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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.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 web-site by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Cases relating to the UNCITRAL Model Arbitration Law (MAL)

Case 1068: MAL 34(2)(b)
Croatia: The Supreme Court of the Republic of Croatia
Gž 2/08-2
30 May 2008
Original in Croatian
Published in: http://sudskapraksa.vsrh.hr/supra
Abstract prepared by Nina Tepeš

[Keywords: arbitrability, enforcement, public policy, setting aside]

On 14 September 2007, the County Court of Zagreb enforced a domestic award previously rendered by the Permanent Arbitration Court at the Croatian Chamber of Economy. The opposing party appealed, stating that (among others) the award represented a violation of Croatian public policy because it violated Croatian "obligatory laws, the decision having been made *ultra et extra petitum*, having resulted in an obligation to pay twice for the same works and having violated the principle of the free evaluation of evidence mandatory rules". The appellant also raised the issue of arbitrability of the case, alleging that the court of first instance had failed to examine the award under this respect.

The Supreme Court rejected the arguments and affirmed the County Court's decision to enforce the award. The Court pointed out that Article 49(1) of the Croatian Law on Arbitration, invoked by the appellant, provides that the court shall, while ruling on claims for recognition or enforcement, confine itself to determining whether the requirements referred to in Article 39 of the Law, which concerns the enforcement of the domestic award,[1] have been met. According to Article 39(1), the court shall enforce a domestic award, unless it establishes the existence of grounds for setting aside as set forth in Article 36(2)(2) (consistent with Article 34(2)(b) MAL). Pursuant to that article, an arbitral award may be set aside by the court only if the court finds, even if a party has not raised these grounds, that the subject matter of the dispute is not capable of settlement by arbitration under the laws of the Republic of Croatia, or the award is in conflict with the public policy of the Republic of Croatia.

As to the question of arbitrability, the Court stated that the parties can agree on domestic arbitration for the settlement of disputes regarding rights of which they may freely dispose. The case in question concerned a claim for the performance of a contract of construction works (and the payment of the agreed amount): rights that the parties may freely dispose of. Therefore, the appellant's objections on this subject were not founded.

The Supreme Court stated that notion of public policy cannot be put on equal foot with the notion of "obligatory laws". It defined public policy as "encompassing only those rules which ensure basic principles of the particular legal system" so that states can, by invoking it, protect their own legal system from application of foreign law that is contrary to those principles". The Court thus concluded that the question

[1] According to Article 2(1)(2) of the Croatian Law on Arbitration, domestic arbitration means arbitration that has place in the territory of the Republic of Croatia.

of the correct application of mandatory law cannot be classified as an issue of public policy.

Case 1069: MAL 34(2)(a); 35(1); 36(1)(b)
Croatia: The Supreme Court of the Republic of Croatia
Gž 6/08-2
5 March 2008
Original in Croatian
Published in: http://sudskapraksa.vsrh.hr/supra
Abstract prepared by Nina Tepeš

[Keywords: arbitration agreement, procedure, public policy, recognition of award]

On 31 December 2007, the Commercial Court in Zagreb recognized an arbitral award issued in July 2006 by the Arbitration Court attached to the Economic Chamber and Agricultural Chamber of the Czech Republic.

The opposing party appealed stating that the recognition had to be refused as the award violated Croatian public policy. As a matter of fact, the appellant had been allegedly unable to present its case before the arbitral tribunal, its attorney had not received proper documentation in English and the proceedings were conducted in the language of the claimant (i.e. Czech). In particular, this last circumstance put the claimant in a more favourable position.

The Supreme Court rejected the argument of the appellant and affirmed the decision to recognize the arbitral award, finding that none of the grounds for refusal of recognition had been met. The Court applied Article 40(1) of the Croatian Law on Arbitration (consistent with art. 35 (1) MAL), which states that a foreign award shall be recognized as binding and shall be enforced in the Republic of Croatia unless the court establishes, upon a request by the opposing party, the existence of a ground referred to in Article 36(2)(1) of this Law (consistent with Article 34(2)(a) MAL) or if it finds that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

The Supreme Court found that the parties had agreed to submit a dispute to arbitration under the auspices of the Arbitration Court attached to the Economic Chamber and Agricultural Chamber of the Czech Republic. Therefore, they had also contracted for the Rules of the Arbitration Court, providing that oral hearings shall be held, and decisions shall be made, in Czech (or in Slovak) language. Also, according to the Rules, the opposing party could have asked for the translation into another language. In light of all the evidence, the Supreme Court affirmed that the opposing party had been given proper notice of the commencement of the arbitral proceedings and was otherwise able to present its case before the arbitral tribunal.

