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CASE LAW ON UNCITRAL TEXTS (CLOUT)

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). Information about the features of that system and about 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 (http://www.uncitral.org).

Issues 37 and 38 of CLOUT introduce several new features. First, the table of contents on the first page lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted by the court or arbitral tribunal. Second, the Internet address (URL) of the full text of the decisions in their original language are 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 by the United Nations or by UNCITRAL of that website; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Third, abstracts on cases interpreting the UNCITRAL Model Arbitration Law now 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, and in the forthcoming UNCITRAL Digest on the UNCITRAL Model Law on International Commercial Arbitration. Finally, comprehensive indices are included at the end, to facilitate research by CLOUT citation, jurisdiction, article number, and (in the case of the Model Arbitration Law) keyword.

Abstracts have been prepared by National Correspondents designated by their Governments, or by individual contributors. 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.

I. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 435: MAL 8(1)
Germany: Bundesgerichtshof; III ZR 262/00
10 May 2001
Original in German
Published in German: VersR 2001, p. 1444; NJW 2001, p. 2176; *Betriebs-Berater 2001*, p. 1327
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll and Katja Richter

[**keywords**: *arbitration agreement; courts; procedure; procedural default; waiver*]

The decision concerns the question of when a defendant in court proceedings must invoke the existence of an arbitration agreement before being barred from doing so.

The claimant, a German limited company, had brought an action against the defendant, one of its managing directors and shareholders, for a declaration that a decision of the shareholders' meeting to reduce the defendant's power of representation to joint agency was valid. The shareholders' agreement provided that all disputes arising out of it should be referred to arbitration, except for actions to set aside or to declare nullity of a shareholder's decision. The defendant did not challenge the jurisdiction of the tribunal within the time limit set by the court for the defence, but invoked the existence of the arbitration clause before the hearing and before taking any steps on the merits. Nevertheless the two lower courts considered the defendant to be barred from relying on the arbitration agreement by virtue of a provision in the German Code of Civil Procedure (ZPO), which allows defences not raised within a time limit set by the courts to be rejected as untimely.

The Supreme Court reversed this decision and found that the defence was timely. It considered that the relevant provision to address the question of when the existence of an arbitration agreement must be raised is section 1032(1) ZPO (modified article 8 MAL), which as *lex specialis* prevails over the other provisions relied upon by the lower courts. According to section 1032(1) the courts must refer the parties to arbitration if one party invokes the existence of an arbitration agreement before the oral hearing on the substance. Therefore, the expiry of the time limit set for the submission of the defence is, in this respect, irrelevant.

The Supreme Court referred the case back to the lower court to deal with the relevant question of whether the arbitration agreement actually covers the action in question. The action brought by the claimant, though it was not one of the special actions explicitly excluded in the arbitration agreement, is so closely connected to excluded actions that the parties might well have intended it to fall under the exception as well.

Case 436: MAL 34(2)(a)(iv)
Germany: Bayerisches Oberstes Landesgericht; 4Z Sch 17/98
24 February 1999
Original in German
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll

[**keywords**: *appointment procedures; arbitral awards; arbitral tribunal; arbitrators; arbitrators—appointment of; award—setting aside; courts; procedure*]

The decision is about a motion for setting aside an award because of procedural errors made in the composition of the arbitral tribunal.

The claimant, a potato farmer, had initiated arbitral proceedings before the arbitral tribunal of the potato industry at the Bavarian Commodities Trading Association against the defendant, a potato trader. After an award was rendered in favour of the defendant, the claimant appealed the award to the Highest Arbitral Tribunal of the Bavarian Commodities Trading Association. The claimant appointed a farmer as his arbitrator. The defendant successfully challenged this arbitrator, as well as the substitute nominated by claimant. Arbitrator C, a trader, was finally appointed for the claimant and claimant's challenge of arbitrator C was dismissed by the Highest Arbitral Tribunal composed of three traders. The claimant applied to the courts to have this award set aside for procedural irregularities in the appointment process.

