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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.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of 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 a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language (s) (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, all Internet addresses contained in this document were functional as of the date of submission of this document, but websites do change frequently). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, 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 on 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 Model Law on International Commercial Arbitration (MAL)

Case 1924: MAL 2A; 16(3); 34(2)(a)(iii)
Canada: Ontario Superior Court of Justice – Divisional Court
2021 ONSC 4604
The Russian Federation v. Luxtona Limited
30 June 2021
Original in English
Available at:
www.canlii.org/en/on/onscdc/doc/2021/2021onsc4604/2021onsc4604.html

[keywords: *arbitral tribunal; arbitration agreement; arbitration clause; validity; jurisdiction; procedure; award-setting aside*]

This case deals primarily with the admissibility of new evidence in an application for judicial review of an arbitral tribunal's jurisdiction decision under article 16 MAL.

The respondent, a former shareholder of an energy company based in Russia, alleged that the appellant, Russia, violated provisions of the Energy Charter Treaty (the "Treaty") by failing to protect the respondent's investments in this energy company. Russia signed the Treaty, but never ratified it. The respondent argued that Russia was nevertheless bound by the Treaty including its arbitration clause, since pursuant to article 45(1) of the Treaty, signatories also agree to its provisional application to the extent that such application is not inconsistent with their national law. Russia contested the provisional application of the Treaty and the consistency of its arbitration provisions with Russian law. The parties appointed an arbitral tribunal seated in Toronto, Canada, which issued an interim arbitral award finding that it had jurisdiction to decide the dispute after hearing arguments on jurisdictional issue and expert evidence provided by both parties on Russian law. Russia applied to set aside the interim award before the Ontario Superior Court of Justice and in this application filed new expert evidence on Russian law that had not been brought before the arbitral tribunal. The respondent objected to the admissibility of this new evidence. The first judge initially presiding the case held that Russia had a right to adduce new evidence. The second judge, who ultimately took over the case, disagreed with this interlocutory ruling, considering that Russia could file new evidence only if it complied with several limiting conditions established by previous case law. Russia appealed to the Ontario Superior Court of Justice – Divisional Court (the Divisional Court).

On appeal, the Divisional Court held that the jurisdictional challenges under article 16 MAL proceed by way of a hearing *de novo* rather than a review of the interim reward, and that the parties are not restricted to the evidentiary record they placed before the arbitral tribunal. The Divisional Court based its reasoning on the wording of article 16(3) MAL, which called for a court to "decide the matter" rather than to review the arbitral tribunal's decision. In doing so, it distinguished between article 16 MAL (arbitral tribunal's competence to rule on its jurisdiction), and article 34(2) MAL, which prescribes a limited review of the tribunal's final award. Unlike the court of first instance, the Divisional Court refused to follow a Canadian case *Mexico v. Cargill*, 2011 ONCA 622 (CLOUT case 1290) since it dealt with article 34(2), i.e. proceedings on a different ground. Instead, the Divisional Court strongly relied on an English case *Dallah v Pakistan*, [2011] AC 763 (CLOUT case 1323), in which the English Supreme Court addressed the issue of tribunal's jurisdiction *de novo*. The Divisional Court identified *Dallah* as a leading international authority on jurisdictional challenges under article 16 MAL giving rise to a strong international consensus that such applications were to proceed as a hearing *de novo*. Due to the "uniformity" principle in article 2A(1) MAL, the Divisional Court held that such consensus ought to be followed in Canada as well. Consequently, it allowed the appeal and set aside the court of first instance's decision.

Case 1925: MAL 7; 8(1); 16
Canada: Ontario Superior Court of Justice
2021 ONSC 2896
Kore Meals, LLC v. Freshii Development, LLC and Freshii Inc.
19 April 2021
Original in English
Available at:
www.canlii.org/en/on/onsc/doc/2021/2021onsc2896/2021onsc2896.html

[keywords: *arbitration agreement; arbitration clause; courts; procedure; validity; kompetenz-kompetenz*]

This case deals primarily with the application of the *forum non conveniens* doctrine in the context of digitalized legal hearings when deciding a motion to stay proceedings under article 8 MAL.