The Supreme Court upheld the Commercial Court findings, and concluded that even if there were procedural errors of the kind invoked by the opposing party, that would still not amount to the violation of Croatian public policy. Consequently, the Court of First Instance had correctly found that the second condition of Article 40(2)(b) (consistent with article 36(1)(b) MAL), was not met, so that the reasons for appeal alleged by the opposing party were ill-founded.

Case 1070: MAL 8(1)
Croatia: High Commercial Court
Pž-8147/04-5
21 May 2007
Original in Croatian
Published in: http://sudskapraksa.vsrh.hr/supra
Abstract prepared by Nina Tepeš

[Keywords: arbitration agreement, courts]

In September 2003, the claimant and respondent concluded a contract that included an arbitration clause providing that any disputes regarding the interpretation of the contract would be solved through arbitration.

In December 2004, the Commercial Court in Zadar declared that it had no jurisdiction over a dispute arisen between the parties, founding its decision on Article 42(1) of the Croatian Law on Arbitration (consistent with article 8(1) MAL), which provides that, if the parties have agreed to submit a dispute to arbitration, the court before which the matter was brought shall, upon respondent's objection, declare its lack of jurisdiction, annul all actions taken in the proceedings and refuse to rule on the claim, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. According to the court, the parties' manifest intention was to have any dispute arisen in the performance of the contract settled by the arbitral tribunal, and as such also the dispute about the payment for the performed works on the property leased with the contract.

The claimant appealed stating that the wording of the arbitration clause, on the contrary, indicated that arbitration only related to the interpretation of the contract. According to the claimant, the parties had opted for such an arbitration clause because the contract had been drafted in Italian and subsequently translated into Croatian without the help of a professional translator.

The High Commercial Court quashed the decision of the Commercial Court and referred the case back to it. The High Commercial Court stressed that the dispute did not relate to issues pertaining to the interpretation of the contract, but to the alleged non-payment under the contract. Since the arbitration clause provided for arbitration only when the parties would have differing views regarding the interpretation of the contract, the High Commercial Court stated that the Commercial Court was wrong to conclude that the parties' intention was to solve all of their disputes arising out of the contract before arbitration (including disputes about non-payment).

Case 1071: MAL 8(1)
Croatia: High Commercial Court
Pž-6756/04-3
17 April 2007
Original in Croatian
Published in: http://sudskapraksa.vsrh.hr/supra
Abstract prepared by Nina Tepeš

[Keywords: courts, procedure]

The respondent appealed against the decision of the Commercial Court of Zagreb, stating that the Court lacked jurisdiction to decide the dispute given the arbitration agreement concluded by the parties, which referred their disputes to the Permanent Arbitration Court at the Croatian Chamber of Economy. The respondent also stated that the Commercial Court should have declared its lack of jurisdiction ex officio.

The High Commercial Court rejected the respondent's arguments and affirmed the opinion of the Commercial Court of Zagreb.

In its decision, the High Commercial Court relied on Article 42(1) of the Croatian Law on Arbitration (consistent with article 8(1) MAL), providing that, if the parties have agreed to submit a dispute to arbitration, the court before which the matter was brought shall, upon respondent's objection, declare its lack of jurisdiction, annul all actions taken in the proceedings and refuse to rule on the statement of claim, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The respondent may raise the objection referred to in Article 42(1) no later than at the preparatory hearing or, if no preparatory hearing is held, at the main hearing before the end of the presentation of the statement of defence (Article 42(2) of the Croatian Law on Arbitration).

The High Commercial Court found that although parties had contracted for arbitration, the Commercial Court could not have ex officio declared that it lacked jurisdiction, but could have done so only upon the timely objection made by the respondent. As the respondent did not raise such an objection in the prescribed time, the High Commercial Court affirmed the judgment of the First Instance Court.

Case 1072: [MAL 8(1)][2]
Croatia: High Commercial Court
Pž-5168/01
29 April 2001
Original in Croatian
Published in Croatian, in: Collection of decisions of the High Commercial Court 1994-2002, No. 9/571

[Keywords: courts, procedure]

In proceedings before the Commercial Court, the respondent failed to object to the jurisdiction of the court, raising the issue of the arbitration agreement only upon

[2] The decision relates to the law in force before the enactment of the Croatian Law on Arbitration (2001), but it is nevertheless relevant, as it corresponds to the provision of Article 42 of the Law on Arbitration [which is consistent with MAL article 8(1)] — see decision of the High Commercial Court Pž-7481/03 of 27 April 2004 and also CLOUT case 657.

appeal. The High Commercial Court ruled that parties in a commercial litigation may renounce their arbitration agreement also by their behaviour: the claimant by submitting his statement of claim to the court (instead of initiating arbitration), and the defendant by entering into arguments regarding the substance of the dispute. The court may not rely upon the existence of an arbitration agreement on its own initiative, but only upon respondent's objection, which can be raised at latest during the preparatory hearing, or at the main hearing, before entering into arguments about the merits of the dispute.