The court granted the application and set aside the award on the basis of § 1059 (2) (1 b, d) Code of Civil Procedure [ZPO; equivalent to article 34(2)(a)(iv) MAL]. It held that the procedure employed by the Highest Arbitral Tribunal with regard to the appointment and challenge of arbitrator C violated § 1032 ZPO of the then-applicable German Arbitration Law. According to § 1032 ZPO (old version) in conjunction with § 1045 ZPO (old version), which could not be derogated from, the motion of the claimant to challenge arbitrator C had to be decided by a court, not by the Highest Arbitral Tribunal. Because the court might have decided differently on the challenge, and the Highest Arbitral Tribunal might have decided—in a different composition—differently on the outcome of the appeal, the court affirmed that the procedural mistake had potentially caused an unfavourable outcome for the claimant.

Also, the court held that the refusal of the Highest Arbitral Tribunal to appoint the substitute arbitrator nominated by the claimant for the successfully challenged first arbitrator had been a procedural error. According to the applicable arbitration rules it was not mandatory that the party-appointed arbitrator come from the list of arbitrators. The list was only to be used as a recommendation.

Case 437: MAL 34(2)(b)(ii)
Germany: Bayerisches Oberstes Landesgericht; 4Z Sch 14/98
24 February 1999
Original in German
Published in German: BayObLGZ 1999, 55-57 (headnote and reasons); BayObLGZ 1999; Nr 14, JMBl BY 1999, 73 (headnote); NJW-RR 2000, 807-808 (headnote and reasons); *Betriebs-Berater*, Beilage 12 zu Heft 50/2000 (RPS), p. 24
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll

[**keywords**: *award—setting aside; courts; procedure*]

The procedural prerequisites for the recognition and declaration of enforceability of a foreign award in Germany were at issue in this case.

The claimant had applied to the court to have an award rendered by a tribunal under the auspices of the Court of Arbitration of the Chamber of Commerce and Industry of the Russian Federation in its favour recognized and declared enforceable in Germany. During the written preliminary proceedings, the defendant asked the German court in a brief to deny the motion, alleging, inter alia, that he had not been given proper notice of the arbitration proceedings and did not know the person who had signed the arbitration agreement on his

behalf. The German court ordered an oral hearing at which the claimant did not appear while the defendant's representative orally repeated his request to deny the motion referring to the reasons stated in his brief.

The Bavarian Higher Regional Court refused to recognize the award and declare it enforceable since the claimant failed to make a procedurally valid request at the oral hearing before the Court. Since the defendant raised potential grounds to refuse recognition (§ 1059 (2) (1b), (1c), (1d) ZPO (the equivalent of article 34(2)(a)(ii), (iii), (iv) MAL)) the Court was required to hold an oral hearing (§ 1063 (2) ZPO). According to §§ 128 (1), 297 ZPO it is required that, in the case of a mandatory oral hearing, any motion by a party has to be made at the oral hearing by way of an oral application or an oral reference to the written application. Where an application does not fulfil the requirements of the German Code of Civil Procedure, the Court may not decide on the merits of the motion (§ 308 ZPO: Principle of Party Disposition). Because the defendant failed to appear at the scheduled hearing, and therefore did not make his motion in the way required by the German Code of Civil Procedure, the Court had to deny the declaration of recognition and enforceability of the award paying no regard to the merits of the case.

Case 438: MAL 11(3)
Germany: Bayerisches Oberstes Landesgericht; 4Z SchH 1/99
4 June 1999
Original in German
Published in German: *Betriebs-Berater* 1999, pp.1785—(headnote and reasons); BayObLGR 1999, p. 72 (headnote)
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll

[**keywords**: *appointment procedures; arbitrators; arbitrators—appointment of; courts; judicial assistance; procedure*]

The decision concerns the application for the appointment of an arbitrator by the court.

The claimant had initiated arbitration proceedings against the defendant before the Bavarian Commodities Trading Association (Bayerische Warenbörse) in Munich. The amount claimed was based on four different contracts, only one of which contained a clause providing for "arbitration in Munich". Since the parties were in dispute about the meaning of this arbitration clause and the existence of arbitration clauses for the other contracts they could not agree on an arbitrator. As a result the claimant applied to the court for the appointment of a sole arbitrator.

The Court refused to make the appointment since, in its view, no valid arbitration agreement existed. While the claimant wanted arbitration before a sole arbitrator to be carried out at the seat of the Bavarian Commodities Trading Association, the respondent always intended that the arbitration be conducted under the rules of the Bavarian Commodities Trading Association, which, inter alia, provided for a special appeal procedure.