The defendant, a Chicago, Illinois-based company, entered into a Development Agent Agreement (the "DAA") with the plaintiff, a Houston, Texas-based company, to develop the defendant's franchises in Texas. The DAA contained an arbitration clause that required disputes between the parties to be submitted for arbitration in the city where the defendant has its business address. The plaintiff brought an action in the Ontario Superior Court (the Court) against the defendant's parent company, based in Ontario, Canada, even though the parent company was not a party to the DAA. The plaintiff's claim was based on a breach of the DAA and unjust enrichment. In addition, the validity of the arbitration agreement was challenged on the grounds that it was too vague (the defendant merely had a postal box and did not actually carry on business in Chicago). The defendants sought for a stay of proceedings and argued with reference to the arbitration agreement that the matter should be arbitrated in the United States and not litigated in Canada.

The Court held that, in general, the test for a stay of proceedings in the face of a valid arbitration clause is a relatively low one, thereby confirming the general preference for referring the parties to arbitration under article 8 MAL. In examining whether there is cogent reason for ignoring the express terms of the arbitration clause in the DAA, the Court considered the convenience factors for the parties related to access to justice. While it accepted that a *forum non conveniens*-type analysis can be applied when determining whether the forum of arbitration is unfair or impractical for one of the parties, it found that the majority of the *forum non conveniens* factors are undermined when hearings are held virtually by videoconference tools. In the Court's view, neither of the possible venues is more or less unfair or impractical than another as they are each accessed in the identical way through digital means. For these reasons, it granted the defendants' motion for a stay in favour of arbitration.

Case 1926: MAL 33(1)(a); 33(3); 34(2)(a)(iv); 34(2)(b)(ii)
Hong Kong: High Court of Hong Kong, Court of First Instance
[2020] HKCFI 2065
SC v. OE1 & Anor. and OE1 & Anor. v. SC
24 August 2020
Original in English
Published in https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130515&QS=%2B&TP=JU

[keywords: *additional award; arbitral awards; award; award – setting aside; award and correction – additional; award and correction – interpretation of; clerical errors; courts; enforcement; errors; procedure*]

The plaintiff and the defendants entered into an Original Equipment Manufacturer Supply Agreement ("SA") which provided that any disputes hereto related should be settled by arbitration in Hong Kong. Subsequently, on the alleged ground that the plaintiff had breached its obligations under the SA, the defendants commenced arbitration in Hong Kong.

In its award, the arbitral tribunal found that the plaintiff was in breach of certain provisions of the SA in respect of its filing of patents and utility models and ordered the plaintiff to pay the costs of the arbitration. It further rejected "all other claims and reliefs sought by the Parties". After the issuance of the award, the defendants claimed that the arbitral tribunal had failed to address the requests for a perpetual licence under the SA and for injunctions and requested correction of the award or issuance of an additional one, pursuant to article 33(1) or article 33(3) MAL respectively. The plaintiff objected to the request, claiming that the arbitral tribunal had already rejected all the claims and reliefs sought by the parties in its Award, and disputed the arbitral tribunal's power to make the correction or to render an additional award. The arbitral tribunal issued an addendum to the Award which decided in favour of the defendants. The arbitral tribunal confirmed that not having addressed the claims regarding the licence and injunctions was "a mistaken omission" and it granted those reliefs. The plaintiff applied to the High Court of Hong Kong to have parts of the addendum to the Award set aside under article 34(2)(a)(iv) and article 34(2)(b)(ii) MAL. The defendants, on the other hand, sought enforcement of the award as corrected by the addendum or, alternatively (in a separate application heard together, cases No. HCCT 48/2019, HCCT 66/2019), sections of the amended award which were not challenged.

The issues for determination by the Court were whether the arbitral tribunal had power to correct the award by the Addendum, or whether it was *functus* when it issued the Addendum; whether the award as corrected by the Addendum should be set aside, or enforced; or whether the award should be enforced without the challenged parts.

