was not signed. The delivery was late and the plaintiff commenced proceedings for damages before its local mainland Chinese Court. The defendant informed the Chinese Court that the plaintiff did not have any legal right to commence proceedings and that CIETAC arbitration was the method of dispute resolution. The Chinese court declared that it did not have jurisdiction. The plaintiff applied for leave, ex parte, to enforce an award made by the China International Economic and Trade Arbitration Commission (CIETAC). The defendant applied to set aside the order and judgment, which resulted therefrom. The defendant argued that there was no written arbitration agreement between the parties pursuant to Article 7(2) MAL.

The plaintiff commenced arbitration proceedings. The defendant appointed an arbitrator, but it challenged the jurisdiction of the arbitration tribunal on the grounds that there was no written contract and no arbitration agreement. The tribunal ruled that it had jurisdiction on the basis of the communication of the defendant to the Chinese court making reference to CIETAC arbitration. Following an interim award by CIETAC, in which the arbitral tribunal held that there was a contract between the parties and that the contract had been performed, the defendant submitted a substantive defence and made submissions to the arbitration tribunal. Eventually the tribunal made a final award for damages, plus arbitration fees and expenses, against the defendant.

In court, the defendant argued that the plaintiff had failed to produce an original arbitration agreement at the enforcement proceedings in accordance with Article 35(2) MAL. The court found that the production of the defendant's correspondence to the Chinese Court referring to arbitration clause together with the unsigned contract complied with Article 35(2) MAL.

The defendant further submitted that Article 7(2) MAL requires an exchange of letter between the parties to constitute a valid arbitration agreement and thus Articles 34(2)(a)(i) and 36(1)(a)(i) MAL would apply. The court found that this argument did not assist the defendant and it was estopped from bringing further evidence by its submission to the jurisdiction of the Chinese court and the tribunal. They dismissed the argument that the tribunal had no jurisdiction to make the award as the award was for damages for breach of the original contract. Articles 34(2)(a)(iv) and 36(1)(a)(iv) MAL did not assist the defendant as there was a binding arbitration agreement.

The court dismissed the application of the defendant to set aside the judgment.

Case 1441: MAL 34(2)(a)(ii); [35]; 36(1)(a)(ii)
Hong Kong: Supreme Court of Hong Kong, High Court
2 HKLR 39 [1993]
Paklito Investment Limited v. Klockner East Asia Limited
15 January 1993
Original in English

[**Keywords**: *arbitration agreement; arbitral awards; enforcement; award-setting aside*]

These proceedings were an appeal by the plaintiffs against the order setting aside the granting of leave to enforce the award, MAL 35.

The defendants argued that they were unable to adequately present their case, (Articles 34(2)(a)(ii) and 36(1)(a)(ii) MAL). The reason submitted was that after the submission of various pleadings the tribunal appointed its own experts to investigate the circumstances of the dispute.

The report of the experts was received in November 1990. Few days later, the defendant formally notified the tribunal that it intended to make a formal defence to the content of the report. Before the submission of any defence the tribunal handed down its award in favour of the plaintiff.

The court found that the inability to comment or refute the contents of the experts' report was not only contrary to the New York Convention but also the Civil Procedure Law of the People's Republic of China. Thus, the court held that the defendants were unable to properly present their case.

The plaintiff submitted that the fact that the defendants had not taken any steps to set aside the award in the People's Republic of China should be taken into account.

The court ruled that there was nothing in the New York Convention which required such a course of action.

The court dismissed the appeal against the setting aside of the leave to enforce the award.