The Court found that the lack of agreement on such an essential issue as the rules to be followed made all arbitration agreements concluded invalid.

Case 439: MAL 11(4)
Germany: Brandenburgisches Oberlandesgericht; 8 SchH 1/00
26 June 2000
Original in German
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll and Katja Richter

[**keywords**: *appointment procedures; arbitrators—appointment of; courts; judicial assistance; procedure*]

The decision is about the appointment of an arbitrator by the state courts after the agreed appointment mechanism had failed.

The German and the Italian parties to a construction contract had concluded an arbitration agreement using the standard form of the German Association for Construction Law according to which the arbitration proceedings should be governed by the Arbitration Rules of the German Association for Construction. The rules provided that both parties should appoint one arbitrator who should then agree on the chairman. In case of a failure of agreement the chairman was to be appointed by the President of the "Landgericht" at the employer's place of business. The German party started arbitration proceedings and since the party-appointed arbitrators could not agree on a chairman, they applied to the Brandenburgische Oberlandesgericht (Higher Regional Court) for the appointment of the chairman.

The Court appointed the arbitrator holding that it had jurisdiction and was competent to do so since the parties had implicitly agreed on arbitration in Germany and the initial appointment procedure had failed. Though the parties had not explicitly agreed upon the place of arbitration, the court derived the parties' intent to arbitrate in Germany from the circumstances: (1) the parties had subjected the material issues of their contractual relationship to German law; (2) performance of the contract was due in Germany; (3) the language of the contract was German; (4) the terms of the contract were specified by the "German Standard Terms for Construction" (VoB) and the German Civil Code; and (5) the price was expressed in German currency. The Court found these facts indicative that the parties did not want a foreign arbitral tribunal, composed of foreign arbitrators unfamiliar with German law, to decide their disputes, particularly because they had submitted the arbitral proceedings to German arbitration rules and they had determined that a German Regional Court was competent for all decisions related to the arbitral proceedings.

The Court concluded that the failure of the appointment process originally agreed upon was due to the non-existence of a "Landgericht" (First Instance Court) at the Italian employer's place of business in Bari, and it was competent to appoint the chairman pursuant to Section 1035 (4) ZPO [adopted from article 11(4) MAL]. Contrary to the defendant's submissions, the president of the Court in Bari could not make the appointment. Although the parties were free to agree on a foreign person to decide about the constitution of the tribunal, there were no indications that they had done so. The standard arbitration contract was made for the use within German relationships. It referred to German procedural rules. It assumed that both parties to the arbitration agreement would have their place of business in Germany, and that state courts engaged with acts relating to the arbitration would also apply German law. Therefore, the standard contract could only mean a German person, when it referred to the "competent president of the Landgericht".

Case 440: MAL 34(2)(a)(iv)
Germany: Oberlandesgericht Köln; 9 Sch 15/99
22 December 1999
Original in German
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll

[**keywords**: *appointment procedures; arbitral tribunal; arbitrators—appointment of; award—recognition and enforcement; award—setting aside; courts; enforcement; ordre public; public policy; recognition—of award; validity*]

The decision concerns an application for the recognition and enforcement of an award rendered by a tribunal in Germany.

In 1989, the parties had entered into a lease agreement containing an arbitration clause. After the termination of the lease, the claimant sent a request for arbitration to the defendant and nominated its arbitrator. Since the defendant did not appoint its arbitrator within the time provided for in the arbitration agreement, the claimant, in accordance with the agreement, appointed the arbitrator for the defendant. The two arbitrators rendered an award in favour of the claimant who moved to have it recognized and declared enforceable.

The Court granted the motion rejecting the objection by the defendant that the tribunal was not properly formed (ZPO §1059 (2) (1d)), [adopted from article 34(2)(a)(iv)) MAL]. It held that the procedure adopted was in line with the agreement of parties, in that it provided for a tribunal, which can be appointed by one party only if the other party did not participate in the appointment process. The Court considered such an agreement to be valid on the basis of the old arbitration law, applicable to the issue since the agreement was entered into before 1 January 1998 (Art. 4 § 1 SchiedsVfG). It held that since the party agreed on such a procedure, the principle of party autonomy requires such agreements to be held valid, as long as it does not violate other principles such as the requirement of neutrality of the tribunal. That principle, however, is sufficiently protected by the right of each party to challenge the arbitrators, but the defendant did not take advantage of this right. Finally, it did not find a causal relationship between the appointment procedure and the decision of the arbitral tribunal.