Regarding whether the addendum to the Award is a correction of errors under article 33(1)(a) MAL, the Court accepted that: (1) such power to correct is confined to "errors in computation", "clerical or typographical errors" or "any errors of similar nature". "Errors of similar nature" are errors of the same kind as those listed, but not precisely falling within those categories. However, the Tribunal's decision not to grant reliefs are not anything close to those types of errors listed in article 33(1)(a) MAL; (2) unlike the Arbitration Act 1996 of England and Wales and Northern Ireland where an arbitrator or a tribunal is empowered to correct errors arising from any accidental slip or omission, such category of mistakes or errors are not to be found in the MAL. Therefore, the purported corrections do not fall within the scope of article 33(1)(a) MAL.

Regarding whether the addendum to the award is "an additional award as to claims presented in the arbitral proceedings but omitted from the award" under article 33(3) MAL, the Court held that: (1) it cannot be disputed that the relevant claims had been presented to the arbitral tribunal in the arbitration by the defendants and the plaintiff had been given the full opportunity to draw the arbitral tribunal's attention on those claims; (2) in order to decide on whether the arbitral tribunal had omitted or addressed the claims, the award shall be read in its context; (3) such reading reveals that the objective intent of the award was not the dismissal or rejection of the defendants' claims for reliefs rather, those claims had not been dealt with by the arbitral tribunal; (4) as the arbitral tribunal had the power to amend an error or to issue an additional award under article 33 MAL, within the time limit, the arbitral tribunal was not *functus* nor did it exceed its jurisdiction when it issued the addendum, and that the award hence should be enforced.

Case 1927: MAL 34; 36 (2)
India: Supreme Court
Writ Petition (Civil) No. 1074 of 2019
Hindustan Construction Company Limited & Anr. v. Union of India & Ors.
27 November 2019
Original in English
Published in English: 2019 SCC Online SC 1520; 2019 (6) ArbLR 171 (SC)
Available on the Internet at: https://main.sci.gov.in/supremecourt/2019/29540/29540_2019_4_1501_18556_Judgement_27-Nov-2019.pdf

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[keywords: *arbitral awards; award – setting aside; courts; due process; procedure; enforcement; substantive law*]

Hindustan Construction Co. Ltd, the petitioner, an Indian construction company, had obtained certain arbitral awards in its favour against various state-owned entities such as National Highways Authority of India ("NHAI"), NHPC Ltd., NTPC Ltd., IRCON International Ltd., and Public Works Department (collectively known as the respondents). Prior to the Arbitration & Conciliation (Amendment) Act, 2015 the legal position was that there would be an "automatic stay" of an award as soon as an application to set aside the award was made under section 34 of the Act (corresponding to article 36 MAL). This provision of "automatic stay" was done away with the 2015 Amendment. However, by the Arbitration & Conciliation (Amendment) Act, 2019, the amendments brought in by the 2015 Amendment were made inapplicable to arbitrations and related court proceedings, in cases where the arbitration had commenced prior to the commencement of the 2015 Amendment (i.e. arbitrations commenced prior to 23 October 2015). The petitioner challenged the constitutional validity of the 2019 Amendments before the Supreme Court of India.

The petitioner took recourse to article 36(2) MAL to state that Section 36 of the Arbitration & Conciliation Act ("1996 Act") does not allow two challenges to the award: one at the time of setting aside the award, and one at the time of recognition and enforcement. The petitioner argued that once an award becomes final, it can be executed in the manner provided by the Code of Civil Procedure, 1908 (the "CPC"). However, Section 36 of the 1996 Act (prior to the 2015 Amendment) had been interpreted by the judgments of the Supreme Court as granting an "automatic stay" the moment a Section 34 application is filed within the time prescribed.