Case 1073: MAL 8
Hong Kong Special Administrative Region of China: Court of Final Appeal
Paquito Lima Buton v. Rainbow Joy Shipping Ltd. Inc.
28 April 2008
Original in English
Unpublished

[Keywords: arbitration agreement, courts, jurisdiction]

The dispute involved the employment of the appellant as a second engineer on board a Hong Kong registered cargo vessel, who was injured at work. The employment agreement was constituted of two contracts, one concluded in the Philippines and the other concluded in Hong Kong. The Philippines contract contained an arbitration clause but it was signed only by the respondent; the Hong Kong contract was signed by both parties. The respondent applied to stay the proceedings initiated by the appellant before the District Court of Hong Kong which was conferred with the exclusive jurisdiction to deal with employees' compensation matters pursuant to the Employees' Claim Ordinance. At the lower court, it was conceded that there was an arbitration clause in the employment agreement. The Court of Final Appeal was asked to decide whether the claim should be dealt with by the District Court or should be stayed for arbitration in the Philippines, pursuant to Article 8 of the MAL.

In refusing to grant a stay for arbitration, the Court of Final Appeal held that the mandatory stay provisions of Article 8(1) of the MAL were inoperative if some other law precluded their application to the dispute in question and that section 18A (1) of the Employees' Compensation Ordinance conferred exclusive jurisdiction on the District Court to deal with all employees' compensation claims save in the cases expressly excepted. Therefore, parties' autonomy for arbitration was subject to the observance of such safeguards as were necessary in the public interest.

The Court of Final Appeal also considered whether there was an arbitration agreement in the employment agreement of the appellant. The Court held that the Philippines contract and the Hong Kong contract were inconsistent with each other and it was only the Hong Kong contract that forms the employment agreement of the appellant.

Case 1074: MAL 8
Hong Kong Special Administrative Region of China: Court of First Instance
HCCL 10/2006
Ocean Park Corporation v. Proud Sky Co. Ltd.
28 November 2007
Original in English
Unpublished

[Keywords: arbitration agreement, validity]

The plaintiff in this action was an entertainment complex that wished to import a "snow making machine". After purchasing the instrument from a European supplier, the plaintiff arranged the transport of the machine from Europe to Hong Kong. It contacted an international freight forwarder, the defendant, which in turn contacted a European freight forwarder requesting that arrangements be made for the shipment of the machine, by air, from Amsterdam to Hong Kong.

The European freight forwarder contacted the designated carrier which was to perform the actual carriage by air, and apparently this latter confirmed that the dimensions of the containers would fit within the hold of the aircraft. Unfortunately, this was not a correct assessment with the result that the machine had to be shipped by sea, utilizing the services of a sea carrier. The corresponding delay forced the plaintiff to hire a substitute snow machine, pending receipt of the one that it had expected to receive. The plaintiff brought thus action against the defendant claiming the cost of the temporary rental of a substitute snow machine plus the cost of sea freighting the original machine.

The defendant denied that it had entered into any contract with the plaintiff and stated that it merely acted as agent for the European freight forwarder: in fact it was this latter with whom the plaintiff had contracted. The defendant issued Third Party proceedings against, among others, the European freight forwarder (the "third party", hereinafter).

The third party submitted that, if there were a contractual nexus between it and the plaintiff, as stated by the defendant, then an arbitration agreement existed between the two parties following which the court should grant a stay on behalf of the third party. As a matter of fact, at the foot of some of the e-mails the third party had sent to the plaintiff, there were references to a set of standard conditions providing for arbitration.

The court referred to Pacific Crown Engineering Ltd. v. Hyundai Engineering and Construction Co. Ltd. [2003] 3 HKC 659, which laid down the principle that there needed to be a good prima facie case, or a plainly arguable case, that an arbitration agreement existed and bound the parties and that the onus lay upon the applicant for the stay to satisfy the court in this regard. In doing so, the court looked first at the evidence in support of the applicant's contention. The court remarked that this was only to see if the evidence was cogent and arguable, and not dubious or fanciful, leaving the arbitrator to make a detailed final determination as to the existence or otherwise of an arbitration agreement.