Case 441: MAL 16(3); 31
Germany: Oberlandesgericht Köln; 9 Sch 6/00
20 July 2000
Original in German
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll

[**keywords**: *arbitral awards; competence; courts; formal requirements; form of arbitration agreement; judicial intervention; jurisdiction; kompetenz-kompetenz; procedure; reasoned awards*]

The decision concerned a motion for the setting aside of a preliminary decision by the arbitral tribunal on its jurisdiction, dealing with the question of when a decision by the arbitral tribunal qualifies as an interim decision according to § 1040 (3) of the German Code of Civil Procedure (ZPO) [adopted from article 16(3) MAL].

In the arbitration proceedings between the parties, the claimant requested the tribunal to declare that it did not have jurisdiction in the matter because of the lack of a valid arbitration agreement. On 21 December 1999, the

arbitral tribunal delivered an order without reasons, declaring that the "application of Applicant was rejected." In a further order, delivered on 1 February 2000, the arbitral tribunal corrected the first order and stated that it "rejected the application of Applicant to decide the issue of jurisdiction by way of an intermediate decision according to § 1040 para. 3 ZPO" and that "The arbitral tribunal will decide on its jurisdiction in the final award." Claimant moved to have this order set aside.

The Court dismissed the motion and held that the decisions of the arbitral tribunal could not be made subject to separate judicial review. The first order could not be an award according to § 1054 ZPO [adopted from article 31 MAL] because it did not comply with the formal requirements (reasons) for an award. Nor was it an interim decision according to § 1040(3) 3 ZPO because the arbitral tribunal had not intended to make a decision regarding its jurisdiction, but merely rejected the procedural application to decide on its jurisdiction by way of an interim decision. This interpretation is confirmed by the second order. A decision on the jurisdiction will only be made in the final award, and may only be reviewed by a court in a motion for setting aside or a motion for recognition and enforcement of the award.

The decision of the Court did not require an oral hearing in terms of § 1063(2) ZPO. The decision did not concern the formal setting-aside procedure according to § 1059 ZPO [article 34 MAL], but referred to an award of the arbitral tribunal that did not become binding on the parties.

Case 442: MAL 13(1); 13(3)
Germany: Oberlandesgericht Köln; 9 SchH 30/00
14 September 2000
Original in German
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll and Roman Mallmann

[**keywords**: *arbitrators—challenge of; challenge; courts; judicial assistance; procedure*]

The issue in this case concerned time limitations to challenges of arbitrators.

The arbitration proceedings were started in April 1998 and were submitted to the arbitration rules for construction and erection of plants. Oral hearings were held on 7 July 1999 and 18 November 1999. The chairman of the arbitral tribunal informed the claimant on 31 March 2000 that she had taken over a case from a partner leaving her law firm, which involved the filing of a claim against the claimant by another client. One other arbitrator was counsel in another case against the claimant which was pending at the Higher Regional Court even before the arbitration started. After its request of 8 May 2000 to replace both arbitrators had been rejected by the defendant, on 20 June 2000, the claimant initiated challenge proceedings with the Regional Court (Landgericht). The Regional Court held itself not competent to decide and transferred the case to the Higher Regional Court.

The Higher Regional Court, which is competent to resolve challenges to arbitrators pursuant to Section 1062(1) 1 of the German Civil Procedure Code, held that the claimant's application was filed with undue delay, and consequently in violation of the arbitration rules. The applicable arbitration rules require that the request for challenging an arbitrator must be filed with the court within fourteen days after the opponent refuses to agree to the challenge. The Court did not need to decide on that point as the claimant failed to comply with a second provision of the arbitration rules, which requires that the claimant file its request for challenge "without undue delay" after he became aware of the event giving rise to his complaint. Therefore, the Court dismissed the

complaint on procedural grounds without reaching the merits of the case regarding whether justifiable doubts against the impartiality of the arbitrators were given or not.