The Supreme Court observed that the 1996 Act is explicitly based on the MAL. Considering article 36(2) MAL, the Supreme Court agreed with the petitioner's argument and held that when an award in India becomes final and binding, it could be enforced under the CPC straightaway, in the same manner as if it were a decree of the Court, there being no recourse to the grounds of challenge under section 34. While overruling its previous decisions in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.* and *Fiza Developers & Inter-Trade Pvt. Ltd. v AMCI (India) Pvt. Ltd.*, the Supreme Court held that Section 36 – even as originally enacted – is not meant to do away with article 36(2) MAL, but is really meant to do away with the "two bites at the cherry" doctrine in the context of awards made in India. Restating the law as held by it in Board of Control for *Cricket in India v. Kochi Cricket Pvt. Ltd.*, the Court held the 2019 Amendment was unconstitutional as being manifestly arbitrary and contrary to public interest as it retrospectively resurrected the provision of "automatic stay" resulting in reversal of payments already made to award holders under the 2015 Amendment.

Case 1928: MAL 24(1); 24(2)
India: High Court of Delhi
O.M.P. 1118/2014
Sukhbir Singh v. Hindustan Petroleum Corporation Ltd.
16 January 2020
Original in English
Published in English: 266 (2020) DLT 612
Available at: https://indiankanoon.org/doc/86294741/

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents and Ishita Mishra

[keywords: *right to cross examine witness; fair hearing; audi alteram partem*]

The petitioner and the respondent were parties to a dealership agreement dated 27 June1994 under which the petitioner was running a retail outlet. The controversy between the parties, which gave rise to the arbitration proceedings, concerned inspection of a sample of motor spirit taken from the petitioner's retail outlet on 22 January 2009. The inspection at the retail outlet of the petitioner resulted in the sample being declared failed on the basis of a mobile lab test report. The respondent issued a show cause notice to the petitioner dated 12 May 2009 to which the petitioner filed a detailed reply. However, the respondent by a reasoned order dated 5 October 2010, found the petitioner's reply unsatisfactory. The dealership was then terminated on 22 December 2010.

The petitioner initiated arbitration proceedings. During the proceedings, the petitioner filed an affidavit of evidence dated 9 September 2013, reiterating its contentions and drawing out various discrepancies in the laboratory reports. On behalf of the respondent, evidence was led through an affidavit dated 27 September 2013 filed by the concerned official. The petitioner filed an application seeking permission to cross-examine the respondent's witness. The arbitrator declined the petitioner's request for an opportunity to cross-examine the witness. The arbitrator passed an award on 9 September 2014 holding that the respondent's termination of the dealership agreement was not illegal. Aggrieved, the petitioner filed a petition, under Section 34 of the Arbitration & Conciliation Act, 1996 ("1996 Act"), to set aside the award on the ground that the arbitrator's failure to permit cross-examination of the respondent's witness rendered the award liable to be set aside for violation of the principles of natural justice.

In order to interpret Section 24(1) of the 1996 Act, the Court relied on the legislative history of the corresponding provision, i.e. article 24(1) of MAL. The Court observed that the use of word "shall" in the second part of article 24(1) appears to be a deliberate and considered attempt to incorporate a mandate to the arbitral tribunal to grant a request, if made by either party.

The Court referred to the UNCITRAL Report on Adoption of the MAL which discussed article 24(1) and (2) of the draft Model Law. Further, as stated in the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, article 24 is characterized as an illustration of the general principle of equality and full opportunity.

The Court held that the understanding of the MAL thus supports the reading of the first proviso to Section 24(1) of the 1996 Act as the "right" of a party, and therefore as a mandate to the Tribunal. Accordingly, the Court held that the first proviso to Section 24(1) requires a party's request for oral hearings at the stage of evidence or arguments to be granted. Unless the right to require oral evidence or oral arguments has been waived by a prior agreement to the contrary between the parties, the proviso to Section 24(1) expresses a legislative preference for the grant of oral hearing at the request of either party.

Accordingly, the Court held the petitioner's request to cross-examine the respondent's witness on the veracity and contents of the letters dated 30 January 2009 and 28 April

2009 was reasonable and could not have been rejected in the manner reflected in the award. The documents were fundamental to the case of the respondent. The Court accordingly allowed the petition. The impugned arbitral award was set aside.