In the present case, the court dismissed the application for a stay by the third party under Article 8 MAL, noting that, while there could be agreement to cooperate in

bringing over the snow machine, the third party had failed to show there was consensus between the parties on how to resolve any dispute if occurred.

Case 1075: MAL 34(2)
Serbia: Appellate Commercial Court, Belgrade
Pz 7311/10
Agency for Privatization of the Republic of Serbia v. Company W
20 April 2010
Unpublished
Abstract prepared by Vladimir Pavic

[Keywords: arbitral award, applicable law, procedure, public policy, setting aside]

The Agency for Privatization initiated an action for setting aside an ICC award made in Belgrade. The Belgrade Commercial Court upheld the award in the first instance. On appeal, the Appellate Commercial Court affirmed the first instance decision.

The Agency for Privatization submitted that the award should be set aside, inter alia, because the arbitrators had deliberated through electronic communication and never actually met physically to sign and "make the award". In addition, it was argued that the arbitration tribunal had overstepped its authority and the scope of the arbitration agreement when awarding damages to the company W. Finally, the Agency submitted that, the award should be annulled because, although the parties had chosen Serbian law as the proper law of the contract, arbitrators had not applied Article 41(a) of the Serbian Law on Privatization.

The Belgrade Commercial Court rejected both grounds for setting aside. First, it observed that neither ICC Rules nor Serbian Law on Arbitration request and mandate a specific method of communication between the arbitrators. Therefore, electronic communication, drafting and voting is sufficient, as long as all members of the tribunal are given opportunity to voice their position. Second, it held that the tribunal had not acted outside of the scope of parties' submission to arbitration. Namely, the arbitrators decided within the sums and values requested by the claimant and were not in any way restricted by the estimation of the value of the investment which has been entered in the appropriate official registry at the time the investment has been made. Finally, the court observed that the award had been rendered on the basis of Serbian law. The tribunal had applied a version of the Serbian Law on Privatization which was in force at the time of the contract conclusion and not the version in force at the time when the contract was rescinded, respecting constitutional prohibition of legislative retroactivity and the stabilization clause contained in the Law on Foreign Investment.

The appellate Commercial Court affirmed the position of the Belgrade Commercial Court that a court is not entitled to review application of the law by the arbitration tribunal, even if it is erroneous. It may only review whether refusal to apply Article 41(a) of the Serbian Law on Privatization is contrary to Serbian public policy. Non-application of a single provision of a particular law does not amount to violation of public policy. In addition, the tribunal actually applied Serbian Law on Privatization in force at the time of the contract conclusion. Therefore, the award was in accordance with Serbian mandatory rules. Other issues, such as whether the tribunal had correctly applied the Serbian Law on Contracts and Torts, were also

outside the scope of the review under Article 58 of the Law on Arbitration (Article 34 (2) of the UNCITRAL Model Law).

Case 1076: MAL 16(3)
Serbia: Supreme Court of Serbia
Decision Prev. 350/08
Agency of Privatization of the Republic of Serbia v. Messrs X, Y and Z
1 October 2008
Unpublished
Abstract prepared by Vladimir Pavic

[Keywords: arbitral tribunal, competence, jurisdiction, award-setting aside]

Three natural persons (who acted as a consortium in a privatization transaction) initiated arbitration before the Permanent Court of Arbitration (PCA) attached to the Serbian Chamber of Commerce[3] against the Agency for Privatization of the Republic of Serbia.

The Agency challenged the jurisdiction of the PCA: the presidency of the PCA had ruled in a separate decision that it had jurisdiction. The Agency challenged this decision before the Commercial Court in Belgrade, asking it to set aside the award. The Commercial Court rejected such request, stating that only arbitral award on the merits may be set aside. On appeal, the Higher Commercial Court in Belgrade affirmed the first instance decision.

On revision, the Supreme Court reversed and annulled the decision of PCA. It ruled that, pursuant to Article 30(2) of the Serbian Law on Arbitration (consistent with Article 16(3) MAL), a party is entitled to request setting aside of separate arbitral jurisdictional decisions. According to the Supreme Court, teleological and systematic interpretation of the Law means that, in order to initiate scrutiny pursuant to Article 30(2), a party has to file action to set the decision aside, just like it has to file action to set aside the final award under Article 57 of the Law on Arbitration.

[3] The Serbian Chamber of Commerce is the arbitration institution that deals exclusively with arbitrations without foreign element.