Case 443: MAL 36(1)(a)(i); 36(1)(b)(ii)
Germany: Oberlandesgericht Dresden; 11 Sch 06/98
13 January 1999
Original in German
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll and Roman Mallmann

[**keywords**: *arbitral awards; arbitration agreement; award; award—recognition and enforcement; award—setting aside; courts; enforcement; ordre public; public policy; recognition—of award; validity*]

The case concerned the recognition and enforcement of a foreign award, in particular the defences of "lack of a valid arbitration agreement" and "violation of public policy".

The original dispute arose out of a contract for the sale of industrial plants by the claimant to the defendant who refused payment alleging defects in the delivered plants. The claimant initiated arbitration proceedings on the basis of an arbitration clause contained in its standard terms based on the widely used United Nations Economic Commission for Europe (ECE) General Conditions of Sale and Standard Form Contracts. It asserted that a copy of its standard terms was given to the defendant's representative during the negotiations. After taking evidence on that point, the arbitrator rendered an arbitral award in favour of the claimant, awarding it approximately 850,000 German Marks (DM) plus interest between 10 per cent and 16 per cent. Furthermore, the award granted the claimant reimbursement of DM 162,000 for legal expenses.

Upon an application by the claimant the Court declared the award enforceable in Germany rejecting the objections by the defendant that no valid arbitration agreement had been concluded and that the interest rate violated public policy.

The Court found that, on the basis of the old German arbitration law (applicable to all agreements concluded before 1998), that the parties had entered into a valid arbitration agreement. According to the relevant former Section 1027(2) ZPO (civil procedure statute) the arbitration agreement did not have to meet any form requirements. Therefore, the arbitration agreement could be validly agreed upon on the basis of the law applicable to the sales contract. Under German law, standard conditions of contract may become part of the contract, if the party using the standard conditions refers to them in any manner in the contract or in the pre-contractual correspondence with the other party. Such a reference to an arbitration agreement would not violate German public policy since also under German law standard conditions can become part of a contract in the same way.

The Court further concluded that also the liquidated interest rate of 14 per cent would not make the enforcement of the award contrary to public policy. The Court found, that the arbitral award did not violate German *ordre public* in granting the claimant reimbursement of his legal expenses, which were in the present case less than 5 per cent of the value of the whole case. Finally, the arbitral award was declared enforceable, although the actual interest rate was not stated in the award itself.

Case 444: MAL 34(2)(b)(ii)
Germany: Oberlandesgericht Dresden; 11 Sch 08/01
8 May 2001
Original in German
Published in German: Betriebs-Berater, Beilage 7 zu Heft 43/2000 (RPS), p. 22
DIS-Online Database on Arbitration Law
http://www.dis-arb.de
Abstract prepared by Stefan Kröll

[**keyword**s: *arbitral awards; award; award—recognition and enforcement; award—setting aside; courts; ordre public; public policy*]

The decision concerned a motion for recognition and enforcement of two awards.

The claimant obtained an award ordering the respondent to give the consent necessary for a transfer of property as well as an award ordering the respondent to pay the cost including the advance payment made by the claimant for the arbitrators' fees. The claimant moved to have both awards recognized and enforced.

The Court granted the motion. It found that in relation to the award on the merits that the declaration of enforceability had only declaratory meaning, since the award replaced the declaration of the respondent's consent *ipso iure*. According to § 1055 ZPO (civil procedure statute), an arbitral award has the same effect as a final judgement, and is not subject to appeal before a court. Where such judgement ordered a party to make a declaration of intention, the judgement itself replaced the declaration without further manifestation of will by the party (§ 894 ZPO).

With regard to the award on the costs, the Court stated that the action for recognition and enforcement was not an appeal against the award, so that most objections raised by the respondent were inadmissible. A wrong method of calculation of the amount in controversy and a false decision on costs do not by themselves violate the *ordre public* (article 34(2)(b)(ii) MAL). The Court also dismissed the objection that the award violated public policy because the arbitrators had been fixing their own compensation. The Court found that the tribunal only determined that respondent had to reimburse claimant for the advance payments made, which was allowed according to the established practice of the Federal Supreme Court (BGH), and did not render a judgement on its own fees.

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