Case 1929: MAL 7; 8(1)
Ireland: High Court
[2020] IEHC 315
Narooma Limited v. Health Service Executive
26 June 2020
Original in English
Available at: https://arbitrationireland.com/wp-content/uploads/2020/12/Narooma-v.-HSE.pdf

[keywords: *arbitration agreement; arbitration clause; clause compromissoire; arbitration agreement – validity; arbitration agreement – separability; enforcement*]

This case deals primarily with the definition of an arbitration agreement, its validity and the obligation of the courts under article 8(1) MAL to refer the parties to arbitration.

The defendant, Health Service Executive, entered into a contract with the plaintiff, Narooma Limited, under which the former agreed to purchase from the latter 350 ventilators at a cost of almost €7.5 million. The contract was signed in circumstances of urgency, on 27 March 2020, in order to secure the supply of a large number of ventilators required to treat people likely to become seriously ill after having been infected with the COVID-19 virus. The contract contained a clause entitled "Resolution of Disputes" providing for arbitration of any dispute to take place in English language, in Dublin, Ireland and under the ICC Rules of Conciliation and Arbitration (the dispute resolution clause).

Three days after the signature of the contract, the defendant refused to pay the price of the goods due to the alleged misrepresentation by the plaintiff that it was an authorized agent/distributor of Aeonmed, a medical device manufacturer in China. The plaintiff commenced court proceedings seeking interlocutory injunctive relief. The defendant sent a letter to the plaintiff in which the proceedings brought by the plaintiff were qualified as an abuse of process, referring to the arbitration clause. The letter also purported to rescind the contract.

The plaintiff decided not to pursue its application for interlocutery injunctive relief and issued a motion before the High Court (the Court) seeking to have it decide on the merits of the case. Shortly thereafter, the defendant applied for an order under article 8(1) MAL, which has force of law in Ireland by virtue of section 6 of the Arbitration Act 2010, in order to have the dispute referred to arbitration and the stay of the court proceedings. Both applications were considered together by the Court.

The plaintiff challenged the existence of a mutual consent to refer any dispute to arbitration. It also underscored that the defendant could not rely on the dispute resolution clause as constituting an arbitration agreement while claiming, at the same time, that "no contractual relationship came into existence at all".

It further challenged the validity of the clause on various grounds. It claimed that the clause was "null and void, inoperative or incapable of being performed" (article 8(1) MAL), notably because it was referring to a set of rules which was no longer in force. In any event, as the plaintiff stated, a number of claims made by the defendant did not fall within the scope of the clause.

The plaintiff further contended that the defendant's request for a referral to arbitration did not meet the requirement under article 8 (1) MAL, since its first statement on the substance of the dispute was made during a telephone conversation with the plaintiff, i.e. prior to seeking the referral of the dispute to arbitration.

Referring to the doctrine of separability, the Court first noted that it had to consider the clause or agreement, which is said to constitute an "arbitration agreement" within

the meaning of that term in article 8 MAL, as a separate and independent agreement, separate and distinct from the main or underlying contract.

The Court confirmed that once the requirements of article 8(1) MAL are satisfied, it has a mandatory obligation to refer the parties to arbitration.

The Court then identified the four issues to be determined as follows (1) whether the dispute resolution clause amounted to an "arbitration agreement" within the meaning of that term under the MAL; (2) if it does, whether the claims made by the plaintiff fell within the scope of that clause; (3) whether the defendant was precluded from seeking a referral to arbitration due to late submission; and (4) whether the alleged arbitration agreement was "null and void, inoperative or incapable of being performed" for the purposes of article 8(1) of the MAL.

Referring to the definition in article 7 MAL, the relevant case law, general principles applicable to contractual interpretation, as well as to principles on the interpretation of arbitration agreements, the Court found that the dispute resolution clause amounted to an arbitration agreement for the purposes of MAL.

The Court then found the plaintiff's claims, including the claims for breach of contract and in tort, to fall within the scope of the arbitration agreement.

As to the argument of the late request for referral to arbitration, the Court made clear that the whole purpose of the requirement in article 8(1) MAL that the referral be requested "no later than when submitting [the] first statement on the substance of the dispute" was that a party should not be able to, on the one hand, participate in the action before the court while, on the other hand, seek to refer the dispute to arbitration. The Court clarified that the "first statement on the substance of the dispute" referred to a submission in the context of an action before a court and concluded that the defendant's request for referral to arbitration submitted at the same time of his first statement on the substance of the dispute before the Court, had not been late.

The Court also considered that a reference to an outdated set of rules had no impact on the validity of the arbitration agreement nor on its enforceability. It held that in order for the arbitration agreement to be effective, the parties had to have intended that the arbitration would be conducted in accordance with the ICC Rules currently in force.

Case 1930: MAL 5; 15; 34(1); 34(2)(a)(ii); 34(2)(a)(iii); 34(3)
Kenya: Supreme Court of Kenya
Petition No. 12 of 2016
Nyutu Agrovet Limited v. Airtel Networks Kenya Limited
6 December 2019
Original in English
Published in Kenya Law Reports: http://kenyalaw.org/caselaw/cases/view/186050/

[keywords: *arbitration agreement; arbitration clause; award – setting aside; court intervention; right of appeal*]

The case deals with the right to appeal a decision of the High Court, as court of first instance, on setting aside an arbitral award.

The High Court set aside an arbitration award granted in favour of the respondent, Airtel Networks Kenya Ltd (Airtel), relating to a commercial dispute with the petitioner, Nyutu Agrovet Limited (Nyutu).

Following the approval of a leave to appeal from the High Court, the Court of Appeal unanimously held that, in accordance with section 35 of the Arbitration Act 1995 of Kenya (the Act), the decision of the High Court, "was final and no appeal lay to the Court of Appeal; thus striking out the appeal."

The decision of the Court of Appeal was subsequently appealed in front of the Supreme Court under article 163(4)(b) of the Constitution of Kenya as a matter of public importance. The appellant laid out several grounds for appeal, including some

relating to the interpretation by the Court of Appeal of section 35 of the Act as not providing for a right of appeal against a decision on setting aside an arbitral award. Section 35 of the Act is an enactment of article 34 MAL.

The Supreme Court decided to consider the issue in light of diverging decisions of the Court of Appeal on whether the silence of section 35 of the Act on the right of appeal was in itself a bar to the statutory right to appeal.

The Supreme Court stated at the outset both the MAL and section 35 of the Act did not expressly forbid an appeal or prescribed whether a decision of the High Court made in respect of that section was final. After considering cases rendered abroad and interpreting arbitration statutes based on the MAL, the Supreme Court noted that the right of appeal on a decision dealing with setting aside an arbitral award, even if explicitly allowed, was rarely granted in practice.

The Supreme Court held that, while it was prudent to protect the arbitral process from unnecessary interventions by a court, as was the intent of article 34(1) MAL, there could be legitimate conditions and circumstances for seeking to appeal decisions of a first instance court, namely where the High Court "ha[d] stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which ha[d] completely closed the door of justice to either of the parties".

The Supreme Court concluded that the Court of Appeal should exercise its jurisdiction to review the decisions of the High Court under section 35 of the Act sparingly and using a narrow definition of the above conditions.

Case 1931: MAL 5; 9; 35
Malaysia: Malaysian High Court
Case No. WA-24NCC-471-10/2020
Danieli & C. Officine Meccaniche S.P.A v. Southern HRC Sdn Bhd
22 February 2021
Original in English
Published by the Office of The Chief Registrar, Federal Court of Malaysia
Available at: 22022021180723-0001.pdf (lh-ag.com)

[keywords: *judicial intervention; interim measures; judicial assistance; recognition – of award; enforcement*]

The case primarily deals with the extent of the court's jurisdiction before, during and after arbitration proceedings.

Danieli & C. Officine Meccaniche S.P.A, an Italian company (the plaintiff) entered into a contract with a Malaysian company, Southern HRC Sdn Bhd (the defendant) for the construction of a plant in Malaysia aimed at producing hot rolled coils. When the dispute arose, it was referred to arbitration in Singapore, as per the parties' agreement.

The arbitral tribunal ruled in favour of the defendant. The contract was rescinded, and the plaintiff was ordered to refund the purchase price and to pay damages. In exchange, the defendant was ordered to hand over to the plaintiff the title of the plant (and additional equipment). Subsequently, the plaintiff applied to the Singapore High Court requesting the setting aside of the final award, but the application was dismissed.

In the meantime, the plaintiff sought an order from the Malaysian High Court (the Court) that would allow an inspection of the plant (and of additional equipment) in order to ascertain, before any payment was made, that the plant still existed and the condition it was in. The defendant objected to the Court's jurisdiction to grant the relief sought, claiming that it could only be seized with regard to the enforcement of the final award under the applicable law, the 2005 Malaysian Arbitration Act.

Referring to Section 8 of the 2005 Malaysian Arbitration Act (MAA), which was modelled after article 5 MAL, the Court reiterated, as in previous decisions, the principle of limited Court intervention in arbitral proceedings. Noting that the

plaintiff's application related to a dispute that had been decided upon by an arbitral tribunal, it considered that under section 38 MAA (modelled after article 35 MAL), the Court's jurisdiction was limited to a party's application claiming recognition or enforcement of the final award. Recalling section 11 MAA (modelled after article 9 MAL) under which interim measures can be sought from the competent national court by a party to international arbitration before or during arbitral proceedings, the Court noted that in the case at hand the plaintiff had failed to seek an order for inspection of the plant while the arbitration procedure was still pending.

The Court held that the Malaysian courts could not reopen matters already decided upon by the arbitral tribunal or materially change the award and referred to relevant case law to recall its obligation to enforce and recognize valid arbitral awards. The award itself, as considered by the Court, did not give rise to a cause of action.

Case 1932: MAL 34(3)
Singapore: Singapore International Commercial Court
[2019] SGHC(I) 10
BXS v. BXT
20 June 2019
Original in English
Available at: www.sicc.gov.sg

[keywords: *arbitration; award; award – setting aside*]

This case deals primarily with whether the three-month time limit to challenge an arbitral award in article 34(3) MAL may be extended.

The arbitration concerned tax indemnities arising out of a contract to sell shares by a company registered in Mauritius (defendant) to entities related to a Thai company (plaintiff). The plaintiff began an arbitration at the Singapore International Arbitration Centre regarding the tax indemnity, but the sole arbitrator dismissed the claim and awarded costs to the defendant in June 2018. Almost five months later in November, the plaintiff applied to the Singapore International Commercial Court (SICC) to set aside the arbitral award.

The plaintiff challenged the award on several grounds, including the number of arbitrators, the governing law, the amount of costs awarded. The defendant opposed the grounds for the challenge, and also emphasized that article 34(3) MAL, which states that an application for setting aside "may not be made after three months have elapsed from the date on which the party making that application had received the award". The MAL was incorporated into Singaporean law by virtue of Singapore's International Arbitration Act. The deadline to challenge the arbitral award had elapsed by 12 September 2018 and the plaintiff's application was late by almost two months.

The SICC ruled in the defendant's favour and refused to set aside the arbitral award. The judge first concluded that each of the grounds for the challenge was without merit. On the question of whether the plaintiff's challenge was made out of time, while there have been judgments in Singapore concerning article 34(3) MAL Law which have concluded that the Singapore courts have no specific power under that article to extend the time limit, there had been no ruling yet on whether the general power of Singapore judges to extend time might apply. That general power is found in the Supreme Court of Judicature Act (Cap 332, 2007 Rev Ed), which states that the courts can extend any time prescribed by any written law, with the exception of those "related to limitation".

Based on the review of case law from multiple jurisdictions including Singapore, Hong Kong, Malaysia, New Zealand, and England, the judge ruled that Singapore courts do not have power to extend the time limit. The general power under Singaporean law did not apply because article 34 MAL was found to be "related to limitation", as it extinguished a substantive right of action to challenge an award, rather than imposing a merely procedural deadline. Article 34(3) of MAL was thus found to impose a mandatory three-month time limit that cannot be revived.